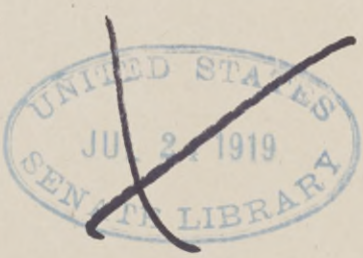
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UNITED STATES REPORTS

VOLUME 248

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1918

FROM OCTOBER 7, 1918, TO MARCH 3, 1919

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
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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.

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 W. DAVIS, Solicitor General.[2]
ALEXANDER C. KING, Solicitor General.[3]
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

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

[2] Resigned November 9, 1918, to take effect November 26, 1918.

[3] On November 18, 1918, President Wilson nominated Alexander C. King, of Georgia, as Solicitor General to succeed John W. Davis, resigned. He was confirmed by the Senate November 21, 1918, and took the oath of office November 27, 1918.

PROCEEDINGS ON THE DEATH OF MR. THEODORE ROOSEVELT

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 6, 1919.

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

MR. ATTORNEY GENERAL GREGORY addressed the court as follows:

May it please the court: It is with pain and sadness that I announce the death of COLONEL THEODORE ROOSEVELT, twenty-sixth President of the United States. He held that high office from the year 1901 to 1909.

Colonel Roosevelt passed away at Oyster Bay, Long Island, at a quarter past 4 o'clock this morning. The end was not anticipated, except by his physician, his family, and a few personal friends. He died in his sixty-first year.

I move that the court adjourn as a mark of respect to the memory of this distinguished statesman, soldier, and citizen.

THE CHIEF JUSTICE responded:

Mr. Attorney General, the court sorrows to learn of the death of the great and conspicuous public servant whose services the country has lost, and it is consoling to be able to give that mark of respect and veneration to his memory which is suggested by your motion, and the court will transact no business today, but stand adjourned until tomorrow.

SUPREME COURT OF THE UNITED STATES.

WEDNESDAY, JANUARY 8, 1919.

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

THE CHIEF JUSTICE said:

Gentlemen of the bar, the funeral of MR. ROOSEVELT takes place today. The two Houses of Congress have adjourned and, following an order of the President, the departments of the Government will be closed. With these things in mind, the court feels that it can not transact public business today. It has, therefore, determined to adjourn until tomorrow morning, not only as an additional manifestation of its sense of the loss which the country has suffered, but also as an indication that, at least in spirit, its members will, in unison with all his countrymen, sorrowfully follow his remains to their last resting place.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1918.

PITTSBURGH MELTING COMPANY *v.* TOTTEN, INSPECTOR OF THE BUREAU OF ANIMAL INDUSTRY OF THE DEPARTMENT OF AGRICULTURE.

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

No. 28. Argued April 22, 1918.—Decided November 4, 1918.

Oleo oil, a substance made from the fat of slaughtered beeves, seldom used by itself as food, but employed largely in making oleomargarine and somewhat in cooking, is a "meat food product," within the Meat Inspection Act of 1906–1907, when manufactured fit for human consumption and not "denatured," and is debarred from interstate and foreign commerce unless first inspected and passed as by that act provided. P. 7.

So *held*, where the shipper labeled the product "inedible," asserting it was not intended for food purposes, but retained no control of the use and declined to certify, as required by regulations of the Secretary of Agriculture, that it was suitable for industrial purposes only, and incapable of being used as food by man.

232 Fed. Rep. 694, affirmed.

THE case is stated in the opinion.

Mr. Samuel McClay, with whom *Mr. William M. Robinson* and *Mr. Allen H. Kerr* were on the brief, for appellant:

The act is directed against meat-food products which are unfit for human food, and applies only to establishments whose products are for human consumption, not to those that prepare and sell exclusively oils intended for industrial purposes.

This view harmonizes with the purpose of the act as expressed in its title and with the construction by the Department of Agriculture in the regulations of April 1, 1908, which, with the approval of the Attorney General's opinion (28 Ops. Atty. Gen. 369, 377), restricted meat-food products to those intended for human use and limited the scope of the act, and jurisdiction under it, accordingly.

The regulations of November 1, 1914, extending the definition to products "capable of being used as food by man," and requiring appellant to certify that its products were not capable of being so used, are unreasonable, and exceed the intent of the act and the power of the Secretary of Agriculture under it. The words "meat" and "meat food products" cannot be separated from the purpose for which the products are to be used. *Commonwealth* v. *Schollenberger*, 153 Pa. St. 625.

The Secretary cannot by his regulations alter, amend, extend or modify the act of Congress. *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *11,150 lbs. of Butter*, 195 Fed. Rep. 657, 663; *St. Louis Independent Packing Co.* v. *Houston*, 215 Fed. Rep. 553, 559, 561. The act does not give him power over inedible grease intended solely for industrial purposes. There was no evidence that appellant was guilty of an attempted evasion. The Secretary may adopt such regulations not inconsistent with law as are necessary to carry out the purposes of the act, but the act confers no power whatever to determine what shall constitute a "meat" or a "meat food product." The meaning of those words, as used, is clear.

1. Argument for Appellee.

Congress cannot delegate legislative authority to an executive officer, and did not intend to do so.

If the meaning of the words, as used in the act, is doubtful, the construction which the Secretary placed upon them for a period of more than six years should have great if not controlling weight.

Appellant's product was tallow oil and not oleo oil.

Appellant rendered its oils from fats purchased from retail butchers and dealers (not subject to the act—§ 21), and from inspected wholesalers, and it had the right to ship them if they were not unhealthful or unwholesome, and even then, if they were intended for industrial and not for food purposes. The Secretary may impose inspection either on the retail dealer or butcher, but, until he elects to do so, neither the retail butcher or dealer nor his product are within the act. He could not require appellant to buy its fats from official establishments rather than retail butchers or dealers. The Department having withdrawn inspection for failure to accede to this demand, appellant thereafter shipped its product solely as inedible, and so marked it, in accordance with the regulations of 1908, certifying that it was intended for industrial uses. Purchasers were not deceived; if any of them converted the oils into a use for which they were not sold, appellant was in no way responsible.

Neither tallow nor oleo oil is ordinarily used as a food.

Denaturing is not practicable and is only adopted in cases of fats taken from diseased animals which have been condemned.

Mr. Assistant Attorney General Frierson for appellee:

Appellant's product is a meat-food product within the meaning of the act.

Being a food product, it is no less so because it may also be used for industrial purposes.

If an article is, in fact, a food product, its shipment

in interstate or foreign commerce without inspection is prohibited whether the manufacturer intended it for food or other purposes.

The evidence fails to show any good faith intention on the part of appellant to confine its product to industrial uses.

The validity or invalidity of the regulations called in question can not affect the decision of this case, since, if they were wholly void, appellant would not be entitled to ship its product in interstate or foreign commerce without inspection.

The regulations in question are, however, valid.

MR. JUSTICE DAY delivered the opinion of the court.

The Pittsburgh Melting Company filed a bill in the District Court of the United States for the Western District of Pennsylvania against the Baltimore & Ohio Railroad Company and G. E. Totten, Inspector of the Bureau of Animal Industry of the Department of Agriculture, seeking a mandatory injunction requiring the Railroad Company to receive and carry in interstate and foreign commerce shipments of oil, the manufacture of the Melting Company, and to restrain the Government Inspector from interfering with the shipments.

A decree in favor of the complainant was rendered in the District Court. 229 Fed. Rep. 214. Upon appeal this decree was reversed by the Court of Appeals, and the cause remanded to the District Court with directions to dismiss the bill. 232 Fed. Rep. 694.

The case arises under the Meat Inspection Act of 1906, 1907, c. 3913, 34 Stat. 674, 675; c. 2907, 34 Stat. 1260, 1262, 1265. The act provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and

unfit meat and meat-food products in interstate and foreign commerce. The act in part provides:

"That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as 'Inspected and passed' all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as 'Inspected and condemned' all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products. . . ."

And the act further provides:

"That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United

States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as 'Inspected and passed,' in accordance with the terms of this Act and with the rules and regulations prescribed by the Secretary of Agriculture: . . ."

The facts appearing of record so far as we deem them necessary to the decision of the case are:

The Melting Company has long been engaged in rendering or converting animal fats into various products, including the oil which is the subject-matter of this controversy. At one time the Company made oleomargarine, but owing to adverse legislation of the State of Pennsylvania desisted from doing so. Government inspectors were in the works of the Melting Company and inspected and marked the products until 1909, when a controversy arose between the Company and the Government officers as to the purchase of the fats used by the Company. Upon refusal to comply with the orders of such officers, inspection was withdrawn. Whether this action was right or not we do not stop to enquire, since the claim for relief is based upon the allegation that complainant's oil is not a meat-food product within the meaning of the statute.

After inspection was withdrawn, the Company continued to ship its oil, but did so under the then regulations of the Department of Agriculture concerning the shipment of fat for industrial use, as "inedible," and so marking the receptacle containing the same and making the certificate then required by the Department of Agriculture that it was inedible and not intended for food purposes. On November 1, 1914, the Department adopted a new regulation requiring a certificate to accompany the shipment of such fats claimed not to be food products, stating that the same "is not capable of being used as food by man, is suitable only for industrial purposes, is not for food purposes, and is of such character or for

such a use that denaturing is impracticable." The regulation permits the shipment of oil for industrial uses after it is "denatured," that is, treated with a substance which renders it unfit for food, while still fit for use in industrial purposes. The Melting Company refused to make this certificate, which resulted in the notice to the Railroad Company to refuse to carry the oil, and brought about this suit to compel the carrier to receive and transport it.

The District Court found that the oil manufactured and shipped by the Melting Company was not within the terms of the act, as it was not a meat-food product, which is prohibited from shipment without inspection. The reasons for reaching that conclusion are set forth in the opinion of the District Judge. 229 Fed. Rep. 214. The Circuit Court of Appeals reached the opposite conclusion upon the testimony adduced. 232 Fed. Rep. 694.

An examination of the record satisfies us that the Circuit Court of Appeals reached the right conclusion. The oil, here in controversy, the testimony shows is generally known as "oleo" oil, and is not "tallow" oil as that term is generally understood by the trade. Both oils are made from the fat of slaughtered beeves. Oleo oil by itself is seldom used as a food. It is, however, largely used in the manufacture of oleomargarine. In fact it constitutes a large percentage of that product. It is used in cooking for shortening purposes. Made as it is by the Melting Company it has no quality which prevents its use for such food purposes. It is not a tallow oil, distasteful and unfit to use in the making of food products. Without elaborating the discussion, we reach the conclusion that this product was clearly a "meat food product," within the meaning of the statute. It is true that the Melting Company does not sell it as such, and now marks it as "inedible." But that does not change the fact that a main use of such oil is in making edible products. The Company has no control over the use of the oil after it is shipped, and the record

does not disclose what use is made of a large percentage of its product which was shipped abroad at the time this action was begun.

The enactment of the statute was within the power of Congress in order to prevent interstate and foreign shipment of impure or adulterated meat-food products. The statute does not specifically define a meat-food product. In our view the product of the Melting Company is a meat-food product in the sense of the use of those terms in the statute, and as such subject to the regulations of the Secretary of Agriculture. It being such meat-food product the Melting Company could not truthfully claim that it was not capable of being used as food by man, and hence could not make the certificate required.

The theory of the bill is that the product in question was not within the terms of the act; the District Court reached the conclusion that this theory was the correct one, and so rendered a decree which required the Railroad Company to receive the oil for transportation in interstate and foreign commerce, without inspection, when labeled "inedible," and accompanied by the certificate of the Melting Company that such oil is inedible and not intended for food purposes and is of such a character that denaturing is impossible or will render the oil unavailable for the desired industrial use. This decree is consistent only with the finding of the District Court that the product was not a meat-food product within the meaning of the statute.

As we have said, we think the record shows, as found by the Circuit Court of Appeals, that the oil made and offered for shipment by the Melting Company was a meat-food product, and hence subject to the regulation of the statute requiring inspection before shipment. The decree requiring such oil to be shipped without inspection was properly reversed.

Affirmed.

WATTS, WATTS & COMPANY, LIMITED, *v.* UNIONE AUSTRIACA DI NAVIGAZIONE &c.

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

No. 25. Argued April 17, 1918.—Decided November 4, 1918.

Upon review of an admiralty case, the court has jurisdiction to make such disposition of it as justice may require at the time of decision, and therein must consider changes in fact and in law which have supervened since the decree below was entered. P. 21.

In a libel *in personam*, brought by a British against an Austro-Hungarian corporation, while their countries were at war and the United States was a neutral, to recover for coal furnished before the war by the libelant to the respondent in Algiers, jurisdiction was obtained by attachment of a ship (for which a bond was substituted); but, after answer and submission of the cause upon agreed facts and proof of foreign law, the District Court declined to proceed, because of prohibitions placed by the belligerent countries on payment of debts to each other's subjects, and dismissed the libel without prejudice. This country having entered the war after the case came to this court—

Held: (1) That the libelant as a co-belligerent had a right to maintain the suit against the respondent, an alien enemy, and that jurisdiction should not be declined as an act of discretion. P. 21.

(2) That respondent, though an alien enemy, was entitled to defend, and that, in view of the non-intercourse laws and the actual impossibility of free intercourse between residents of this country and of Austria-Hungary, further prosecution should be suspended until through restoration of peace, or otherwise, adequate presentation of respondent's defense should become possible. P. 22.

229 Fed. Rep. 136, reversed.

THE case is stated in the opinion.

Mr. John M. Woolsey, with whom *Mr. J. Parker Kirlin* and *Mr. Cletus Keating* were on the brief, for petitioner:

The drafts did not constitute a novation or waiver.

The Emily Souder, 17 Wall. 666. The obligation sued on is in essence for goods sold and delivered—an obligation justiciable in any civilized country, *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, and one peculiarly within the jurisdiction of every maritime tribunal which could obtain jurisdiction over the defendant by attachment or otherwise. If the debt had been assigned to a subject of any power not at war with England, no question could have been raised against enforcement here. *The Anna Catharina*, 4 C. Rob. 107, 112–113.

The respondent, conceding the obligation to pay, appeared generally and expressly admitted the jurisdiction of the court. The objection raised, on the trial, *viz*, that as a subject of Austria, and because of an alleged Austrian moratorium, it should not be compelled to pay to a British subject, should have been pleaded. It was personal to the respondent, not going to the subject-matter of the suit, and the court, *sua sponte*, could not have made it. Under well-settled principles, any objection to the court's taking jurisdiction over respondent's person was waived. But the courts below have erroneously allowed the respondent to come in and go out at will. *Cf. Porto Rico* v. *Ramos*, 232 U. S. 627, 632. They should have adjudicated the case in regular course.

Our admiralty courts take jurisdiction, in proceedings between foreigners either *in rem* or *in personam*, notwithstanding the contract in suit was made and to be performed, or the tort complained of was committed, in a foreign country or on the high seas. The only requisite is jurisdiction of person or property. *The Maggie Hammond*, 9 Wall. 435; *The Titanic*, 233 U. S. 718; *The Jerusalem*, 2 Gall. 191; *Thomassen* v. *Whitwell*, 9 Ben. 113; *Bernhard* v. *Greene*, 3 Sawyer, 230; *Mason* v. *Blaireau*, 2 Cranch, 240; *Cooper* v. *Newman*, 14 Wall. 152; *The Napoleon*, Olc. 208; *Davis* v. *Leslie*, Abb. Adm. 123; *Bucker* v. *Klorkgeter*, Abb. Adm. 402; *Fairgrieve* v. *Marine Ins. Co.*, 94 Fed.

Rep. 686; *The Attualita*, 238 Fed. Rep. 909. Although in some suits between foreigners our admiralty courts may have discretion to decline jursidiction, this is not such a case. The discretion referred to is not absolute but has been strictly defined by this court. *The Maggie Hammond*, 9 Wall. 435, 456, 457; *The Belgenland*, 114 U. S. 355.

This suit is plainly outside the exceptions enumerated in *The Belgenland, supra*, and within the rule laid down in that opinion, at pp. 368, 369. The controversy is *communis juris*, the parties do not belong to the same foreign nation, and, further, most of the coal was bought and used in carrying on trade between Trieste and New York, which gave the United States an interest in the transaction as directly supporting its commerce. See *The Belgenland*, p. 366; and *The Jerusalem*, 2 Gall. 191.

The District Court's decision in effect gives extraterritorial force to the Austrian war law to bar the claim of a British subject who had secured jurisdiction according to our practice. Strict neutrality required that we disregard the war measures of all belligerents and apply our laws, since neither party had any claim to have his own applied. If, as declared by our Government, commerce in munitions of war with the enemies of Germany was not unneutral (*cf. Northern Pacific Ry. Co.* v. *American Trading Co.*, 195 U. S. 439), how can it be said that the enforcement of admitted simple contract obligations, having nothing to do with war, infringes neutrality?

The failure of the courts to adjudicate this case is not comity, but a breach of comity. The defense is in reality a plea of alien enemy, which so long ago as 1799 was said by Lord Kenyon in *Casseres* v. *Bell*, 8 Term Reports, 166, to be "an odious plea." Raised in the courts of a neutral nation, such a plea was absurd and should have been as unsuccessful as it is odious.

Notwithstanding that when the case was tried we knew

no alien enemies, this court is called upon by this defense to discriminate in favor of the Austrian Government against Englishmen. Since the obligation itself is not affected by the prohibition, it seems clear enough that the prohibition at most goes only to the party who shall sue. An alien enemy has no right to sue in the courts of a king with whom his own sovereign is at war, because a personal disability of suing under such circumstances attaches to an alien. *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] 2 A. C. 307, 316. There is not any such disability in an alien friend.

It is elementary, however, that the matter of parties is to be governed by the law of the forum, and a question of personal jurisdiction of a defendant may be waived.

A civil moratorium will be recognized in a foreign court as the law at the place of payment, provided it is not inconsistent with the public policy of the forum, and is otherwise enforceable. *Rouquette* v. *Overman*, L. R., 10 Q. B. 525. But there was no local moratorium prohibiting payment in England, where payment in this case should have been made, nor in Algiers where it might have been made.

No rule of law which has hitherto been recognized can be invoked to call for the enforcement in this country of the Austrian prohibition as a moratorium. It was not intended to relieve Austrian subjects from the immediate pressure of debts, as is the case of ordinary moratorium decrees, nor intended to benefit them at all. It was promulgated for the avowed purpose of injuring British merchants' commerce and property in connection with war, and is highly penal.

It is immaterial that Great Britain enacted similar but less stringent prohibitions. *Robinson & Co.* v. *Continental Ins. Co. of Mannheim*, [1915] 1 K. B. 155. The courts of one country will not enforce or recognize the penal laws of another.

The Austrian proclamation has no extraterritorial operation. Comity in its true sense is limited to enforcing substantive rights, Wharton, Confl. of Laws, 3d ed., § 428A, vol. 2, pp. 938–939; Rorer, Interstate Law, p. 7; accruing under some foreign law which is analogous to the law existing in the State where the litigation arises. Effect cannot be given to the defense unless this Austrian war measure is enforced as a part of our municipal law. To do this would be the very denial of comity. The reasons stated by the District Judge have been strongly disapproved in *Compagnie Universelle de Telegraphie* v. *United States Service Corporation*, 84 N. J. Eq. 604; *s. c.*, 85 *id.* 601.

Confiscation of the debt in Austria, even if such proceedings had been taken, could not have any extraterritorial effect. *Baglin* v. *Cusenier Co.*, 221 U. S. 580; Hall, International Law, 4th ed., p. 459.

If as the respondent argues the effect of the giving of the drafts was to transfer the place of payment from Algiers to London, which the libelant denies, it does not avail as a defense. Under the law of England, as set forth in the King's Proclamation, known as "Trading with the Enemy Proclamation No. 2," issued on September 9, 1914, express permission was given to one in the position of the libelant to receive payment from an enemy, without being guilty of a prohibited transaction. *Oronstein & Koppel* v. *Egyptian Phosphate Co.*, [1914] 2 Scotch L. T. 293; Trotter's Law of Contract During War, 428; *Ingle* v. *Mannheim Ins. Co.*, 31 T. L. R. 41, [1915] 1 K. B. 227. Further, under British law, if jurisdiction could have been obtained over the defendant, the libelant could have maintained an action for the amount due for the coal in the English courts. *Robinson & Co.* v. *Continental Ins. Co. of Mannheim, supra; Ingle* v. *Mannheim Ins. Co., supra; Leader* v. *Direction Der Disconto Gesellschaft*, 31 T. L. R. 83, [1915] 2 K. B. 154.

Our law is the same as the English law in this regard. *McVeigh* v. *United States*, 11 Wall. 259, 267, citing Bacon's Abr., Tit. Alien, d; Story's Equity Pleadings, § 53; *Albrecht* v. *Sussman*, 2 Vesey & Beam, 323; *Dorsey* v. *Kyle*, 30 Maryland, 512, 522; *cf.* Pollock on Contracts, 8th ed., p. 100; *Compagnie Universelle de Telegraphie* v. *United States Service Corporation*, *supra*.

In no case was jurisdiction declined by our courts in their discretion where denial of justice or hardship upon the libelant would result. They have consistently taken and held jurisdiction where no other courts were available, regardless of the pressure of business, and in some instances of the protests of consuls of foreign countries whose subjects were involved in the litigation. *Chubb* v. *Hamburg-American Packet Co.*, 39 Fed. Rep. 431; *The Amalia*, 3 Fed. Rep. 652; *Boult* v. *Ship Naval Reserve*, 5 Fed. Rep. 209; *The Walter D. Wallet*, 66 Fed. Rep. 1011; *The Attualita*, 238 Fed. Rep. 909; *The Troop*, 118 Fed. Rep. 769; *The Noddleburn*, 30 Fed. Rep. 142; *The Lady Furness*, 84 Fed. Rep. 679; *Aktieselskabet K. F. K.* v. *Rederiaktiebolaget Atlantan*, 232 Fed. Rep. 403; *The City of Carlyle*, 39 Fed. Rep. 807; *The Sirius*, 47 Fed. Rep. 825; *Bolden* v. *Jensen*, 70 Fed. Rep. 505; *The Ucayali*, 164 Fed. Rep. 897; *The Ester*, 190 Fed. Rep. 216. *Goldman* v. *Furness, Withy & Co.*, 101 Fed. Rep. 467, distinguished.

There is no suspension of claims against an enemy in the home forum or an allied forum for debts due under executed contracts. *Halsey* v. *Lowenfeld*, [1916] 2 K. B. 707; *Robinson & Co.* v. *Continental Ins. Co. of Mannheim*, [1915] 1 K. B. 155. *Hiatt* v. *Brown*, 15 Wall. 177; *Janson* v. *Driefontein Consolidated Mines*, [1902] A. C. 484; and Trotter, Law of Contract During War, p. 39, refer to executory contracts only.

By the writ of certiorari the case has been removed to this court and is here to be tried *de novo*. The subject of

an ally seeks to recover an admitted debt from the subject of an enemy. The suit should be sustained. *Irvine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544; *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] 2 A. C. 307; the District Court's opinion in this case, and cases there cited, 224 Fed. Rep. 188, 193; *Taylor* v. *Carpenter*, 3 Story, 458; *Société Anonyme Belge* v. *Anglo-Belgian Agency*, [1915] 2 Ch. 409, 414.

Mr. Charles S. Haight, with whom *Mr. Clarence Bishop Smith* was on the brief, for respondent:

If the court must take jurisdiction, against its better judgment, merely because it has the power to do so, there is no discretion. The claim that respondent admitted jurisdiction is erroneous. The courts in each case between foreigners, in connection with contracts made and to be performed abroad, should decide whether it is proper and will promote justice to take jurisdiction. This principle is clearly stated in *The Maggie Hammond*, 9 Wall. 435, and *The Belgenland*, 114 U. S. 355, which make it clear that "the question is one of discretion in every case." In the case at bar a controversy *communis juris* has been modified by the war statutes of belligerent nations. The exercise of discretion will not be disturbed on appeal, unless that discretion has been abused. *Earnshaw* v. *United States*, 146 U. S. 60; *Sun Cheong-Kee* v. *United States*, 3 Wall. 320; *Silsby* v. *Foote*, 14 How. 218; *The Belgenland, supra; The Dos Hermanos*, 10 Wheat. 306, 310, 311. This is so in trials *de novo*. *The Eliza Strong*, 130 Fed. Rep. 99; *Bearse* v. *Three Hundred and Forty Pigs of Copper*, 2 Fed. Cas., p. 1192.

In refusing to take jurisdiction the court committed no breach of comity.

Irrespective of war complications, where an action is brought by a non-resident against a non-resident, in con-

nection with a contract which is made and to be performed outside of the United States, the District Court, in its discretion, ordinarily does not take jurisdiction if one party objects. *Goldman* v. *Furness, Withy & Co.*, 101 Fed. Rep. 467.

Not only are all of the reasons of convenience opposed to the trial of such cases here, but an American court is not the appropriate forum to pronounce upon questions of foreign law, especially where the parties are all foreigners. Foreign law is difficult to prove, and in cases of doubt the court should be slow to assume that the law of these countries is the same as that of the United States. *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473.

The complications of the war have strengthened and emphasized the reasons for refusing to take jurisdiction. War prevents intercourse between belligerents and suspends the payment of debts, so that belligerent nations in modern times do not consider it necessary to confiscate debts. In recent times it has been customary to confiscate only property at sea; but there can be no question about the right of a belligerent to confiscate every kind of enemy property within its reach, on land and on sea, including the debts owed by its subjects. 1 Kent, Com., 64, 65; *Brown* v. *United States*, 8 Cranch, 110, 122, 124; *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, 869; *The Rapid*, 1 Gall. 295. *Baglin* v. *Cusenier Co.*, 221 U. S. 580; Hall, International Law, p. 458, distinguished.

It is clear, therefore, that the rights and liabilities of the parties in the case at bar have been vitally altered by the declaration of war. Their contracts and rights of property are suspended, and, in addition, the Austrian Government has the clear right to confiscate the credits of the libelant, by ordering the respondent to pay to the Austrian Government itself. Such a confiscation would destroy the right of the libelant to recover from the respondent.

If the courts do not recognize this suspension of obligations, confiscation of debts by belligerents will be stimulated, which is undesirable. Austrian law having forbidden any payments to English citizens, during the war, under penalty of imprisonment and fine, and England having similarly forbidden her citizens to make payments to Austrians, it can hardly be supposed that this court would undertake to order a foreign corporation, in such a case as this, to commit a crime against the laws of its own country.

To have taken jurisdiction would have amounted to an abuse of discretion. The only case cited for the proposition that the United States should entertain a suit between citizens of belligerent nations, during war, is *Compagnie Universelle de Telegraphie* v. *United States Service Corporation*, 84 N. J. Eq. 604, a case distinguishable, among other reasons, as involving a contract for the sale of land in the United States, to be performed here.

This court does not give extraterritorial force to a German or Austrian law when it recognizes the fact that the defendant is absolutely prohibited, by the law of his own country, from paying the debt sued upon, and is subject to heavy penalties if he does so. The power of a government to prohibit its own citizens from doing any treasonable act beyond its own boundaries is well illustrated by the cases where the courts of one State have restrained citizens of that State from bringing suit in another State or in a foreign country. *Cole* v. *Cunningham*, 133 U. S. 107; *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188; *French* v. *Hay*, 22 Wall. 250, 252; *Dehon* v. *Foster*, 4 Allen, 545, 550; *Matter of Belfast Shipowners Co.*, [1894] 1 L. R., Ir. 321; *Lord Portarlington* v. *Soulby*, 3 M. & K. 104, 108; *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527.

As for there being a trial *de novo* here, *Irvine* v. *The Hesper*, 122 U. S. 256, 266, and *Reid* v. *American Express Co.*,

241 U. S. 544, both hold that an appeal to the Circuit Court of Appeals is such a trial, but neither so holds of a review of that court's decision on certiorari. The trend of legislation is to have cases disposed of in the Circuit Court of Appeals as far as possible. But, were jurisdiction discretionary, it should be declined, because of the foreign character of the parties and the contract, and the inaccessibility of witnesses,—reasons accentuated by the war, and to avoid which the parties made a stipulation whose construction is now in dispute.

That one is not obliged to perform a contract made before the war, when its performance has become illegal, see *The Teutonia*, L. R., 3 A. & E. 394; *s. c.* L. R., 4 P. C. 171, 181, 187; *The Rapid*, 1 Gall. 295. The important point to note is that the relations which exist between individual enemies during war are treated by a general rule, and individual instances are not considered to determine whether some person in this country, or the country as a whole, will be benefited thereby.

All debts are suspended during war, and no interest then accrues because the obligation is wholly suspended. See *Hiatt* v. *Brown*, 15 Wall. 177, (which is not distinguishable as involving an executory contract, since the money was due during the war); *DuBelloix* v. *Lord Waterpark*, 24 Rev. Rep. 628, 630, *s. c.* 1 Dowl. & Ry. 16–20; *Rederei Actien Gesellschaft Oceana* v. *Clutha Shipping Co.*, 226 Fed. Rep. 339, 342.

The fact that an express permission was given in England to enable creditors to sue under the policy laid down in Great Britain for this war, is evidence of the general rule that during war contracts are suspended. See *Robinson & Co.* v. *Continental Ins. Co. of Mannheim*, [1915] 1 K. B. 155.

The *McVeigh Case*, 11 Wall. 259, and the authorities cited in it do not in any way affect the question whether contractual obligations are suspended during war.

Authorities cited by libelant, and in the District Judge's opinion, to show that there is no suspension of claims against recovery in the home forum or an allied forum, do not support the assertion; some of them sustain the contention of the respondent. See *Hangar* v. *Abbott*, 6 Wall. 532, 539, *et seq.; Janson* v. *Driefontein Consolidated Mines*, [1902] A. C. 484, 499; *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Robinson & Co.* v. *Continental Ins. Co. of Mannheim, supra.*

Libelant cannot recover since the drafts were not surrendered. *The Emily Souder*, 17 Wall. 666; *Ramsay* v. *Allegre*, 12 Wheat. 611, 613.

Mr. Justice Brandeis delivered the opinion of the court.

On August 4, 1914, Great Britain declared war against Germany, and on August 12, 1914, against Austria-Hungary. Prior to August 4, Watts, Watts & Co., Limited, a British corporation, had supplied to Unione Austriaca di Navigazione, an Austro-Hungarian corporation, bunker coal at Algiers, a dependency of the French Republic. Drafts on London given therefor having been protested for non-payment, the seller brought, on August 24, 1914, a libel *in personam* against the purchaser in the District Court of the United States for the Eastern District of New York. Jurisdiction was obtained by attaching one of the steamers to which the coal had been furnished. The attachment was discharged by giving a bond which is now in force. The respondent appeared and filed an answer which admitted that the case was within the admiralty jurisdiction of the court; and it was submitted for decision upon a stipulation as to facts and proof of foreign law.

The respondent contended that the District Court, as a court of a neutral nation, should not exercise its juris-

dictional power between alien belligerents to require the transfer, by process of judgment and execution, of funds by one alien belligerent to another; an act which it alleged was prohibited alike by the municipal law of both belligerents. The libelant replied that performance of the contract by respondent, that is, the payment of a debt due, was legal by the law of the place of performance, whether that place be taken to be Algiers or London; that it was immaterial whether it was legal by the Austro-Hungarian law, since Austria-Hungary was not the place of performance; and that the enforcement of legal rights here would not infringe the attitude of impartiality which underlies neutrality. The District Court held that it had jurisdiction of the controversy, and that it was within its discretion to determine whether it should exercise the jurisdiction, since both parties were aliens and the cause of action arose and was to be performed abroad. It then dismissed the libel without prejudice, saying: "From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries [Great Britain and Austria-Hungary] forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it." 224 Fed. Rep. 188, 194.

The dismissal by the District Court was entered on May 27, 1915. On December 14, 1915, the decree was affirmed by the Circuit Court of Appeals, on the ground that it was within the discretion of the trial court to determine whether to take or to decline jurisdiction, *The Belgenland*, 114 U. S. 355; and that the exercise of this discretion should not be interfered with, since no abuse was shown. 229 Fed. Rep. 136. On June 12, 1916, an application for leave to file a petition for writ of mandamus to compel the Court of Appeals to review the

exercise of discretion by the District Court was denied (241 U. S. 655), and a writ of certiorari was granted by this court. 241 U. S. 677. The certiorari and return were filed July 21, 1916. On December 7, 1917, the President issued a proclamation declaring that a state of war exists between the United States and Austria-Hungary. The case was argued here on April 17, 1918.

This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler* v. *Eaton*, 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478; *Berry* v. *Davis*, 242 U. S. 468; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Jones* v. *Montague*, 194 U. S. 147; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Mills* v. *Green*, 159 U. S. 651; *The Schooner Rachel* v. *United States*, 6 Cranch, 329; *United States* v. *The Schooner Peggy*, 1 Cranch, 103, 109–110. In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton* v. *United States*, 5 Cranch, 281; *Irvine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544.

Since the certiorari was granted, the relation of the parties to the court has changed radically. Then, as earlier, the proceeding was one between alien belligerents in a court of a neutral nation. Now, it is a suit by one belligerent in a court of a co-belligerent against a common enemy. A suit may be brought in our courts against an alien enemy. *McVeigh* v. *United States*, 11 Wall. 259, 267. See also *Dorsey* v. *Kyle*, 30 Maryland, 512. If the libel had been filed under existing circumstances, security for

the claim being obtained by attachment, probably no American court would, in the exercise of discretion, dismiss it and thus deprive the libelant not only of its security, but perhaps of all possibility of ever obtaining satisfaction. Under existing circumstances, dismissal of the libel is not consistent with the demands of justice.

The respondent, although an alien enemy, is, of course, entitled to defend before a judgment should be entered. *McVeigh* v. *United States*, *supra*. See also *Windsor* v. *McVeigh*, 93 U. S. 274, 280; *Hovey* v. *Elliott*, 167 U. S. 409. It is now represented by counsel. But intercourse is prohibited by law between subjects of Austria-Hungary outside the United States and persons in the United States. Trading with the Enemy Act of October 6, 1917, § 3 (c), c. 106, 40 Stat. 411. And we take notice of the fact that free intercourse between residents of the two countries has been also physically impossible. It is true that, more than three years ago, a stipulation as to the facts and the proof of foreign law was entered into by the then counsel for respondent, who has died since. But reasons may conceivably exist why that stipulation ought to be discharged or modified, or why it should be supplemented by evidence. We cannot say that, for the proper conduct of the defense, consultation between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.

Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the District Court for further proceedings, but that no action should be taken there (except such, if any, as may be required to preserve the security and the rights of the parties in *statu quo*) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become

possible for the respondent to present its defense adequately. Compare *The Kaiser Wilhelm II*, 246 Fed. Rep. 786. *Robinson & Co.* v. *Continental Insurance Company of Mannheim*, [1915] 1 K. B. 155, 161–162.

Reversed.

KING *v.* PUTNAM INVESTMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 10. Submitted November 7, 1918.—Decided November 18, 1918.

The contention that a contract of agency to sell real estate was void because federal lands, under homestead entry, were included, presents no federal question where the state court found they were not included and the record supports the finding.

Writ of error to review 96 Kansas, 109, dismissed.

THE case is stated in the opinion.

Mr. Lee Monroe for plaintiff in error. *Mr. James A. McClure* and *Mr. C. M. Monroe* were also on the brief.

Mr. B. I. Litowich for defendant in error.

Memorandum for the court by THE CHIEF JUSTICE.

Having previously considered this case (82 Kansas, 216; 87 Kansas, 842) the court awarded relief because of the violation of a contract of employment to procure the sale of real estate. 96 Kansas, 109.

The case is here in reliance upon a federal question based upon the assumption that the authority to sell included land belonging to the United States covered by an inchoate homestead entry. But the court below expressly

found that such land was not included in the contract, hence the sole basis for the asserted federal question disappears.

And this result is not changed by considering, to the extent that it is our duty to do so, the question of fact upon which the existence of the alleged federal question depends. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591. We so conclude because the result of discharging that duty leaves us convinced that the finding below was adequately sustained; indeed, that the record makes it clear that the alleged ground for the federal question was a mere afterthought. The case, therefore, must be and is

Dismissed for want of jurisdiction.

LAY ET AL. *v.* LAY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 633. Motion to dismiss or affirm submitted November 4, 1918.—Decided November 18, 1918.

As between the parties to it, an assignment of a claim against the Government for property taken during the Civil War, or of the right to a fund appropriated by Congress to satisfy a judgment therefor, is not made void by Rev. Stats., § 3477.

118 Mississippi, 549, affirmed.

THE case is stated in the opinion.

Mr. Wm. H. Watkins, for defendants in error, submitted the motion.

Mr. John C. Bryson, for plaintiffs in error, in opposition to the motion. *Mr. Wm. I. McKay* was also on the brief.

Memorandum for the court by THE CHIEF JUSTICE.

The right to a fund resulting from the payment of an appropriation by Congress to satisfy a judgment for the value of property taken during the Civil War is the issue here involved. The contestants are the heirs at law of the original claimant and persons holding under an assignment by her of all her right to the claim or fund. The court enforced the assignment.

Under the assumption that the claimant was prohibited by the law of the United States (§ 3477, Rev. Stats.) from making an assignment, the heirs at law prosecute error to correct the federal error thus assumed to have been committed. But the assumption indulged in as to the effect of the law of the United States is without merit. *McGowan* v. *Parish,* 237 U. S. 285, 294, and cases cited. This renders it unnecessary to consider whether, if the heirs at law were entitled to the fund, they would be liable to pay the full sum of the attorney's fee contracted for by the transferee and the duty to pay which the transferee and those in privity do not dispute.

Judgment affirmed.

STATE OF GEORGIA *v.* THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY AND THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

IN EQUITY.

No. 21 Original. Argued November 7, 1918.—Decided November 18, 1918.

In the absence of language suggesting a different intention, a grant of the use of a railroad right of way must be taken as granting the right of way itself. So *held*, where the purpose was to supply a roadbed for a trunk line, necessitating expenditure by the grantee. P. 28.

A grant of a railroad right of way to a corporation, or to perpetual trustees holding for corporate uses, does not need words of succession to be perpetual. *Ib.*

A grant of right of way for a railway from which great public benefit is expected *held* not a gratuity within the provision of the Georgia constitution forbidding the general assembly to grant any donation or gratuity in favor of any person, corporation, or association. P. 29.

By the Act of October 8, 1879, the State of Georgia granted a perpetual right of way for the Cincinnati Southern Railway, not a revocable license.

Bill dismissed.

THE case is stated in the opinion.

Mr. William A. Wimbish for complainant.

Mr. Edward Colston, with whom *Mr. Michael M. Allison, Mr. Washington T. Porter, Mr. John Weld Peck* and *Mr. Henry T. Hunt* were on the briefs, for defendants.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in this Court by the State of Georgia to prevent the defendants from longer occupying or using any portion of the right of way of the Western and Atlantic Railroad, a railroad built and owned by the

plaintiff State. The question, although argued at considerable length, is a very short one. On October 8, 1879, the State passed an act sufficiently explained by its contents.[1] On August 21, 1916, reciting that the Cincinnati

[1] An Act granting right-of-way to the Cincinnati Southern Railway, where its route adjoins that of the Western and Atlantic Railroad.

Section I. *Be it enacted by the General Assembly of the State of Georgia*, That whereas the city of Cincinnati has nearly completed the Cincinnati Southern Railway, a grand trunk line which will be of great benefit to the State of Georgia, forming a most important feeder and, practically, an extension of the Western and Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West;

And whereas, said railway reaches the Western and Atlantic Railroad at Boyce's Station, and for the most of the distance to the termini of the two railroads in Chattanooga, their routes run parallel to and adjoining each other, a distance of about five miles;

And whereas, it is to the advantage of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed and facilitating railroad operations; and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Tennessee river; there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right-of-way of the Western and Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and a half feet westerly from the center of the track of the Western and Atlantic Railroad, so as to admit of laying track, if desired, near enough to the track of the Western and Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet; *Provided always*, that this grant is subject to the consent and approval of the lessees of the Western and Atlantic Railroad as to the term of their lease; *Provided further*, that the grade adopted by the said Cincinnati Southern Railroad [*sic*] along and over the aforegranted right-of-way shall always be the same as that of the Western and Atlantic Railroad.

Sec. II. *Be it further enacted*, That all Acts and parts of Acts inconsistent with this Act are hereby repealed. [Laws 1879, No. 234].

Southern Railway now is controlled by a competitor of the Western and Atlantic road and that the Western and Atlantic needs the space, Georgia undertook to repeal the former act and to treat it as giving a license only, that the State was free to revoke. [Laws 1916, No. 539.] The defendants say that the words "there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway the use of that portion of the right-of-way of the Western and Atlantic Railroad" &c. grant a right of way in fee.

The Ohio statute under which the Cincinnati Southern Railway was constructed by the City of Cincinnati provided for a board of trustees to be appointed and kept filled by the Superior Court of the city, to have control of the fund raised by the city, and to acquire and hold all the necessary real and personal property and franchises either in Ohio or in any other State into which the line of railroad should extend. Therefore the grant to the trustees was the proper form for a grant in effect to the Railway, as it was styled in the title of the Georgia act, or to the city if the city was in strictness the *cestui que trust*. No other facts of much importance appear. Considerations are urged on behalf of Georgia to show that the motives for a perpetual grant were weak, but nothing that affects the construction of the words used or that shows that they are not to be given their ordinary meaning, as indeed the argument for the plaintiff agrees. But if that be true, *cadit quaestio*. A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words, and a grant of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need words of succession to be perpetual. The words "and its successors" or "in fee" would not enlarge the content of a grant to a corporation. *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 66. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 395.

Great Northern Ry. Co. v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, 5 DeG. & Sm. 138, 146. If a grantor wishes to limit the effect of words sufficient on their face to convey a fee it should express the limitation in the instrument. The purpose of the grant in this case, to supply a roadbed for a trunk line, necessitating considerable expenditure on the part of the grantee, confirms, if confirmation were required, the legal effect of the words unexplained. *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, 663. *Llanelly Ry. & Dock Co.* v. *London & Northwestern Ry. Co.*, L. R., 8 Ch. 942, 950. *Great Northern Ry. Co.* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, 5 DeG. & Sm. 138.

We think it unnecessary to refer to the language in detail beyond saying that there is nothing in the statute to suggest an intent to limit the scope of the grant and that such expressions as "*Provided further*, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right-of-way shall always be the same as that of the Western and Atlantic Railroad," further confirm our interpretation, as does also the requirement of the consent of the lessees "as to the term of their lease," since those words imply that that grant is of something more that does not require their assent. Elaborate discussion of the circumstances seems to us superfluous. But it is necessary to mention the objection that by the constitution of Georgia the general assembly was forbidden to "grant any donation or gratuity in favor of any person, corporation, or association," and that there was no consideration for this grant. Even if the contemplated and invited change of position on the part of the Cincinnati Southern Railway and the benefit to the State expressly contemplated as ensuing from it were not the conventional inducement of the grant, and so, were not technically a consideration, we are of the opinion that the grant was not a gratuity within the meaning of

the state constitution. A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent and in our opinion is not within the meaning of the word as it naturally would be understood. We deem further argument unnecessary to establish that the State of Georgia made a grant which it cannot now revoke.

Bill dismissed.

DETROIT & MACKINAC RAILWAY COMPANY *v.* FLETCHER PAPER COMPANY.

SAME *v.* ISLAND MILL LUMBER COMPANY.

SAME *v.* CHURCHILL LUMBER COMPANY.

SAME *v.* RICHARDSON LUMBER COMPANY.

SAME *v.* MICHIGAN VENEER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Nos. 336–340. Motions to dismiss or affirm or place on the summary docket submitted October 8, 1918.—Decided November 18, 1918.

Various questions of law, involving the fixing of railroad rates on intrastate traffic and reparation to shippers, *held* local, and not reviewable in error to the state court.

Where the carrier has full opportunity to test whether rates are confiscatory in a suit against the rate-fixing commission, provision of the state law making the judgment conclusive against the carrier in subsequent actions for reparation, is consistent with the Fourteenth Amendment.

198 Michigan, 469, affirmed.

THE cases are stated in the opinion.

Mr. Edward S. Clark and *Mr. I. S. Canfield,* for defendants in error, submitted the motions.

Mr. James McNamara and *Mr. Fred A. Baker,* for plaintiff in error, in opposition to the motions. *Mr. C. R. Henry* was also on the briefs.

MR. JUSTICE HOLMES delivered the opinion of the court.

These five suits were actions of assumpsit brought to recover the difference between the rates fixed by the Michigan Railroad Commission on logs carried wholly within the State, from points on the defendant's (the plaintiff in error's) road to Alpena, and the higher rates that the defendant actually charged. The plaintiffs got judgments which were affirmed by the Supreme Court of Michigan, (198 Michigan, 469), and the cases are brought here upon lengthy assignments of error. The plaintiff's now move to dismiss or affirm. We are of opinion that the judgments should be affirmed.

Most of the assignments of error concern questions of local law with which we cannot deal. Such are whether the orders of the Commission were in force pending an injunction and before the defendant railroad had fixed rates in pursuance of a mandate of the State Court; whether the state laws permit an action to be maintained without an order of reparation by the Commission; and whether the statutes purport to make the order fixing the rates conclusive in the present suits. These questions depend upon the construction of the state laws, as to which, upon writs of error to the State Court that Court has the last word. Its power would not be diminished if similar provisions in an act of Congress had been differently construed by this Court. The only question properly before us is whether the statutes as construed run against the Fourteenth Amendment of the Constitution of the United States. It is argued that they do, if,

as was held, they preclude an inquiry in these proceedings into the confiscatory character of the rates in present circumstances. But the defendant had had its chance to have the validity of the rates judicially determined in a suit for that purpose and had used it. *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission*, 235 U. S. 402. There is nothing to hinder a State from providing that after a judicial inquiry into the validity of such an order it shall be binding upon the parties until changed. The defendant was free to apply to the Commission.

A milling-in-transit rate allowing the defendant to add fifty cents a thousand feet on lumber if, instead of being carried on, after it was manufactured, on the through rate, the product was not reshipped by the defendant's line, was held to be permitted by the statute. It is said that this would be contrary to the Interstate Commerce Act if these cases involved interstate commerce, which they do not. We see no question concerning it that requires to be dealt with here.

Judgments affirmed.

PALMER ET AL. *v.* STATE OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 260. Motion to affirm submitted October 28, 1918.—Decided November 18, 1918.

The right of individuals to sue a State depends entirely on the consent of that State.

Whether an amendment of the Ohio constitution (Art. I, § 16, as amended 1912) gives such consent directly or requires legislation to put it into effect, *held* a question of local law, in no sense involving rights under the due process clause of the Fourteenth Amendment of individuals suing the State for damage to property.

The Fifth Amendment relates to federal action only.
Upon error to a state court, this court, finding no substantial federal question, will dismiss, *sua sponte*, denying a motion to affirm.
Writ of error to review 96 Ohio St. 513, dismissed.

THE case is stated in the opinion.

Mr. Clarence D. Laylin and *Mr. Frank Davis, Jr.*, for defendant in error, submitted the motion. *Mr. Joseph McGhee*, Attorney General of the State of Ohio, was also on the brief.

Mr. I. F. Raudabaugh and *Mr. John G. Romer*, for plaintiffs in error, in opposition to the motion.

MR. JUSTICE CLARKE delivered the opinion of the court.

The plaintiffs in error sued the State of Ohio for damages for flooding lands by elevating the spillway of a state-maintained dam. The Supreme Court of the State affirmed the action of the lower courts in dismissing the petition on the ground that the State had not consented so to be sued, and we are asked to review this decision.

The plaintiffs in error agree, as they must, that their suit cannot be maintained without the consent of the State, but they claim that such consent was given in an amendment to § 16 of Article I of the state constitution, adopted in 1912, which reads:

"*Suits may be brought against the State, in such courts and in such manner, as may be provided by law.*"

The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in

violation of the Fourteenth Amendment to the Constitution of the United States.

The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Company* v. *Tennessee*, 101 U. S. 337; *Hans* v. *Louisiana*, 134 U. S. 1. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Memphis Street Ry. Co.* v. *Moore*, 243 U. S. 299, 301.

The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. *Barron* v. *Baltimore*, 7 Pet. 243, 250; *Brown* v. *New Jersey*, 175 U. S. 172, 174.

No federal question being presented by the record, the motion to affirm is denied and this court, *sua sponte*, dismisses the writ of error for want of jurisdiction.

Dismissed.

ORR *v.* ALLEN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 288. Submitted October 14, 1918.—Decided December 9, 1918.

The "Conservancy Act of Ohio," designed to prevent floods, and authorizing creation of drainage districts, and drainage improvements through administrative boards empowered to exert eminent domain, and to tax, assess for benefits, and issue bonds, affords full opportunity for testing private grievances judicially, and, as correctly construed by the court below, is consistent with the state and federal constitutions.
245 Fed. Rep. 486, affirmed.

THE case is stated in the opinion.

Mr. Robert J. Smith for appellant.

Mr. Oren Britt Brown for appellees. *Mr. John A. McMahon* was also on the brief.

Memorandum opinion by THE CHIEF JUSTICE.

The "Conservancy Act of Ohio" is the name given the statute by its first section. Its seventy-nine sections are thus epitomized in the title: "To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts." Ohio Gen. Code, §§ 6828–1 to 6828–79; Laws of Ohio, vol. 104, p. 13. The statute was admittedly designed to prevent the recurrence of the unprecedented and disastrous flood which invaded the Miami Valley in 1913. Briefly, there was provision for drainage districts, for boards to plan, construct and maintain the works contemplated, with the right to

exert eminent domain, and to raise money by taxation, by assessments for benefits, and, in some cases, by issue of bonds. Every person affected who was aggrieved was undoubtedly given ample means by the statute to test judicially his grievance.

A district was organized embracing land along each side of the Miami River which had been flooded in 1913 or which was required for reservoir sites or for furnishing material.

The appellant, a citizen of California owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the constitution of the State and that of the United States. The court, organized under § 266 of the Judicial Code, in a careful and clear opinion disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

All the contentions rest upon one or the other or both of two propositions; (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by Government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the constitution of the State forbids the exertion of a legislative power which the same court has expressly held the legislature possessed. The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

Thus concluding, we think nothing is required to dis-

pose of the controversy but to cite the two lines of cases referred to. (1) *Snyder* v. *Deeds*, 91 Ohio St. 407; *Miami County* v. *Dayton*, 92 Ohio St. 215; *County Commissioners* v. *Gates*, 83 Ohio St. 19, 34; *State ex rel. Franklin County Conservancy District* v. *Valentine*, 94 Ohio St. 440; (2) *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262, and cases cited.

Affirmed.

E. W. BLISS COMPANY *v.* UNITED STATES.

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

No. 15. Argued November 20, 21, 1918.—Decided December 9, 1918.

In a contract for supplying torpedoes, the manufacturer agreed with the Government not to make use of any device the design for which was furnished to it by the United States, in torpedoes constructed for other persons or governments, and not to disclose such devices, but no device or design was to come within the prohibition unless so designated in writing by the Government at the time when it was conveyed to the manufacturer.

Held: (1) That the obligation to secrecy was not confined to devices which were secret, or to inventions by the United States, but extended to such as were furnished—communicated with certainty—, and designated for secrecy, by the United States, even where the design was subsequently worked out by employees of the manufacturer. Pp. 43–48.

(2) That injunction against disclosure should be confined to devices in use, but without prejudice to the right of the Government to enjoin disclosure of others, upon proof of intention to make use of them. P. 48.

Davison patent relating to propulsion of torpedoes construed. P. 44.

224 Fed. Rep. 325; 229 Fed. Rep. 376, modified and affirmed.

THE case is stated in the opinion.

Mr. George W. Field, with whom *Mr. Frank H. Platt* and *Mr. Eli J. Blair* were on the briefs, for appellant:

To furnish a design, it is necessary to furnish something concrete. So of a device. One cannot exhibit an idea. A device has been defined as a thing "devised or formed by design; a contrivance; an invention." "Device" meant some contrivance which could be installed in the torpedo.

The Government has published by the Davison patent and otherwise the nature of the balanced turbine and has therefore waived secrecy. This clause must be construed against the Government because drawn by it. Further, it is a restriction on the defendant's power of alienation of its own property.

It should be construed to avoid absurdity or unfair advantage to one party over the other. *Bell* v. *Bruen*, 1 How. 169; *Sanford* v. *Brown Brothers Co.*, 208 N. Y. 90.

The balanced turbine principle being public property, the Government could not furnish it to the defendant.

The purpose was to prevent knowledge of new inventions going to the other nations. By the issuance of patents, both domestic and foreign, this purpose is frustrated by the plaintiff itself.

As no irreparable injury can be suffered by repetition of such knowledge, injunction was improper.

The position of the defendant is analogous to that of the holder of a trade secret. Once a trade secret has become generally known, regardless of the contract between the parties, its further promulgation will not be protected by injunction. *Bell & Bogart Soap Co.* v. *Petrolia Mfg. Co.*, 25 Misc. (N. Y.) 66; *National Tube Co.* v. *Eastern Tube Co.*, 23 Ohio C. C. 468; *Chain Belt Co.* v. *Von Spreckelsen*, 117 Wisconsin, 106.

Mr. Assistant to the Attorney General Todd, with whom *Mr. A. F. Myers* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a decree of the United States Circuit Court of Appeals amending and affirming a decree of the District Court for the Eastern District of New York entered in a suit brought by the United States against appellant (herein referred to as the Bliss Company) restraining the latter from exhibiting or communicating the construction and operation of a torpedo known as the Bliss-Leavitt torpedo.

The controversy turns upon the construction and application of certain clauses of the contracts between the Bliss Company and the United States and is not, we think, in broad compass. In support of its contention in the main the United States has the sanction of the two courts.

The development, construction and operation of the torpedo gave animation and attraction to the argument, but it is enough to say that its method of propulsion is the balanced turbine method, so called, that is, turbines revolving in opposite directions. The United States asserts that to this method of propulsion the excellence and efficacy of the torpedo is due and that it was the conception of the United States; that it was the result of much experimentation on the part of its engineers and those of the Bliss Company and the expenditure of substantial sums of money by the Government, and that because of the superior speed, range and power of this new weapon, other nations have been eager to learn the secrets of its construction.

The Bliss Company denies these assertions, opposes them, besides, by the contentions that the balancing of rotary bodies analogous to turbines rotating in opposite directions was a matter of common knowledge long prior to any transactions with the United States and that the

torpedoes constructed by it under its contract contained balanced turbines, so called, of its own design and property; or, to quote counsel: "The torpedo is the product of the assiduity and genius of the defendant's officers and engineers, and not that of the Government." And, further, that it purchased from Lieutenant Davison, with full knowledge of the United States, all of his rights to foreign patents, and to this patent, it is said, the United States assigns a special excellence. This is the issue in outline. The Bliss Company asserts the right to have other customers than the United States and to seek other markets, and not subject to restriction by the United States. The United States claims an exclusive service and even concealment from all others except as it may concede it. The resolution of the contentions is in the contract of the parties.

Their transactions date to 1905 and are exhibited in three contracts, one of November 22, 1905, one of June 12, 1912, and an intervening one dated June 16, 1909. In the 1905 contract there was a provision which it is admitted was embodied in all subsequent contracts. Disputes arose as to the meaning of the provision, the rights and restraints under it, and the Bliss Company brought them to litigation by expressing its desire to negotiate with Messrs. Whitehead & Company for the right to manufacture the torpedo in foreign countries. The Bureau of Ordnance objected, and on May 9, 1913, the company addressed the Secretary of the Navy as follows: "As a means to this end we notify you hereby that it is our intention to communicate the complete construction and operation of the existing type of Bliss-Leavitt torpedo, and to make a demonstration of the operation of said torpedo, to a representative of Messrs. Whitehead and Company on or immediately after June 1, 1913."

To restrain the threatened action this suit was brought. The prayer of the bill covers the balanced turbine and

certain other features, and it is manifest that whether it should be granted depends particularly upon a provision of the contract which prohibits the exhibition of the torpedo or its performance to any person whatsoever or to any other government, or its representatives, than that of the United States. That provision is that the Bliss Company "will not make use of any device the design for which is furnished to it" by the United States "in any torpedo constructed or to be constructed for any person or persons, firms, corporations, or others, or for other governments than" the United States and "will not exhibit such device or in any way describe it to or give any information in regard to it to any person . . . or to other governments, or their representatives" or exhibit its performance "either in shop or in service tests." A violation of the contract incurs its cancellation and releases the United States from all claims or demands under it. It is, however, provided that no design shall be considered as coming within the provisions unless the United States communicates in writing to the Bliss Company that it (the United States) thinks it is embraced by the provision.[1] It is disputed whether the condition of the pro-

[1] "Nineteenth. It is hereby expressly further stipulated, covenanted, and agreed, that the party of the first part will not make use of any device the design for which is furnished to it by the party of the second part in any torpedo constructed or to be constructed for any person or persons, firms, corporations, or others, or for other governments than the party of the second part hereto; that the party of the first part will not exhibit such device or in any way describe it to or give any information in regard to it to any person or persons, firms, corporations, or others, or to other governments, or their representatives, than the party of the second part hereto; that the party of the first part will not exhibit the performance of any torpedo containing such device, either in shop or in service tests, to any person or persons, firms, corporations, or others, or to other governments, or their representatives, than the party of the second part hereto:

* * * * * * * *

"Provided furthermore, That no device or design shall be considered

vision was performed, but both the lower courts have found that it was, and we concur in their judgment. The condition of the provision, then, having been performed, we come to its meaning, the Bliss Company contending that the device must be of the invention of the United States, and the latter contending that it need only be "furnished" by the United States.

The Bliss Company's contention in its detail is somewhat difficult to state concisely. It rests as much in implication as in expression. It is said that the restrictive clause "applies only to a 'device the design for which is furnished by the Government'" and "expressly and clearly excludes ideas, methods or principles." And it is further urged that "to furnish a design, it is necessary to furnish something concrete. A device also is something

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as coming within the provisions of this clause unless the party of the second part shall state to the party of the first part in writing, at the time when the said device or design is itself conveyed to the party of the first part by written communication from the party of the second part, that the party of the second part considers that the said device or design is embraced within the provisions of this clause."

In the contract of June 12, 1912, the foregoing clause became clause Twentieth. The 1912 contract contained, however, in the second clause, the following new matter, which (save that part enclosed by brackets) had not been included in previous contracts:

"[Second. The manufacture of said torpedoes] (the word 'torpedoes' as used throughout this contract being intended to include everything covered by the drawings, plans, and specifications above referred to) [shall conform in all respects to and with said drawings, plans and specifications], including duly authorized changes therein, but said drawings, plans and specifications are not hereto annexed or made a part hereof. They contain information of a confidential character that can not be made public without detriment to the Government's and the contractor's interests, and they are to be treated as confidential by the parties to this contract, it being understood, however, that nothing in this clause shall be construed as depriving the party of the first part of the right to make and sell such torpedoes to any other party or government whatsoever, except as limited by clause twentieth of this contract."

concrete. One cannot exhibit an idea." To support these declarations legal and other definitions are adduced. One is selected from *Armour Packing Co.* v. *United States*, 209 U. S. 56, which explains a device to be a thing "devised or formed by design; a contrivance; an invention." It is hence asserted that the United States did not comply with these definitional requirements—indeed, from the state of the art, could not; and therefore could not impose secrecy upon the Bliss Company.

The tangibility of the definitions and the arguments based upon them are not very clear nor what purpose they tend to establish. The company asserts a right to employ the principle of propulsion and this principle it asserts to be—to quote counsel—"the balancing of rotary bodies analogous to turbines rotating in opposite directions and of equal speeds for the purpose of eliminating gyroscopic effect," and that it was "long prior to 1906 [the first contract was made in 1905] a matter of common knowledge and known to the defendant" (the company); and again, "The balanced turbine principle was public property and not the property of the Government. It was a matter of public knowledge and not a secret." Therefore, as we have said, the contention is that it was not within the prohibition of the contracts. Immediately it may be asked: This being the condition, of what value was the restrictive clause to the Government? Surely the Government sought to secure something valuable and practical, and yet it was apparently only the promise of words never to have effective realization. Instead of security the Government got a controversy. Anything it might offer or suggest or, to use the word of the contract, "furnished," would be open to dispute and the charge of being anticipated, already in existence among the things available to the company as "public property and not the property of the Government" —"a matter of public knowledge and not a secret." And the Govern-

ment could not even fortify itself by the presumptions of a patent. To have done so would have been to break the seal of secrecy and relieve the company from the obligations imposed by the contract. To this contention the Bliss Company is driven to get rid of the Davison patent, the design for which was furnished the company by the United States. Counsel say: "Assuming that the particular design of a balanced turbine produced by Davison was a secret, it lost every attribute of a secret upon the issuance by the United States Government of letters patent to Davison." And further: "The issuance of this patent, therefore, became an act of the Navy Department. Thus, the Government through the same department by which it entered into the several contracts with the defendant [the company], caused the alleged secret of the balanced turbine to be laid open to the public." And, besides, it is said that the Government "tacitly permitted Davison, one of its officers and subject to its discipline, to assign" to the company "foreign patents for the device in issue"; and that therefore "it cannot now successfully contend that its design is within the restrictive clause." But this gives an exaggerated effect of publicity to a patent and cannot dispense with the explicit obligation of the restrictive clause. Indeed, we may repeat, Of what avail was the restrictive clause to the Government under the contentions of the company? It was assured of nothing but opposition and litigation. We may cite in further illustration of this that the Bliss Company asserts that the Davison device was without novelty in the field of "opposite revolving turbines" (another name for a balanced turbine) and that all he did was to take a "design of unbalanced turbine shown" in a prior patent "and reverse one of the turbine wheels with the incidental and necessary change in the gearing." The assertion is that "the designing of this gearing is what occupied Lieutenant Davison's time and thought." We

may say that we concur with the lower courts and think the patent is not so limited. The Bliss Company thought well enough of it to buy its foreign rights.

The several contentions of the company are but fragments of the broader one that there were in the world's knowledge and available to the company practical devices as well as principles of operation which precluded a demand of secrecy by the Government and which left the company free to use or exhibit or sell to anybody torpedoes embodying them, the final and dominant contention being that the Government's reservation was only of inventions—inventions, however, undisclosed, patentable but not patented. Yet the word of the contract is "furnished," not invented, and the words are of different significance. To invent means to create; to furnish means to supply. And the difference was too important, too pertinent to the purpose to have been overlooked—indeed, must have been deliberately contemplated to achieve the object of the parties. The Government in its situation, considering the use of torpedoes and the uncertainty against whom to be used, would want to avail itself of the whole universe of things then existing or that might be brought into existence, in whatever way or combination it could. It is easy to believe that an arrangement of old devices might have value. And secrecy was an especial object, as far as it could be maintained and for such length of time as it could be maintained. The fact and the time might in instances be critical and determinative of a decisive result. The Government considered the provision important to insert in the contract of 1905 and to repeat in every subsequent contract, to and including that of 1912, and to disregard the plea of the company for some relaxation of it to accommodate the company's interests. There was some relaxation in 1912 and 1913, but the confidential relation of the parties was emphasized as we have seen.

This was the simple situation. It is free from the tangle and perplexities of the company's contentions. It gives use to the restrictive clause, directness of right and remedy, not dependent upon explorations into the prior art or the delays and termination of law suits. These observations apply to other parts of the torpedo as well as to the balanced turbine. The remarks of the Circuit Court of Appeals are pertinent. The court said:

"Throughout the entire record, in the contracts, correspondence and dealings of the parties, the importance of secrecy is everywhere manifest. The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable. We are of the opinion, therefore, that the injunction should include all designs, drawings, plans and specifications used by the defendant in making the Bliss-Leavitt torpedo for the Government which were approved by the Ordnance Bureau, notice of which was given to the Bliss Company pursuant to the provisions of Clauses 19 and 20 of the contracts in question." The court hence directed the amendment of the decree of the District Court, "adding such a provision."

A rehearing was asked of the case. It was denied as to the balanced turbine and granted as to the other devices, that is, Double Regulation of Air, Ball Bearings for Gyroscope, and Inside Superheater. To the inclusion of these in the decree it is objected, as to the Double Regulation of Air, that written notice was not given the company as required by the restrictive clause. The assertion is that what was done by the Government was

nothing but suggestions, first verbal, and then by letter, but not accompanied by "blue prints of design." [1] The objection is based on the contention already referred to that a device or design must be something concrete or, it is now said, if not that, "it at least imports something as to dimensions, size, shape, weight, etc., from which a device could be constructed." The objection

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[1] Bureau of Ordnance
Navy Department

25698/102–(G)–O. January 18, 1913.

Sirs: 1. The Bureau is pleased to note the decided improvement shown in the dynamometer tests of the Mark VII torpedo by the use of double regulating valves.

2. This plan or idea of double regulation was first submitted to the Bureau by a letter from Lieut. E. Frederick, then Assistant Inspector of Ordnance at your works, dated March 9, 1911, which was received and filed in this office on or about March 15, 1911, and the value of the invention was successfully established by the actual tests at the Naval Torpedo Station, Newport, R. I.

3. The Bliss Company had been furnished verbally with the idea and the fact that its value had been established by actual trials. This was also furnished the E. W. Bliss Company by the Bureau's letter No. 25698/92 (G) of January 4, 1913.

4. In view of the above the Bureau requests that you will note for record that the double regulating principle has been submitted by the Bureau, and that this principle of any device embodying the same falls under the provisions of Clause 20 of the contracts now existing.

5. While the Bureau has no actual blue prints of design it has on record cards and certain data obtained by experiments at the Torpedo Station which the Bureau will be pleased to furnish the E. W. Bliss Company for their information if they so desire and will request it.

6. The Bureau again desires to express its pleasure in noting the improvement in the dynamometer tests due to the double regulation and the change in angle spray which was introduced at the suggestion of the Bureau's inspectors at your works.

Respectfully,

N. C. TWINING,
Chief of Bureau.

E. W. Bliss Co., Brooklyn, N. Y.
(Through Inspector of Ordnance.)

is hypercritical and we are somewhat surprised at it. There was no uncertainty in the Government's demand and no misunderstanding of it. There were discussions concerning the practical means of using it, and it was testified that "the sole question practically reducing itself to whether or not they had sufficient space to apply this design or principle." And the design was subsequently worked out by the employees of the company. The objection was rested on other grounds, and it was rightfully dealt with by the Circuit Court of Appeals.

The same objection is not made as to the Superheater and the Ball Bearings. It is said of them that they are not used in the existing type of torpedo. As this is conceded by the Government, and as we do not agree with its assertion that the company "displays a disposition to violate its trust whenever it seems advantageous to do so," we think the decree should not include the devices. In other words, it should be modified to exclude them, without prejudice, however, to the Government's right to obtain an injunction against their disclosure, upon proper proof of an intention to use the devices, in proceedings supplemental to this action or in an independent action. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 262.

The decree is modified as stated, and, as modified, affirmed.

Affirmed.

THE CHIEF JUSTICE dissents.

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

Counsel for Parties.

VAN DYKE ET AL. *v.* ARIZONA EASTERN RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 59. Argued November 19, 1918.—Decided December 9, 1918.

A railroad company, having surveyed a line over public land and filed map and application for right of way under the Act of March 3, 1875, (which affects public land only,) and the land having in the interim become part of a National Forest, made application, upon the same map, to the Commissioner of the General Land Office for permission to construct in the Forest; received such permission from the Forest Service, to which the matter was referred; amended its location somewhat, so as to lay the right of way, staked 200 feet wide, across a mining claim in the Forest; obtained conveyance of 100 feet in width from the mining claimants, and constructed and operated its road. Thereafter, the original application was approved by the Secretary of the Interior, and thereafter the tract crossed was thrown open to entry.

Held, (construing the Act of 1875, *supra*, and the Act of March 3, 1899, relating to rights of way in forest reservations,) (1) That the right of the railroad, to the full 200 feet, was superior to the right of one who held under the mining claim until the land was thrown open and who then settled, and ultimately obtained patent, under the Homestead Law, although his homestead right was initiated before the company amended its map to show the change of location and before the Secretary approved the application as thus amended. P. 53.

(2) That the question whether failure to describe the route in its charter left the company without power to construct upon it, and unqualified to receive the grant, was not subject to be raised by the homesteader. P. 54.

18 Arizona, 220, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Richard E. Sloan* and *Mr. F. C. Jacobs* were on the brief, for plaintiffs in error.

Mr. Charles L. Rawlins for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of affirmance of a judgment rendered in the Superior Court of Gila County, Arizona, quieting the title of the Railroad Company to 2.23 acres of land in the N. W. ¼ of the S. E. ¼, Sec. 30, T. 1 N., R. 15 E., Gila County, Arizona.

The trial court made findings of fact which were concurred in by the Supreme Court. And we see no reason for not accepting them, notwithstanding plaintiffs in error urge a review of them. They are as follows:

The railroad, as the successor of the Gila Valley Globe & Northern Railway Company, acquired its rights, including rights of way and all other assets. In March, 1906, the latter company platted a line of railroad from Globe to Miami, Arizona, about nine miles in length, passing over and across certain public land, and, November 5, 1908, filed in the local land office its map or profile of definite location as provided by the Act of Congress of March 3, 1875. Prior to that time the land covered by the map as well as the land in dispute was thrown into the Crook National Forest Reserve. April 19, 1909, written application to the United States Department of Agriculture, Forest Service, with map of right of way attached, was made by the railroad to enter and extend its line across a portion of the Forest Reserve. The railroad was given permission, on July 6, 1909, to enter the reservation and to locate and construct its road therein. The map and profile of its road was approved September 21, 1909, by the Secretary of the Interior in accordance with the act of Congress.

In April, 1909, the Globe Company commenced the construction of its road and completed it in September of that year, and it and the appellee company have operated trains ever since October, 1909. Before construction was commenced, to-wit, in November and December, 1908,

the Globe Company amended its line of survey and changed the course of its road upon and across the land in dispute and along its entire length to the extent of 100 feet in width on each side of the center line of its railroad and constructed its road on the amended location conforming on the ground to the staked and marked line.

At the time of the amended location the land was held by the Miami Land & Improvement Company, a corporation, as mineral land, and the Globe Company accepted a deed from it to a right of way across the land. By executive order the land in dispute was restored to the public domain December 22, 1909, on which date appellant, Cleve Van Dyke, filed upon the same under the homestead law. He had theretofore accepted it under an option to purchase as a mineral location from the Miami Improvement Company. On that date he went off the land, but immediately returned and established his residence with a view to homesteading. In due course he made final proof and on February 12, 1912, a patent without any reservation was issued to him for his homestead.

December 30, 1909, the Globe Company filed its amended map and profile of its right of way in the local land office which was regularly and duly approved March 4, 1911.

Van Dyke attempted to show that he had established residence upon the land prior to December 22, 1909, the date upon which he filed his homestead entry. But it is clear that he did not go upon the land prior to its inclusion in the Forest Reserve. He was upon the land under the option to purchase mentioned, and he attempted to show that he was there under a verbal permit from the Forest Supervisor with the intention of entering the land as a homestead and that he made application to the Forestry Department for an examination and listing thereof under the Act of June 11, 1906 [c. 3074, 34 Stat. 233]; application, however, was rejected.

That he did not rely upon the settlement prior to December 22, 1909, is clearly shown by his testimony. He said: "It is a fact that about midnight on the 22nd of December, 1909, I took up my residence in the house testified to. That is, I went off the ground and back on again at midnight." December 22nd was the first time the land could have been settled upon without permission from the National Government, and this permission he did not obtain.

Upon these facts the Supreme Court said certain contentions arose: (1) It is that of the railroad that its rights were fixed and established in August and September, 1909, when it completed the construction of its railroad. (2) Opposing, plaintiffs in error assert that, because the railroad changed its route as located by its original map and profile approved by the Secretary of the Interior, it acquired no rights until it filed with the local land office on December 30, 1909, its amended map of location, which was too late, Van Dyke having taken the land as a homestead December 22, 1909. And to the contention of the company that if the land was public it was not bound to follow the line as shown on its map and profile, plaintiffs in error reply that the land had ceased to be public land by being thrown into the National Forest Reserve and that the railroad was hence restricted to the specific right of way shown on its approved map and profile; or, if changed to another and different route, the consent of the Interior Department was necessary and that such permission had not been given and hence the railroad acquired no rights, at least against plaintiffs in error. It is conceded, however, that the railroad company was entitled to a right of way to the extent of 50 feet on each side of the center of its line of track acquired by deed from the Miami Land & Improvement Company, in the execution of which deed Van Dyke "acquiesced." Therefore, as said by the Supreme Court, "Fifty feet on each side of

the center line of the track, or 100 feet of the right of way, are not involved in this suit; the area in question being the excess of 100 feet up to 200 feet, amounting to 2.23 acres."

We have had occasion to consider the Act of 1875, 18 Stat. 482, and what constituted a definite location of the right of way under it, and have decided that such event occurs by the actual construction of the road. *Jamestown & Northern R. R. Co.* v. *Jones*, 177 U. S. 125; *Minneapolis &c. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142.

It was found by the courts below that the construction of the railroad was commenced in April, 1909, and completed September, 1909, and that trains have been operated on it ever since. This satisfies the condition expressed in the cited cases of the appropriation of a right of way. But it is objected that the land was not then subject to appropriation, being within a Forest Reserve. In reply the Act of Congress of March 3, 1899, c. 427, 30 Stat. 1233, is adduced. It reads as follows: "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Of this act we said, in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 357, 358, that it commits to the Secretary of the Interior the question of determining whether the public will be injuriously affected by the grant of a right of way to a railroad through a forest reserve and authorizes him to file and approve surveys and plats of the right of way. The measure of his discretion is large and only through his approval can a right of way be acquired.

The condition was satisfied in this case. The Globe Company—to the rights of which defendant in error

succeeded—in 1906, in preparation for the construction of its road, platted its road and filed in the local land office its map and profile of definite location under the Act of 1875, in November, 1908. Several months prior to the latter date the land of the platted line and the land in dispute were thrown into the Crook National Forest Reserve. In the following year the railroad company made application to the Commissioner of the General Land Office for permission to enter the reserve and to locate and construct its road thereon. And the application was communicated to the Department of Agriculture and approved by the Acting District Forester; the permission was granted and the map and profile of the road was approved September 21, 1909, by the Secretary of the Interior, pursuant to the Act of Congress of March 3, 1875. The road was constructed, and, as we have said, completed in September, 1909, and put in operation in October. And these successive steps were before the date on which Van Dyke attempted to initiate a homestead right. The discretion of the Secretary of the Interior was therefore exercised, and we agree with the Supreme Court that we cannot infer a rule of the Department which precluded the granting of permission upon the original map and profile.

Plaintiffs in error contend that the railroad company had no power to construct a road from Globe to Miami, Arizona, because its charter failed to designate such a line as within the project for which it was incorporated. This was made an issue by the pleadings and the court found against it. Besides, it is not within the province of plaintiffs in error to make the objection; it was a matter for the Secretary of the Interior to determine. And, again, plaintiffs in error have not such relation to the railroad company as to complain of the exercise of power outside of its charter.

Judgment affirmed.

BUCKEYE POWDER COMPANY *v.* E. I. DuPONT DE NEMOURS POWDER COMPANY ET AL.

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

No. 7. Argued April 30, May 1, 1917; restored to docket for reargument June 10, 1918; reargued November 13, 1818.—Decided December 9, 1918.

In an action for triple damages under § 7 of the Sherman Act, where the scope of the declaration, plaintiff's interpretation of it and the nature of the proofs characterized the case as based on § 2 of the Act, dealing with attempted and effected monopolies, rather than on § 1, dealing with contracts and combinations in restraint of trade, and where the case was fully tried upon this basis, without objection, and the jury was allowed to consider contracts so far as they bore upon the supposed attempt to subject plaintiff to a monopoly,—

Held: (1) That technical error committed at the close of the trial in requiring plaintiff to elect whether it would rely on the first or second section of the act (whereupon it elected the second without asking to amend,) was harmless. P. 60.

(2) That instructions pointing out that § 2 extends to attempts to monopolize were advantageous rather than harmful to plaintiff. P. 62.

In such an action, where the only ground for holding a defendant is responsibility (through stock ownership) for the acts of another defendant, error in directing a verdict for the former is harmless if the latter be exonerated upon the merits by the jury, after instructions fairly presenting the case against it. P. 62.

Before the Clayton Act, c. 323, 38 Stat. 731, a judgment in a Government proceeding finding a company guilty of an attempt to monopolize was inadmissible in a private action for triple damages under § 7 of the Sherman Act. P. 63.

The provisions of § 5 of the Clayton Act for admitting such judgments, "hereafter rendered" in Government cases, in other litigation, and for suspending the statute of limitations as to private rights pending Government prosecutions, do not affect retrospectively, on review, a judgment rendered in an action for triple damages before the Clayton Act was passed. *Id.*

A corporation suing for triple damages under the Sherman Act has

no ground to complain of the mere existence of a power in trade attained by a defendant and known to the organizers of the plaintiff before the plaintiff was created, without proof of some oppressive use of it afterwards. P. 63.

An instruction *held* to state correctly that, on the question whether plaintiff's failure in trade was due to its incapacity or to defendant's oppression, the jury might consider whether the motive in organizing plaintiff was to sell out to defendant or to compete. P. 64.

In an action for triple damages under the Sherman Act, the court excluded statements by third parties of their reasons for refusing or ceasing to do business with plaintiff. *Held* correct, as the statements were wanted not as evidence of motives but as evidence of facts recited as furnishing the motives. P. 65.

Where the jury found for defendant, rulings as to damages *held* immaterial. P. 65.

223 Fed. Rep. 881, affirmed.

THE case is stated in the opinion.

Mr. Twyman O. Abbott, with whom *Mr. Willard U. Taylor* was on the briefs, for plaintiff in error, among other points, urged that § 7 of the Sherman Act, prescribing a remedy for injuries suffered "by reason of anything forbidden or declared to be unlawful by this act," gives a single and indivisible right of action, and makes no distinction between the things that are declared to be unlawful by § 1 and those that are declared to be unlawful by § 2; citing *United States* v. *Kissel,* 218 U. S. 601, 607; *Cilley* v. *United Shoe Machinery Co.,* 202 Fed. Rep. 598; *Strout* v. *United Shoe Machinery Co.,* 202 Fed. Rep. 602; *Corey* v. *Independent Ice Co.,* 207 Fed. Rep. 459, 463; *Monarch Tobacco Works* v. *American Tobacco Co.,* 165 Fed. Rep. 774; *People's Tobacco Co.* v. *American Tobacco Co.,* 170 Fed. Rep. 396, 407; *Occidental &c. Co.* v. *Comstock Tunnel Co.,* 111 Fed. Rep. 135. Furthermore, in practically all equity cases brought by the Government under the Sherman Act, both §§ 1 and 2 were involved, and the Government had never been compelled to elect under

which section it would proceed. Under the Clayton Act, it was now provided that private persons might sue in equity. Act of October 15, 1914, § 16, 38 Stat. 731. If the ruling of the trial court were correct, the absurd situation would be presented of requiring a private person to elect in an action at law, but not in an equity proceeding. The error in requiring an election, was not harmless. The opinion below, in stating that "practically" all the evidence was directed to a monopoly, conceded that there was some to show a contract or combination. But in any event, plaintiff was entitled to have the scheme or combination considered as a whole, by the jury, and not in part only.

Amendment at that stage of the case was entirely out of the question, as a matter of fact, even if not as a matter of law. Furthermore, the order came as a complete surprise to the plaintiff as it was a reversal of the earlier position taken by the court upon the motion to strike the declaration. Plaintiff relied, and had a right to rely, upon the ruling made at that time, as being the law of the case.

Defendants did not acquire the right to perpetuate their monopoly by reason of long continued misconduct; and the fact that defendants were large and powerful as factors in the trade and that plaintiff's promoter had knowledge of this fact, and of their monopoly and of their practices and policies in maintaining it, did not alter plaintiff's right of action under § 7 of the act to recover for injuries suffered by reason of conduct forbidden by that act. Plaintiff was not bound to enter the business at its peril by reason of this knowledge, nor did plaintiff occupy any different position as a competitor than it would have occupied if it had been in existence during the period that the defendant's influence was being developed, and had suffered injuries at the hands of the defendants during said period or afterwards. In *Loewe* v. *Lawlor*, 208 U. S.

274, it was said that: "The act made no distinction between classes." It did not create any distinction between the rights or remedies of a person injured by an unlawful combination, whether such person or corporation was in existence before the combination had developed its power and influence, or afterwards; or whether it had previous knowledge, or acquired it later.

It was unnecessary and improper for the court to instruct the jury upon a supposititious case which was not in issue. The question was not what would have been the plaintiff's rights had it been in existence earlier, nor what would have been the rights of some other person who might not have been cognizant of the facts. The sole question before the court was, What are plaintiff's rights now? *United States* v. *Breitling*, 20 How. 252; *Railroad Co.* v. *Houston*, 95 U. S. 697, 703.

The question whether plaintiff was sufficiently capitalized to compete was a question of fact, not of intention. Even if the intention had been, as it was not, to be bought out rather than to compete, that would not afford the slightest excuse in law for the unlawful acts of the defendants, since the exercise of a legal right cannot be affected by the motive which controls it. *Sullivan* v. *Collins*, 107 Wisconsin, 291; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819; *Northwestern Consolidated Milling Co.* v. *Callam & Son*, 177 Fed. Rep. 786; *Independent Baking Powder Co.* v. *Boorman*, 130 Fed. Rep. 726.

A combination of individuals engaged in interstate commerce is a veritable outlaw. It has no right to exist. And whatever it does "by reason" of which any person suffers injury, must be compensated for. The contention is that any and all injuries which may be suffered by reason of the competition induced by an unlawful combination in interstate commerce, must be

compensated for regardless of whether the acts which caused them were "fair" or "unfair," and regardless of whether such acts might have been in themselves lawful.

It has been several times held by this court that it is not alone the actual doing of the prohibited thing which the anti-trust acts strike at, but the power to do it. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 322; *Monarch Tobacco Works* v. *American Tobacco Co.*, 165 Fed. Rep. 774, 780.

The reasons given by customers for ceasing to do business with plaintiff, as shown by their letters and by their statements to its officers and agents, should have been received. The question of the admissibility of such evidence is no longer an open one since the decision in *Lawlor* v. *Loewe*, 235 U. S. 522. 3 Wigmore, Evidence, § 1729 (2); *Elmer* v. *Fessenden*, 151 Massachusetts, 161; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 295. The testimony rejected by the trial court all touched upon the vital issue whether the acts charged against the defendants and their co-conspirators had really accomplished the object of "inducing" consumers not to use plaintiff's product.

The decrees in the "Government Case" which adjudged the defendants guilty of violation of the Sherman Act upon a state of facts almost identical with those presented in this case, and directed their dissolution, should have been received. *Portland Gold Mining Co.* v. *Stratton's Independence*, 158 Fed. Rep. 63. The grounds upon which plaintiff relies to sustain admissibility are: (1) As evidence of the fact that the defendants had been adjudged guilty of forming the same combination and conspiracy in restraint of trade which was in issue. *St. Louis Mutual Life Ins. Co.* v. *Cravens*, 69 Missouri, 72; 1 Greenleaf,

Evidence (16th ed.), § 538; *National Cash Register Case*, 222 Fed. Rep. 599, 629; *Coffey* v. *United States*, 116 U. S. 436. (2) As an admission of guilt. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 691; *United States* v. *Parker*, 120 U. S. 89; *Nashville &c. Ry. Co.* v. *United States*, 113 U. S. 261.

As supporting the first of these grounds, it was important to consider that plaintiff's president and chief promotor and sponsor made the petition which led to the government suit, assisted actively and was virtually treated as the plaintiff in that case,—facts which were fully brought out by the defendants in this one. As supporting the second ground, the decree in the government case was made by consent, after months of negotiation.

Mr. William H. Button and *Mr. Frank S. Katzenbach, Jr.*, with whom *Mr. John P. Laffey* was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the plaintiff in error to recover triple damages under the Sherman Act, July 2, 1890, c. 647, § 7, 26 Stat. 209, 210. There was a trial that lasted five months, in which the facts were shown at great length, and after a very full and fair charge by the presiding judge the jury found a verdict in favor of the principal defendant, the E. I. DuPont de Nemours Powder Company, on the merits, and for the other two by direction of the Court. Elaborate exceptions were taken but they were overruled by the Circuit Court of Appeals. 223 Fed. Rep. 881. 139 C. C. A. 319.

The first one that we shall deal with complains of the Court's sustaining a motion at the end of the trial that the plaintiff should elect whether it would rely upon the

first or the second section of the Sherman Act. If the case were different the question presented might be grave. In the one before the Court the only error was in the use of the word election and the implied admission that the trial possibly could be taken not to have proceeded upon the second section of the act, coupled of course with § 7, giving a private action to persons injured by breach of the statute. The first section deals with contracts in restraint of trade, the second with monopolizing and attempting to monopolize it. The declaration, after stating the organization of the plaintiff in January, 1903, for the purpose of manufacturing and selling powder, particularly black blasting powder, alleges a long previous conspiracy on the part of various companies to monopolize the trade in explosives, which ended in the organization of the E. I. DuPont de Nemours Powder Company in May, 1903, in order more completely to carry out that end. It is alleged that the defendants and others have carried out that end, and that in pursuance of it they did acts, detailed at great length, for the purpose of compelling the plaintiff to join them or else go out of business. That, with an allegation that they succeeded and forced the plaintiff to sell out at a loss, is the whole scope of the declaration. There was a motion to strike it out for duplicity, but the motion was overruled on the ground that the declaration was as we have stated. 196 Fed. Rep. 514. The trial proceeded on that footing without complaint. So far as contracts bore upon the supposed attempt to subject plaintiff to the monopoly the jury was allowed to consider them. The case was fully tried upon the ground taken by the plaintiff at the outset and the only one on which it could hope to succeed. The plaintiff did not ask to amend. It is unnecessary to advert to the statement of the judge that in his opinion the exception to be considered should have the whole record behind it, or whether, as has been suggested, the

second section is not the only one addressed to transactions such as were alleged. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 404. When the plaintiff, after the ruling of the judge, went through the form of electing to rely upon acts done contrary to § 2 of the statute, it simply adhered to the interpretation of its declaration that it had accepted at the beginning and had endeavored to sustain throughout. Portions of the charge are criticised in this connection for pointing out to the jury that § 2 embraced not only monopoly but attempts to monopolize. But this was wholly to the plaintiff's advantage, as it explained that if the plaintiff was driven out of business by the defendant's acts it was entitled to recover if those acts were done in the course of an attempt to monopolize, whether or not they were crowned with success. It allowed the jury to consider everything that indicated such an attempt.

Next in importance is an exception to the Court's directing a verdict in favor of the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company. There were no acts done by either of these companies that were aimed at the plaintiff. The only substantial ground for charging them was that if they were parties to a conspiracy as alleged they became responsible for the acts of the DuPont Company as their own. As the jury exonerated the latter company this ground fails. So that even if the ruling was wrong it did no harm unless something more can be found in the case. *Portland Gold Mining Co.* v. *Stratton's Independence*, 158 Fed. Rep. 63. The ruling did not import that there was no evidence against the DuPont Company, the case against which was put fairly to the jury, but that there was no evidence that the other defendants conspired with it, so far at least as the plaintiff was concerned. These companies did not make black blasting powder and had no interest immediately adverse to the plaintiff.

The basis of the charge of conspiracy affecting the black blasting powder business was that the DuPont Company directly or through another company was interested in their stock. No other is suggested in the declaration and it would be hard to extract any act from the evidence. Certainly none could be found that was more than an infinitesimal fraction of those done by the DuPont Company. Here again the Court was of opinion that the exception to be considered should have the whole record behind it, but on the record as it stands we think it sufficiently appears that the plaintiff suffered no real harm.

The next matter requires but a few words. The plaintiff offered in evidence decrees in a proceeding by the Government finding the DuPont Company guilty under the Sherman Act of an attempt to monopolize. 188 Fed. Rep. 127. These of course were held inadmissible. The Court also ruled that the statute of limitations barred recovery for any damage suffered before September 18, 1905, six years before the beginning of the present suit. The plaintiff now contends that the Clayton Act of October 15, 1914, c. 323, § 5, 38 Stat. 731, making admissible such criminal judgments "hereafter rendered," in some way should affect our decision upon a ruling made years before, and that by virtue of the same section the running of the statute of limitations was suspended retrospectively as to claims already barred, pending the Government suit. These matters do not need more than a statement of what was argued and what was done.

Another exception seems to us over-critical. Mr. Waddell, the organizer of the plaintiff corporation and chief witness on its behalf, started it directly after leaving the DuPont Company, with which he had been for many years. He knew all the elements of the situation before he embarked on the venture, and did not do so until the DuPont Company had reached the height of its power. The judge remarked in his charge that the plaintiff did

not stand like a competitor that had been in existence while the defendant's influence was being developed and that had been injured in its business during the course of such development—that the mere existence of the defendant's power as it was when the plaintiff was born was not in itself a cause of action to the plaintiff, but that the plaintiff must show that the defendant used its power oppressively, if not against the plaintiff, at least in the course of defendant's business. This was innocuous truth. The plaintiff could not be called into being in order to maintain a suit for conduct that made it not pay to be born. Claims for such antenatal detriments are not much favored by the law. See *National Council, United American Mechanics*, v. *State Council of Virginia*, 203 U. S. 151, 161.

Another statement in the charge concerning Mr. Waddell's knowledge of the defendant's power and policy is complained of, but the complaint seems to us based upon a perversion of its meaning. The defendant had put in evidence tending to show that Mr. Waddell organized the plaintiff merely to sell it out to the defendant, without any real intent to compete. The Court said that of course Mr. Waddell had a right to go into business and that his motive was of little moment so far as that was concerned, but that it might have a bearing on the question whether the plaintiff was sufficiently capitalized to meet normal conditions, adding that it did not matter whether it was or not as against a competition forced upon it by unlawful means. This is treated as if it had made the motive an answer to the claim. What it really did was to state correctly that, on the question whether the plaintiff's failure was due to the defendant's oppression or to the plaintiff's incapacity, the jury in estimating the evidence and finding what the facts were might consider Mr. Waddell's motive if they should find it to have been what the defendant alleged.

We agree with the Circuit Court of Appeals that it is not

necessary to deal specifically with all the details brought up by the dragnet of the plaintiff's exceptions and assignments of error, sixty-nine in number and occupying more than sixty pages of the record. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 508, 509. Several exceptions were taken to the exclusion of statements by third persons of their reasons for refusing or ceasing to do business with the plaintiff. We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case. But the exclusion in this instance was proper. The statement was wanted not as evidence of the motives of the speakers but as evidence of the facts recited as furnishing the motives. *Lawlor* v. *Loewe*, 235 U. S. 522, 536; *Elmer* v. *Fessenden*, 151 Massachusetts, 359, 362. In view of the finding of the jury the rulings as to damages are immaterial and need no discussion here. The defendant put in evidence tending to show that its conduct was not the cause of the plaintiff's failure, and its evidence, or the weakness of the plaintiff's, prevailed. Our conclusion upon the whole case is that the plaintiff has had a fair trial and that the judgment should not be disturbed.

Judgment affirmed.

WATTERS *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 58. Submitted November 19, 1918.—Decided December 9, 1918.

Whether a city ordinance regulating peddling and canvassing from house to house for sale of property on subscription, is confined to a general course of such business or applies also to isolated transactions, is a local question determinable by the state court.

192 Michigan, 462, affirmed.

THE case is stated in the opinion.

Mr. Maurice B. Dean for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was complained of for having engaged in peddling goods and having canvassed and taken orders from house to house for the sale of goods in the city of Munising, Michigan, without having received a license as required by a city ordinance. It may be assumed that much the greater part of his business was interstate commerce and free from any obligation that the ordinance imposed. But in the course of his business he did sell two cans of toilet cream that were at rest in the State before the sale, and it is admitted that this transaction was not protected from state legislation. *Bacon* v. *Illinois*, 227 U. S. 504. On this ground the Supreme Court of the State sustained a conviction and fine. 192 Michigan, 462. The ordinance makes it unlawful to engage in peddling any goods or to canvass from house to house for the sale of property on subscription without a license, which may be had on payment of specified fees. The plaintiff in error argues that the application of this law should be determined by the general course of business, not by an isolated transaction, and the argument has force. It depends, however, on the construction of the ordinance, and as the State Court has construed it to apply to and forbid the act proved, the judgment must be affirmed.

Judgment affirmed.

UNION PACIFIC RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 65. Argued November 19, 20, 1918.—Decided December 9, 1918.

A Utah corporation, operating an extensive railroad through several States, with but slight mileage, and small proportion of its property, and no intrastate business, in Missouri, seeking to issue over $30,000,000 bonds under mortgage of its whole line to meet expenditures incurred but in small part in that State, was charged for the privilege, by a Missouri commission, over $10,000, calculated by a percentage of the entire issue. *Held*, a direct, unconstitutional interference with interstate commerce. P. 69.

This court must examine for itself whether there is any basis in fact for a finding by a state court that a constitutional right has been waived. P. 69.

Where a State exacted an unconstitutional fee for a certificate of authority to issue railroad bonds, under statutes threatening heavy penalties and purporting to invalidate the bonds, and so rendering them unmarketable, if the certificate were not obtained, *held*, that application for and acceptance of the certificate, with payment under protest, were made under duress. P. 70.

268 Missouri, 641, reversed.

THE case is stated in the opinion.

Mr. N. H. Loomis, with whom *Mr. Henry W. Clark* was on the briefs, for plaintiff in error.

Mr. A. Z. Patterson, with whom *Mr. Wm. G. Busby* and *Mr. James D. Lindsay* were on the brief, for defendant in error:

This court has no jurisdiction because the alleged federal question did not control nor even affect the decision of the state court. This court has repeatedly

ruled that where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the federal questions, even in cases where the state court actually considered and decided such questions adversely to plaintiff in error's contention.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case concerns the validity of a charge made by the Public Service Commission of Missouri for a certificate authorizing the issue of bonds secured by a mortgage of the whole line of the Union Pacific road. The statutes of Missouri have general prohibitions against the issue of such bonds without the authority of the Commission, impose severe penalties for such issue and purport to invalidate the bonds if it takes place. Moreover the bonds would be unmarketable if the certificate were refused. Upon these considerations the plaintiff in error applied, in all the States through which its line passed, for a certificate authorizing the issue of bonds to the amount of $31,848,900. The Missouri Commission granted the authority and charged a fee of $10,962.25. The Railroad Company accepted the grant as required by its terms, but protested in writing against the charge as an unconstitutional interference with interstate commerce, and gave notice that it paid under duress to escape the statutory penalties and to prevent the revocation of the certificate. It moved for a rehearing on the ground that the statutes of Missouri, if they gave the Commission jurisdiction, did not purport to authorize the charge, or, if they did purport to do so and to invalidate an issue without the Commission's assent, were in conflict with the Constitution of the United States. The rehearing was denied and thereupon the Railroad, pursuant to state law, applied to a local Court for a certiorari to set

the Commission's judgment aside as an interference with interstate commerce and as bad under the Fourteenth Amendment. The Court decided that the charge was unreasonable and that the minimum statutory fee of $250 should have been charged. On appeal by the Commission the Supreme Court held the Railroad estopped by its application, reversed the Court below and upheld the charge. 268 Missouri, 641.

The Railroad Company is a Utah corporation having a line over thirty-five hundred miles long, extending through several States, from Kansas City, Missouri, and elsewhere, to Ogden, Utah. It has only about six-tenths of one mile of main track in Missouri, and its total property there is valued at a little more than three million dollars, out of a total valuation of over two hundred and eighty-one millions. The bonds were to reimburse the Company for expenditures of which again less than one hundred and twenty-five thousand dollars had been made in Missouri. The business done by the Railroad in Missouri is wholly interstate. On these facts it is plain, on principles now established, that the charge, which, in accordance with the letter of the Missouri statutes, was fixed by a percentage on the total issue contemplated, was an unlawful interference with commerce among the States. *Looney* v. *Crane Co.*, 245 U. S. 178, 188. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal

right has been waived. *Creswill* v. *Knights of Pythias*, 225 U. S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280.

On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. *The Eliza Lines*, 199 U. S. 119, 130, 131. If, as may be, the Supreme Court of the State regards or will regard this statute as inapplicable, *Public Service Commission* v. *Union Pacific R. R. Co.*, 271 Missouri, 258, probably the State would not wish to retain the charge, but we repeat, the Railroad Company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law, *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280, 286.

Judgment reversed.

GULF OIL CORPORATION *v.* LEWELLYN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

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

No. 310. Argued November 4, 1918.—Decided December 9, 1918.

Dividends of earnings by subsidiaries to a company holding all their stock and controlling them in conducting a single enterprise, the result of the transfers being merely that the main company became the holder of debts in the business, previously due from one subsidiary to another, *held* not taxable as income under the Income Tax Act of October 3, 1913, where the earnings were accumulated before the taxing year and had practically become capital. *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330.
245 Fed. Rep. 1, reversed.

THE case is stated in the opinion.

Mr. Wm. A. Seifert, with whom *Mr. J. H. Beal* was on the brief, for petitioner.

Mr. William C. Herron for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover a tax levied upon certain dividends as income, under the Act of October 3, 1913, c. 16, § II, 38 Stat. 114, 166. The District Court gave judgment for the plaintiff, 242 Fed. Rep. 709, but this judgment was reversed by the Circuit Court of Appeals. 245 Fed. Rep. 1. 158 C. C. A. 1.

The facts may be abridged from the findings below as follows. The petitioner was a holding company owning

all the stock in the other corporations concerned except the qualifying shares held by directors. These companies with others constituted a single enterprise, carried on by the petitioner, of producing, buying, transporting, refining and selling oil. The subsidiary companies had retained their earnings, although making some loans *inter se*, and all their funds were invested in properties or actually required to carry on the business, so that the debtor companies had no money available to pay their debts. In January, 1913, the petitioner decided to take over the previously accumulated earnings and surplus and did so in that year by votes of the companies that it controlled. But, disregarding the forms gone through, the result was merely that the petitioner became the holder of the debts previously due from one of its companies to another. It was no richer than before, but its property now was represented by stock in and debts due from its subsidiaries, whereas formerly it was represented by the stock alone, the change being effected by entries upon the respective companies' books. The earnings thus transferred had been accumulated and had been used as capital before the taxing year. *Lynch* v. *Turrish*, 247 U. S. 221, 228.

We are of opinion that the decision of the District Court was right. It is true that the petitioner and its subsidiaries were distinct beings in contemplation of law, but the facts that they were related as parts of one enterprise, all owned by the petitioner, that the debts were all enterprise debts due to members, and that the dividends represented earnings that had been made in former years and that practically had been converted into capital, unite to convince us that the transaction should be regarded as bookkeeping rather than as "dividends declared and paid in the ordinary course by a corporation." *Lynch* v. *Hornby*, 247 U. S. 339, 346. The petitioner did not itself do the business of its subsidiaries and have

possession of their property as in *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, but the principle of that case must be taken to cover this. By § II, G, (c), 38 Stat. 174, and S, *id.* 202, the tax from January 1 to February 28, 1913, is levied as a special excise tax, but in view of our decision that the dividends here concerned were not income it is unnecessary to discuss the further question that has been raised under the latter clause as to the effect of the fact that excise taxes upon the subsidiary corporations had been paid.

Judgment reversed.

STERRETT, AS RECEIVER OF THE ALABAMA TRUST & SAVINGS COMPANY, *v.* SECOND NATIONAL BANK OF CINCINNATI, OHIO.

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

No. 378. Argued November 8, 1918.—Decided December 9, 1918.

A chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. *Booth* v. *Clark*, 17 How. 322. P. 76.

Certain Alabama laws, relating to the administration of the assets of insolvent banking and other corporations (Code, 1907, §§ 3509, 3511, 3512, 3560), *held* not to vest title in the receiver so as to enable him to sue in the District Court in another State without an ancillary appointment. P. 77.

246 Fed. Rep. 753, affirmed.

THE case is stated in the opinion.

Mr. Edmund H. Dryer, with whom *Mr. Philip Roettinger* and *Mr. S. C. Roettinger* were on the briefs, for petitioner.

Mr. Lawrence Maxwell, with whom *Mr. Charles M. Leslie* was on the brief, for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff, as receiver of the Alabama Trust & Savings Company, a banking corporation organized under the laws of the State of Alabama, filed his bill in the United States District Court for the Southern District of Ohio, against the Second National Bank of Cincinnati, to recover sums of money for which he alleged the Second National Bank was liable on account of certain transactions which had taken place between the National Bank and the Savings Company and its officers, the details of which it is unnecessary to set forth. Upon final hearing the District Court found the defendant liable for the application of a balance of the Savings Company's deposit in the National Bank, upon paper held by it on which the Savings Company appeared as principal maker, but which was found to have been given for the benefit of certain of the Savings Company's officers. Plaintiff's remaining claims were rejected. Both parties appealed to the Circuit Court of Appeals for the Sixth Circuit, which reversed the decree of the District Court, upon the ground that the Receiver had no authority to bring the suit, (246 Fed. Rep. 753) and the case is here on writ of certiorari to the Circuit Court of Appeals.

In the year 1911 certain creditors of the Savings Company, an Alabama corporation, filed a bill against it in a chancery court of Alabama alleging its insolvency.

The chancery court on April 27, 1911, rendered a final administration decree, wherein it found that the defendant Savings Company was insolvent; that its assets constituted a trust fund for the payment of its creditors, and the same should be marshalled and administered in that court; that the defendant was a corporation organized under the General Laws of Alabama; that upon final

settlement it should be dissolved; that it had suspended business and was not about to resume the same, and could not do so with safety to the public; that, therefore, W. C. Sterrett be appointed receiver of defendant, and empowered and directed to demand and take into his possession all of the defendant's assets and property to which it was entitled and to recover the same and reduce it to money, and administer the same under the further order of the court. And the court further authorized the Receiver to employ counsel and to bring such actions at law or in equity as he might be advised and to incur such expenses as might be necessary. Later, on March 8th, 1912, the Alabama chancery court specifically directed the Receiver, plaintiff herein, to bring this suit in the District Court of the United States for the Southern District of Ohio, Western Division.

The material parts of the sections of the Code of Alabama, (1907, vol. II, pp. 430, 433) pertinent to this case, provide as follows:

"3509. . . . The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshalled and administered in courts of equity in this state."

Section 3511 provides for the dissolution of corporations by action of the stockholders, and enacts that the court

". . . Shall appoint a receiver of all the books, property, and assets of the corporation . . . [who] shall, under the direction of the court, collect all debts due the corporation, and sell all the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue after the debts and costs are paid, among the several classes of stockholders, according to the amount owned by each, and according to the preferences, if any, of the several classes as provided in the certificates of incorporation."

Section 3512 covers the application for receivership and dissolution of insolvent corporations upon bill of creditors or stockholders in the chancery court, and provides:

". . . The court . . . may appoint a receiver of all the property and assets of the corporation, . . . [who] under the direction of the court, must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof as the court shall direct. . . ."

There is also a provision for proceedings by the attorney general (p. 444):

"3560. Proceedings when bank found not solvent.—Whenever the treasurer finds that a bank or corporation chartered by the laws of this state and doing a banking business, is not in a solvent condition, he shall immediately report the condition of the bank to the governor, and the governor shall direct the attorney-general to institute proceedings in a court having jurisdiction in the county where the bank or parent bank is located, to put the bank in the hands of some competent person, who shall give bond in an amount to be fixed by the judge for the faithful discharge of his duties, and said person so appointed shall immediately take charge of the business of said bank, collecting its assets and paying off its liabilities under the law and rules of such court."

The question presented for our consideration is whether the receiver appointed in the chancery court is authorized to sue in the federal court for the recovery of such property.

Since the decision of this court in *Booth* v. *Clark*, 17 How. 322, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which

he was appointed. The reasons for this rule were fully discussed in *Booth* v. *Clark*, and have been reiterated in later decisions of this court. *Hale* v. *Allinson*, 188 U. S. 56; *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 575, 577; *Keatley* v. *Furey*, 226 U. S. 399, 403. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered. The system established in *Booth* v. *Clark* has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action. *Great Western Mining Co.* v. *Harris*, *supra*, p. 577.

Counsel for petitioner insists that the case is not ruled by the doctrine of *Booth* v. *Clark*, and that under the Alabama statutes and the decisions of the Supreme Court of that State the title to the property of the Trust Company is vested in the Receiver in such wise that he is authorized to sue for its recovery in the courts of a foreign jurisdiction. If this contention is well founded there is no question of the authority of the Receiver to prosecute the action. *Relfe* v. *Rundle*, 103 U. S. 222; *Hawkins* v. *Glenn*, 131 U. S. 319; *Bernheimer* v. *Converse*, 206 U. S. 516, 534; *Converse* v. *Hamilton*, 224 U. S. 243, 257; *Keatley* v. *Furey*, 226 U. S. 399, 403.

The Alabama cases, *Oates* v. *Smith*, 176 Alabama, 39; *Montgomery Bank & Trust Co.* v. *Walker*, 181 Alabama, 368; *Cobbs* v. *Vizard Investment Co.*, 182 Alabama, 372; *Coffey* v. *Gay*, 191 Alabama, 137; *Hundley* v. *Hewitt*, 195 Alabama, 647, are fully reviewed in the opinion of the Circuit Court of Appeals. To rehearse them now would be but a repetition of what is said in that opinion.

An examination of the sections of the statutes, here involved, in the light of the decisions of the Supreme Court of Alabama, does not in our opinion warrant the conclusion that title is vested in the Receiver as assignee or as statutory successor of the insolvent corporation in such wise as to authorize the action to recover in a foreign jurisdiction. Collectively, these sections provide for a receivership to administer the property and assets of the insolvent corporation under the authority and direction of the appointing court. The statutes do not undertake to vest in the receiver an estate in the property to be administered for the benefit of creditors, as was the case in *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243, in which the right to sue in the courts of a foreign jurisdiction was sustained.

The Circuit Court of Appeals left open the question of the right to apply for an ancillary receivership in the District Court, and the effect of such appointment, if made, upon the pending suit. We pursue the like course, and as such an application could only originate in the District Court we express no opinion concerning it. The decree of the Circuit Court of Appeals is

Affirmed.

ALASKA PACIFIC FISHERIES *v.* UNITED STATES.

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

No. 212. Argued November 4, 1918.—Decided December 9, 1918.

For safeguarding and advancing a dependent Indian people, resident on islands belonging to the United States in the Territory of Alaska, Congress has power to reserve for their use, until otherwise provided by law, not only the upland of the islands but also the ad-

jacent submerged land and deep waters supplying fisheries essential to the Indians' welfare. P. 87.

An act of Congress set aside, "until otherwise provided by law the body of lands known as Annette Islands," in Alaska, for the use of the Metlakahtla Indians (recently emigrated from British Columbia and settled on the islands with the encouragement of executive and administrative officers,) and such other Alaskan natives as might join them, to be held and used by them in common, under regulations of the Secretary of the Interior. The islands were a well-defined group, uninhabited before the coming of the Indians, who were peculiarly dependent on the adjacent fisheries. *Held*, in view of the circumstances at time of the enactment and its subsequent construction, that the reservation included adjacent deep waters; and that a fish net constructed therein by defendant 600 feet beyond high tide line, and whose operation might materially reduce the supply of fish accessible to the Indians, was subject to abatement at the suit of the United States. P. 89.

240 Fed. Rep. 274, affirmed.

THE case is stated in the opinion.

Mr. John A. Hellenthal in a brief for appellant:

The act is explicit, reserving only the "body of lands known as Annette Islands." The water surrounding an island forms no part of it. Grants of land on navigable water go only to ordinary high tide.

Public navigable waters are not part of the public domain. In a Territory, the United States holds them, not as land-owner, but as sovereign, in trust for all the people, who have common rights therein of fishery and navigation. And this right of fishery is a property right. *McCready* v. *Virginia*, 94 U. S. 391; *Rossmiller* v. *State*, 114 Wisconsin, 169. The Government as in the case of a State may regulate the use for the benefit of all, but neither can create a private fishing reserve for the benefit of a few to the exclusion of all others. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387; *Arnold* v. *Mundy*, 6 N. J. L. 1; *Illinois Central R. R. Co.* v. *Chicago*, 176 U. S. 646; *Martin* v. *Waddell*, 16 Pet. 345; *Pewaukee* v. *Savoy*, 103 Wis-

consin, 271; *Rossmiller* v. *State*, *supra*. These authorities show that a State cannot substantially impair the public rights of fishery and navigation, but is bound to preserve the public waters so that the people may be able to exercise these rights forever. These rights are no different and are no less binding on the Government when, the waters being in a Territory, title is held in trust for a future State. *Shively* v. *Bowlby*, 152 U. S. 1. The authority of the sovereign to make grants below high-water mark depends in each case upon whether the value of the public right will be enhanced or destroyed. *Manchester* v. *Massachusetts*, 139 U. S. 240. This is recognized in *Illinois Central R. R. Co.* v. *Illinois*, *supra*, as applied to a State. It applies also to the United States, in Alaska, where the Constitution is in full force. *Rasmussen* v. *United States*, 197 U. S. 516. See *United States* v. *Mackey*, 214 Fed. Rep. 146; *Shively* v. *Bowlby*, *supra*; *Illinois Steel Co.* v. *Bilot*, 109 Wisconsin, 418.

Grants of limited exclusive privileges, as for those who produce new supplies of fish or oysters, are upheld as benefiting the public right. *Commonwealth* v. *Weatherhead*, 110 Massachusetts, 175; *Rowe* v. *Smith*, 48 Connecticut, 444; *Commonwealth* v. *Vincent*, 108 Massachusetts, 441.

The effect of the proclamation is to create an exclusive fishery for the benefit of the Metlakahtlans. This is quite different from a withdrawal from entry of public land. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. The Constitution nowhere confers upon the President any special power respecting navigable waters or fisheries; and the common law, in the light of which the Constitution must be considered, recognized no such right in the King. The fisheries in the navigable waters belong to the people at large. The Government has no interest therein which it can reserve for the use of any individual or class. The President cannot include such waters in an Indian reservation. *United States* v. *Ashton*, 170 Fed. Rep. 509.

The proclamation is contrary to § 254, Alaska Compiled Laws, prohibiting aliens from fishing in Alaskan waters. The Metlakahtlans are not natives of Alaska.

The fish-trap was not a purpresture. It was sanctioned by §§ 261, 262, c. 3, Alaska Compiled Laws, and in the exercise of appellant's right of fishing. *Lincoln* v. *Davis*, 53 Michigan, 375. It was vested property. *McCready* v. *Virginia, supra;* Farnham on Waters, § 394; *Lewis* v. *Portland*, 25 Oregon, 133; *Pitkin* v. *Olmstead*, 1 Root (Conn.), 217; *Lay* v. *King*, 5 Day (Conn.), 72; *Gallup* v. *Tracy*, 25 Connecticut, 10; *Post* v. *Kreischer*, 32 Hun (N. Y.), 49; *Glover* v. *Powell*, 10 N. J. Eq. 211.

The trap did not obstruct navigation, and authority under the Rivers and Harbors Act was not required.

Mr. C. H. Hanford argued the case for appellant:

The injunction strikes a legitimate business. The proclamation creates a private monopoly out of what by right is common to all. It is contrary to public policy. The act is not ambiguous and to strain its construction would not be permissible in the interest of the Indians who are neither wards of the Nation nor in need of charity. Government surveys of land stop at the water's edge. *Barney* v. *Keokuk*, 94 U. S. 324–328; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273–286. Hence, a grant or reservation of a body of land described as an island is a tract having a water boundary; all within the line of separation between the solid and liquid elements constitutes the granted or reserved tract. *Shively* v. *Bowlby*, 152 U. S. 1. The only absolute right appurtenant to land bounded by navigable water is the right of access. An exclusive right was not necessary, in the case of these Indians, to the beneficial pursuit of their calling as fishermen. An exclusive right of fishery offshore is different from a right appertaining to land, so different in essence, so extraordinary, and so unnecessary to the beneficial use

of land, that it does not come within the category of rights appurtenant to the title to real estate. *Baron* v. *Alexander*, 206 Fed. Rep. 272; *Parker* v. *People*, 111 Illinois, 588. *Cf. Kennedy* v. *Becker*, 241 U. S. 556. *Russian-American Co.* v. *United States*, 199 U. S. 579, distinguished.

The act is special, to be strictly construed. *Expressum facit cessare tacitum.*

The President is unauthorized to appropriate any part of the public domain for alien Indians. 18 Opin. Atty. Gen. 557.

Congress alone has power to make rules and regulations respecting Alaska, and its governmental power is to be exercised with a view to the erection of new States to enter the Union on an equal footing with the original States. Congress has declared the status of Alaska to be territory eligible to become one or more States of the Union which will have governmental and proprietary rights with respect to its waters. Act of May 14, 1898, 30 Stat. 409; Alaska Compiled Laws, 1913, § 92.

The proclamation is the first and only public assertion of exclusive rights of fishery in the public waters of Alaska. It was not issued until after the appellant located and constructed its fish-trap, involving a large investment, with due observance of the fishing laws. Since Magna Charta control and regulation of fishing rights has been by the common law of England a legislative function, Crown grants of exclusive rights being expressly forbidden; and in the jurisprudence of this country based upon the common law, the right of fishery in public waters belongs to all the people, controlled and regulated within the States by statutes enacted by their respective legislatures. Gould on Waters, 3d ed., §§ 1, 2, 30, 32, 34, 36, 39, 189; *McCready* v. *Virginia*, 94 U. S. 391; *Manchester* v. *Massachusetts*, 139 U. S. 259, 260; *United States* v. *Shauver*, 214 Fed. Rep. 157; *United States* v. *McCullagh*, 221 Fed.

Rep. 292. This means that in a Territory the subject can only be regulated by acts of Congress.

The Government is not the real party in interest, but appears as a volunteer for the benefit of others to whom it is not legally or morally obligated. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 286.

The fish-trap is a lawful structure on a lawful site.

The Rivers and Harbors Act affords no justification for an injunction in this case.

Mr. Assistant Attorney General Brown for the United States:

The power of the Government to reserve parts of the public domain for the exclusive use of Indian tribes is undoubted. This reservation was not for the Metlakahtlans alone, and they, besides, had acquired the same status as other Indian peoples longer resident within the bounds of our country.

The locus in question is part of the public domain within this rule. The United States has a title in these waters which it could even grant outright to individuals. *Shively* v. *Bowlby*, 152 U. S. 1. Undoubtedly, the United States has exercised sparingly its power to make such grants—they are not made under general laws—and has recognized that such lands, chiefly valuable for the public purposes of commerce, navigation and fishery, should be held as a whole, to be ultimately dealt with by the future State. See *Mann* v. *Tacoma Land Co.*, 153 U. S. 273. If, however, it be said that this is a holding in trust, it is a trust like that under which all the public lands of the Nation are held for the people of the whole country. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160. "It is not for the courts to say how that trust shall be administered." *Light* v. *United States*, 220 U. S. 523, 537. So far as the policy interposes any check upon the free dis-

position of these tide lands it is a check upon the conscience and guide to the intelligence of Congress and is not a limitation upon its power. Where the grant is reasonably in aid of a public purpose, the power of the United States to make the grant is absolute.

The power to make the reservation is superior to any right of fishery the appellant may claim, and most especially the right to maintain a permanent fish-trap, affixed to the soil and necessarily excluding all others.

A general right of fishery at common law, if existing, is inapplicable to these waters, which were derived by the United States from the Emperor of all the Russias, with all the rights, franchises and privileges belonging to Russia when the cession was made. Treaty of 1867, 15 Stat. 539. Under the law of Russia, such property was at the sovereign's disposal. Russian Civil Code, bk. II, tit. I, c. II, arts. 248, 251; *ib.* tit. II, c. I, arts. 263, 264; Code Civil de l'Empire de Russie. Traduit sur les editions officielles par un Jurisconsulte Russe (with a prefatory essay by Victor Foucher, Advocat-General du Roi), Paris, 1841. The United States succeeded to the rights of the Czar. *Strother* v. *Lucas*, 12 Pet. 410.

There is, however, no such general right of fishery as the appellant asserts, effective against a reservation of the waters, for a public purpose, by the United States. The rights of a State in tide-lands depend in each case on the local law. *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Illinois Central R. R. Co.* v. *Chicago*, 176 U. S. 646, 659. The state laws differ widely, and state decisions must therefore be applied with caution. *Shively* v. *Bowlby*, *supra*, p. 26. But it is established law in substantially every State of the Atlantic and Gulf seaboard that the sovereign may grant rights of fishery despite the alleged general right of the public [citing numerous state grants]. It is true these legislative grants are in general designed to encourage development of the fishing, espe-

cially the shell-fish, industry thus benefiting the public; but they are exclusive, and they do not, as appellant contends, add value to the public right of fishing. Such grants can serve no higher public purpose than does this Indian reservation.

Arnold v. *Mundy*, 6 N. J. L. 1, seems to have been overruled, *Shively* v. *Bowlby*, *supra; Stevens* v. *Patterson &c. R. R. Co.*, 5 Vroom, 532; *Pennsylvania R. R. Co.* v. *New York &c. R. R. Co.*, 23 N. J. Eq. 157; *Hoboken* v. *Pennsylvania R. R. Co.*, 124 U. S. 656, 688, 690, 691; and if accepted as law is fatal to appellant's claim of a vested right in an exclusive location. *McCready* v. *Virginia*, 94 U. S. 391, upholds the state power, as does also *Lincoln* v. *Davis*, 53 Michigan, 375. See *Donnelly* v. *United States*, 228 U. S. 243; *s. c.* 228 U. S. 708, 711. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, decided a question of Illinois law on peculiar facts, and did not involve rights of the United States. A grant to a railroad for its own profit generally of the control of practically the entire harbor of Chicago was held revocable. Here there is but a reservation, expressly revocable, for a public purpose. The *Illinois Case* contains dicta, doubtless among those referred to disapprovingly in *Shively* v. *Bowlby*.

The act of Congress contemplated not only the reservation of the uplands of "that body of lands known as Annette Islands," but also of the adjacent waters and, fairly construed, was such a reservation.

In any event the President's proclamation of April 28, 1916, was an effective exercise of the power of the United States to reserve such adjacent waters.

The proclamation was within the authorization of § 465, Rev. Stats.

The fish-trap, erected without license, was a purpresture and the appellant a mere trespasser. *Webber* v. *Harbor Commissioners*, 18 Wall. 57; *Russian-American Co.* v. *United States*, 199 U. S. 570.

The trap was erected in violation of the Rivers and Harbors Act of 1899.

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

This is a suit by the United States to enjoin the Alaska Pacific Fisheries, a California corporation, from maintaining, and to compel it to remove, an extensive fish-trap erected by it in navigable waters at the Annette Islands in Alaska. The objections urged against the trap are, first, that it is within a reservation lawfully established for the use of the Metlakahtla and other Indians, and, second, that it is an unauthorized obstruction to the navigable capacity of waters of the United States. A decree was entered granting the relief sought, and this was affirmed by the Circuit Court of Appeals. 240 Fed. Rep. 274.

The Annette Islands are a group of small islands in southeastern Alaska. During the summer of 1887 some 800 Metlakahtla Indians emigrated from British Columbia and settled on one of these islands. The emigration and settlement were not only acquiesced in but encouraged by executive and administrative officers of the United States,[1] and subsequently were sanctioned by Congress through the enactment of § 15 of the Act of March 3, 1891, c. 561, 26 Stat. 1101. That section reads as follows:

"That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such

[1] House Ex. Docs., 50th Cong., 1st sess., vol. 10, p. 64, vol. 13, p. 34; Sen. Mis. Doc., No. 144, 53d Cong., 2d sess.; Sen. Doc., No. 275, 55th Cong., 2d sess.

other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior."

The fish-trap was erected in 1916 without the consent of the Indians or the Secretary of the Interior. It is a formidable structure consisting of heavy piling and wire webbing, is located in water of considerable depth, approximately 600 feet from the high tide line of the island on which the Indians settled, is intended to catch about 600,000 salmon in a single season, and its operation will tend materially to reduce the natural supply of fish accessible to the Indians.

The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands."

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton*, 101 U. S. 129, 133; *Shively* v. *Bowlby*, 152

U. S. 1, 47–48, 58; *United States* v. *Winans*, 198 U. S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U. S. 375, 379, *et seq.; United States* v. *Rickert*, 188 U. S. 432, 437.

The islands are in the interior of the Alexander Archipelago and separated from other islands by well known bodies of water. Before the Metlakahtla settlement they were wild and uninhabited. While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore and the opportunity thus afforded for securing fish for local consumption and for salting, curing, canning and sale gives to the islands a value for settlement and inhabitance which otherwise they would not have.

The purpose of the Metlakahtlans, in going to the islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

After their settlement and before the reservation was created, the Indians, under the guidance of a noted missionary, adopted a form of self-government suited to their needs; established for themselves a village with substantial dwellings, schoolhouses and the like, and

constructed and installed an extensive establishment where they canned salmon for the market.[1]

The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.

The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands.

This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate* v. *Trapp*, 224 U. S. 665, 675, and cases cited. And it has further support in the facts that, save for the de-

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[1] House Ex. Docs., 50th Cong., 2d sess., vol. 10, p. cii; House Mis. Docs., 52d Cong., 1st sess., vol. 50, part 9, pp. 27–29, 188.

fendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands.

These views are decisive of the suit and sustain the decree below.

Decree affirmed.

UNITED DRUG COMPANY *v.* THEODORE RECTANUS COMPANY.

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

No. 27. Argued March 12, 13, 1918.—Decided December 9, 1918.

A right of trade-mark is not a right in gross; it exists only as appurtenant to an established business and for the protection of the good will thereof. P. 97.

The adoption of a trade-mark does not project the right of protection in advance of the extension of the trade. P. 98.

Where A had a trade-mark in Massachusetts, in connection with a business there and in neighboring States, and B, afterwards, in good faith, without notice of A's use or intent to injure or forestall A, adopted the same mark in Kentucky, where A's business theretofore had not extended, and built up a valuable business under it there, *held*, that A, upon entering B's field with notice of the situation, had no equity to enjoin B as an infringer, but was estopped. P. 103.

226 Fed. Rep. 545, affirmed.

THE case is stated in the opinion.

Mr. Laurence A. Janney, with whom *Mr. Alexis C. Angell* and *Mr. Frederick L. Emery* were on the briefs, for petitioner:

When the first user of a trade-mark, reasonably diligent in extending the territory of his trade, ultimately engages, in good faith, in competition with a later user in a common market under the same mark, the first user is entitled to an injunction. Whether the first user has been reasonably diligent is a question of fact in each case. Mrs. Regis did her utmost to promote her business; did no act which amounted to an abandonment of any territory; by federal registration she gave notice of her countrywide claim. If the first user innocently promotes his business, and in the course of a natural growth encounters competition of a later user, he has acted in good faith, particularly if he has been, until the beginning of competition, ignorant of the later user's activities, as in the case at bar. The application of this principle would be nothing more than a recognition of the prior legal title and the prior equity of the first as against a mere subsequent equity of the later user. It would also protect the public against confusion and deception.

In granting the injunction, the District Court accepted the rules laid down in *McLean* v. *Fleming,* 96 U. S. 245; *Menendez* v. *Holt,* 128 U. S. 514; *Saxlehner* v. *Eisner & Mendelson Co.,* 179 U. S. 19; *Saxlehner* v. *Siegel-Cooper Co.,* 179 U. S. 42; and interpreted those decisions as they had been interpreted for many years. The Circuit Court of Appeals attempted to distinguish them on the ground that the defendants had not acted innocently. But this court did not treat that fact as controlling; and the decisions would have been the same if each party had proceeded in ignorance of the other's acts. In the *Siegel-Cooper Case,* defendant's innocence was not held to exonerate it from the charge of infringement nor to relieve it from liability to injunction. See also *Merriam* v. *Smith,* 11 Fed. Rep. 588.

The *McLean Case* presents all the elements of an estoppel, and this court so held in denying an accounting. The complainant knowingly acquiesced in the respondent's use of the mark, and the respondent knowingly relied thereon and made his investment accordingly. He had acted innocently and in good faith. Nevertheless, the court sanctioned complainant's repudiation of acquiescence and did not exonerate the respondent from the charge of infringement. The decision was no doubt influenced largely by the obligation to protect the public. In *Menendez* v. *Holt*, the *McLean Case* was followed. The Court of Appeals erred in holding that Rectanus had a right to assume that he was entitled to continue using the mark because he remained ignorant of any adverse rights. He has no better excuse than had the defendant in the *McLean Case*.

If any estoppel could arise from acquiescence, the intentional acquiescence of complainants in the *McLean* and *Menendez Cases* would create estoppels much more surely than the conduct of Mrs. Regis and her successor in this case. It is the conduct of the party against whom the estoppel is urged which determines the existence of estoppel. The *Saxlehner Cases* sustain the contention that innocence on the part of defendants is not a defense; that their ignorance or knowledge cannot possibly determine the existence of estoppel against the complainant.

See also *Merriam* v. *Smith*, 11 Fed. Rep. 588; *New York Grape Sugar Co.* v. *Buffalo Grape Sugar Co.*, 18 Fed. Rep. 638; *Sawyer Spindle Co.* v. *Taylor*, 56 Fed. Rep. 110; 69 Fed. Rep. 837; *Taylor* v. *Sawyer Spindle Co.*, 75 Fed. Rep. 301; *Ide* v. *Trorlicht*, 115 Fed. Rep. 137; *Fahrney* v. *Ruminer*, 153 Fed. Rep. 735; *Layton Pure Food Co.* v. *Church & Dwight Co.*, 182 Fed. Rep. 35; Paul, Trade-Marks, par. 109; Hopkins, Trade-Marks, 2d ed., par. 75, p. 172.

The well settled rules governing estoppel in general

preclude the possibility of finding that Mrs. Regis and her successor are estopped in the circumstances at bar. See Bigelow, Estoppel, 5th ed. The cases of *Carroll* v. *McIlvaine*, 171 Fed. Rep. 125; 183 Fed. Rep. 22; *Macmahan Co.* v. *Denver Co.*, 113 Fed. Rep. 468; and *Hanover Milling Co.* v. *Allen & Wheeler Co.*, 208 Fed. Rep. 513; *s. c. Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, referred to by the Circuit Court of Appeals, and *Saxlehner* v. *Eisner & Mendelson Co.*, *supra*, and *Kahn* v. *Gaines*, 155 Fed. Rep. 639; 161 *id.* 495, are distinguishable, and are not authority for finding an estoppel upon the facts of this case.

Mr. Clayton B. Blakey for respondent.

Mr. Justice Pitney delivered the opinion of the court.

This was a suit in equity brought September 24, 1912, in the United States District Court for the Western District of Kentucky, by the present petitioner, a Massachusetts corporation, against the respondent, a Kentucky corporation, together with certain individual citizens of the latter State, to restrain infringement of trade-mark and unfair competition.

The District Court granted an injunction against the corporation defendant pursuant to the prayer of the bill. 206 Fed. Rep. 570. The Circuit Court of Appeals reversed the decree and remanded the cause with directions to dismiss the bill. 226 Fed. Rep. 545. An appeal was allowed by one of the judges of that court, and afterwards we allowed a writ of certiorari. Pursuant to a stipulation, the transcript of the record filed for the purposes of the appeal was treated as a return to the writ. Under § 128, Judicial Code, as amended by Act of January 28, 1915, c. 22, § 2, 38 Stat. 803, the appeal must be dismissed, and the cause will be determined on the writ of certiorari.

The essential facts are as follows: About the year 1877 Ellen M. Regis, a resident of Haverhill, Massachusetts, began to compound and distribute in a small way a preparation for medicinal use in cases of dyspepsia and some other ailments, to which she applied as a distinguishing name the word "Rex"—derived from her surname. The word was put upon the boxes and packages in which the medicine was placed upon the market, after the usual manner of a trade-mark. At first alone, and afterwards in partnership with her son under the firm name of "E. M. Regis & Company," she continued the business on a modest scale; in 1898 she recorded the word "Rex" as a trade-mark under the laws of Massachusetts (Acts 1895, p. 519, c. 462, § 1); in 1900 the firm procured its registration in the United States Patent Office under the Act of March 3, 1881, c. 138, 21 Stat. 502; in 1904 the Supreme Court of Massachusetts sustained their trade-mark right under the state law as against a concern that was selling medicinal preparations of the present petitioner under the designation of "Rexall remedies" (*Regis* v. *Jaynes*, 185 Massachusetts, 458); afterwards the firm established priority in the mark as against petitioner in a contested proceeding in the Patent Office; and subsequently, in the year 1911, petitioner purchased the business with the trade-mark right, and has carried it on in connection with its other business, which consists in the manufacture of medicinal preparations, and their distribution and sale through retail drug stores, known as "Rexall stores," situate in the different States of the Union, four of them being in Louisville, Kentucky.

Meanwhile, about the year 1883, Theodore Rectanus, a druggist in Louisville, familiarly known as "Rex," employed this word as a trade-mark for a medicinal preparation known as a "blood purifier." He continued this use to a considerable extent in Louisville and vicinity, spending money in advertising and building up a trade, so that—

except for whatever effect might flow from Mrs. Regis' prior adoption of the word in Massachusetts, of which he was entirely ignorant—he was entitled to use the word as his trade-mark. In the year 1906 he sold his business, including the right to the use of the word, to respondent; and the use of the mark by him and afterwards by respondent was continuous from about the year 1883 until the filing of the bill in the year 1912.

Petitioner's first use of the word "Rex" in connection with the sale of drugs in Louisville or vicinity was in April, 1912, when two shipments of "Rex Dyspepsia Tablets," aggregating 150 boxes and valued at $22.50, were sent to one of the "Rexall" stores in that city. Shortly after this the remedy was mentioned by name in local newspaper advertisements published by those stores. In the previous September, petitioner shipped a trifling amount—five boxes—to a drug store in Franklin, Kentucky, approximately 120 miles distant from Louisville. There is nothing to show that before this any customer in or near Kentucky had heard of the Regis remedy, with or without the description "Rex," or that this word ever possessed any meaning to the purchasing public in that State except as pointing to Rectanus and the Rectanus Company and their "blood purifier." That it did and does convey the latter meaning in Louisville and vicinity is proved without dispute. Months before petitioner's first shipment of its remedy to Kentucky, petitioner was distinctly notified (in June, 1911,) by one of its Louisville distributors that respondent was using the word "Rex" to designate its medicinal preparations, and that such use had been commenced by Mr. Rectanus as much as 16 or 17 years before that time.

There was nothing to sustain the allegation of unfair competition, aside from the question of trade-mark infringement. As to this, both courts found, in substance, that the use of the same mark upon different but somewhat

related preparations was carried on by the parties and their respective predecessors contemporaneously, but in widely separated localities, during the period in question—between 25 and 30 years—in perfect good faith, neither side having any knowledge or notice of what was being done by the other. The District Court held that because the adoption of the mark by Mrs. Regis antedated its adoption by Rectanus, petitioner's right to the exclusive use of the word in connection with medicinal preparations intended for dyspepsia and kindred diseases of the stomach and digestive organs must be sustained, but without accounting for profits or assessment of damages for unfair trade; citing *McLean* v. *Fleming*, 96 U. S. 245; *Menendez* v. *Holt*, 128 U. S. 514; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 39; *Saxlehner* v. *Siegel-Cooper Co.*, 179 U. S. 42. The Circuit Court of Appeals held that in view of the fact that Rectanus had used the mark for a long period of years in entire ignorance of Mrs. Regis' remedy or of her trade-mark, had expended money in making his mark well known, and had established a considerable though local business under it in Louisville and vicinity, while on the other hand during the same long period Mrs. Regis had done nothing, either by sales agencies or by advertising, to make her medicine or its mark known outside of the New England States, saving sporadic sales in territory adjacent to those States, and had made no effort whatever to extend the trade to Kentucky, she and her successors were bound to know that, misled by their silence and inaction, others might act, as Rectanus and his successors did act, upon the assumption that the field was open, and therefore were estopped to ask for an injunction against the continued use of the mark in Louisville and vicinity by the Rectanus Company.

The entire argument for the petitioner is summed up in the contention that whenever the first user of a trade-mark has been reasonably diligent in extending the

territory of his trade, and as a result of such extension has in good faith come into competition with a later user of the same mark who in equal good faith has extended his trade locally before invasion of his field by the first user, so that finally it comes to pass that the rival traders are offering competitive merchandise in a common market under the same trade-mark, the later user should be enjoined at the suit of the prior adopter, even though the latter be the last to enter the competitive field and the former have already established a trade there. Its application to the case is based upon the hypothesis that the record shows that Mrs. Regis and her firm, during the entire period of limited and local trade in her medicine under the Rex mark, were making efforts to extend their trade so far as they were able to do with the means at their disposal. There is little in the record to support this hypothesis; but, waiving this, we will pass upon the principal contention.

The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *McLean* v. *Fleming*, 96 U. S. 245, 254. There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 412–414.

The owner of a trade-mark may not, like the proprietor

of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 250; *Bement* v. *National Harrow Co.*, 186 U. S. 70, 90; *Paper Bag Patent Case*, 210 U. S. 405, 424.

In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade. And the expression, sometimes met with, that a trade-mark right is not limited in its enjoyment by territorial bounds, is true only in the sense that wherever the trade goes, attended by the use of the mark, the right of the trader to be protected against the sale by others of their wares in the place of his wares will be sustained.

Property in trade-marks and the right to their exclusive use rest upon the laws of the several States, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several States and with the Indian tribes. *Trade-Mark Cases*, 100 U. S. 82, 93.

Conceding everything that is claimed in behalf of the petitioner, the entire business conducted by Mrs. Regis and her firm prior to April, 1911, when petitioner acquired it, was confined to the New England States with inconsiderable sales in New York, New Jersey, Canada, and Nova Scotia. There was nothing in all of this to give her

any rights in Kentucky, where the principles of the common law obtain. *Hunt* v. *Warnicke's Heirs*, 3 Kentucky (Hardin), 61, 62; *Lathrop* v. *Commercial Bank*, 8 Dana (Ky.), 114, 121; *Ray* v. *Sweeney*, 14 Bush (Ky.), 1, 9; *Aetna Ins. Co.* v. *Commonwealth*, 106 Kentucky, 864, 881; *Nider* v. *Commonwealth*, 140 Kentucky, 684, 687. We are referred to no decision by the courts of that State, and have found none, that lays down any peculiar doctrine upon the subject of trade-mark law. There is some meager legislation, but none that affects this case (Kentucky Stats., § 2572c, subsec. 7; §§ 4749–4755). There was nothing to prevent the State of Kentucky (saving, of course, what Congress might do within the range of its authority) from conferring affirmative rights upon Rectanus, exclusive in that Commonwealth as against others whose use of the trade-mark there began at a later time than his; but whether he had such rights, or respondent now has them, is a question not presented by the record; there being no prayer for an injunction to restrain petitioner from using the mark in the competitive field.

It is not contended, nor is there ground for the contention, that registration of the Regis trade-mark under either the Massachusetts statute or the act of Congress, or both, had the effect of enlarging the rights of Mrs. Regis or of petitioner beyond what they would be under common-law principles. Manifestly, the Massachusetts statute (Acts 1895, p. 519, c. 462) could have no extra-territorial effect. And the Act of Congress of March 3, 1881, c. 138, 21 Stat. 502, applied only to commerce with foreign nations or the Indian tribes, with either of which this case has nothing to do. See *Ryder* v. *Holt*, 128 U. S. 525. Nor is there any provision making registration equivalent to notice of rights claimed thereunder. The Act of February 20, 1905, c. 592, 33 Stat. 724, which took the place of the 1881 Act, while extending protection to trade-marks used in interstate commerce, does not en-

large the effect of previous registrations, unless renewed under the provisions of its twelfth section, which has not been done in this case; hence we need not consider whether anything in this act would aid the petitioner's case.

Undoubtedly, the general rule is that, as between conflicting claimants to the right to use the same mark, priority of appropriation determines the question. See *Canal Co.* v. *Clark*, 13 Wall. 311, 323; *McLean* v. *Fleming*, 96 U. S. 245, 251; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 463. But the reason is that purchasers have come to understand the mark as indicating the origin of the wares, so that its use by a second producer amounts to an attempt to sell his goods as those of his competitor. The reason for the rule does not extend to a case where the same trade-mark happens to be employed simultaneously by two manufacturers in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another. It would be a perversion of the rule of priority to give it such an application in our broadly extended country that an innocent party who had in good faith employed a trade-mark in one State, and by the use of it had built up a trade there, being the first appropriator in that jurisdiction, might afterwards be prevented from using it, with consequent injury to his trade and good-will, at the instance of one who theretofore had employed the same mark but only in other and remote jurisdictions, upon the ground that its first employment happened to antedate that of the first-mentioned trader.

In several cases federal courts have held that a prior use of a trade-mark in a foreign country did not entitle its owner to claim exclusive trade-mark rights in the United States as against one who in good faith had adopted a like trade-mark here prior to the entry of the foreigner into this market. *Richter* v. *Anchor Remedy Co.*, 52 Fed.

Rep. 455, 458; *Richter* v. *Reynolds*, 59 Fed. Rep. 577, 579; *Walter Baker & Co.* v. *Delapenha*, 160 Fed. Rep. 746, 748; *Gorham Mfg. Co.* v. *Weintraub*, 196 Fed. Rep. 957, 961.

The same point was involved in *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 415, where we said: "In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

In this case, as already remarked, there is no suggestion of a sinister purpose on the part of Rectanus or the Rectanus Company; hence the passage quoted correctly defines the status of the parties prior to the time when they came into competition in the Kentucky market. And it results, as a necessary inference from what we have said, that petitioner, being the newcomer in that market, must enter it subject to whatever rights had previously been acquired there in good faith by the Rectanus Company and its predecessor. To hold otherwise—to require Rectanus to retire from the field upon the entry of Mrs. Regis' successor—would be to establish the right of the latter as a right in gross, and to extend it to territory wholly remote from the furthest reach of the trade to which it was annexed, with the effect not merely of depriving Rectanus of the benefit of the good-will resulting from his long-continued use of the mark in Louisville and vicinity, and his substantial expenditures in building up his trade, but of enabling petitioner to reap substantial benefit from the publicity that Rectanus

has thus given to the mark in that locality, and of confusing if not misleading the public as to the origin of goods thereafter sold in Louisville under the Rex mark, for, in that market, until petitioner entered it, "Rex" meant the Rectanus product, not that of Regis.

In support of its contention petitioner cites the same cases that were relied upon by the District Court, namely, *McLean* v. *Fleming*, 96 U. S. 245; *Menendez* v. *Holt*, 128 U. S. 514; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 39; and *Saxlehner* v. *Siegel-Cooper Co.*, 179 U. S. 42. They exemplify the rule that, where the proof of infringement is clear, a court of equity will not ordinarily refuse an injunction for the future protection of the proprietor of a trade-mark right, even where his acquiescence and laches have been such as to disentitle him to an accounting for the past profits of the infringer. The rule finds appropriate application in cases of conscious infringement or fraudulent imitation, as is apparent from a reading of the opinions in those cases; but it has no pertinency to such a state of facts as we are now dealing with. In *McLean* v. *Fleming*, the only question raised in this court that affected the right of the appellee to an injunction was whether the Circuit Court had erred in finding that defendant's labels "Dr. McLean's Universal Pills," etc., infringed complainant's label "Dr. C. McLane's Celebrated Liver Pills," and this turned upon whether the similarity was sufficient to deceive ordinarily careful purchasers. The evidence showed without dispute that from the beginning of his use of the offending labels the defendant (McLean) had known of the McLane liver pills, and raised at least a serious question whether he did not adopt his labels for the purpose of palming off his goods as those of complainant. What he controverted was that his labels amounted to an infringement of complainant's, and when this was decided against him the propriety of the injunction was clear. In *Menendez* v.

Holt, likewise, defendants (Menendez) admitted the existence of the brand in question—the words "La Favorita" as applied to flour—and admitted using it, but denied that Holt & Company were the owners, alleging that one Rider was a former member of that firm and entitled to use the brand, and that under him defendants had sold their flour branded "La Favorita, S. O. Rider." There was, however, no question but that defendants adopted the brand knowing it to be already in use by others. In the *Saxlehner Cases*, the facts were peculiar, and need not be rehearsed; injunctions were allowed to restrain the sale of certain waters in bottles and under labels in which those of complainant were intentionally imitated. In all four cases the distinguishing features of the present case were absent.

Here the essential facts are so closely parallel to those that furnished the basis of decision in the *Allen & Wheeler Case*, reported *sub nom. Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 419–420, as to render further discussion unnecessary. Mrs. Regis and her firm, having during a long period of years confined their use of the "Rex" mark to a limited territory wholly remote from that in controversy, must be held to have taken the risk that some innocent party might in the meantime hit upon the same mark, apply it to goods of similar character, and expend money and effort in building up a trade under it; and since it appears that Rectanus in good faith, and without notice of any prior use by others, selected and used the "Rex" mark, and by the expenditure of money and effort succeeded in building up a local but valuable trade under it in Louisville and vicinity before petitioner entered that field, so that "Rex" had come to be recognized there as the "trade signature" of Rectanus and of respondent as his successor, petitioner is estopped to set up their continued use of the mark in that territory as an infringement of the Regis trade-mark. Whatever confusion may have

arisen from conflicting use of the mark is attributable to petitioner's entry into the field with notice of the situation; and petitioner cannot complain of this. As already stated, respondent is not complaining of it.

Decree affirmed.

RUDDY *v.* ROSSI.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 17. Submitted November 13, 1918.—Decided December 9, 1918.

Section 4 of the Homestead Act of May 20, 1862, (§ 2296, Rev. Stats.), providing that no lands acquired under the act shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of patent therefor, applies as well to debts contracted after final entry and before patent as to debts contracted before final proof, and in both respects is within the constitutional power of Congress.

28 Idaho, 376, reversed.

THE case is stated in the opinion.

Mr. Charles E. Miller for plaintiff in error. *Mr. A. H. Featherstone* was also on the brief:

The jurisdiction of the Interior Department respecting a homestead entry is not divested until the patent is issued. [Citing Land Decisions.]

The doctrine of relation is inapplicable in the construction of the statute. Debts contracted after final entry but before patent are within the intention no less than the clear letter. *Wallowa National Bank* v. *Riley*, 29 Oregon, 289; *Watson* v. *Voorhees*, 14 Kansas, 254; *Doran* v. *Kennedy*, 237 U. S. 362; *Hussman* v. *Durham*, 165 U. S. 144; (*cf. Leonard* v. *Ross*, 23 Kansas, 292);

Seymour v. *Sanders*, 3 Dill. 437; *Brun* v. *Mann*, 151 Fed. Rep. 145; *In re Kohn*, 171 Fed. Rep. 570; *In re Parmeter's Estate*, 211 Fed. Rep. 757; *Grames* v. *Consolidated Timber Co.*, 215 Fed. Rep. 785.

Numerous decisions by the Supreme Courts of Arizona, Arkansas, California, Minnesota, Missouri, Nebraska, Oregon, South Dakota, Washington and Wisconsin reach the same conclusion.

No appearance for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, c. 75, 12 Stat. 392, Congress prescribed the conditions under which citizens could acquire unappropriated public lands in tracts of not exceeding one hundred and sixty acres. A manifest purpose was to induce settlement upon and cultivation of these lands by those who, five years after proper entry, would become owners in fee through issuance of patents. The great end in view was to convert waste places into permanent homes. Such occupancy and use constituted a most important consideration and were rightly expected to yield larger public benefits than the small required payment of one dollar and a quarter per acre.

Decision of this cause requires us to consider the meaning and validity of § 4 of the act (Rev. Stats., § 2296) which provides: "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

Plaintiff in error made preliminary homestead entry of designated land within the State of Idaho August 6, 1903; submitted final proofs October 4, 1909; obtained

final receipt and certificate November 12, 1909; final patent issued August 26, 1912. In 1914 two judgments were obtained against him; the first upon indebtedness incurred prior to November 12, 1909; the second upon debts contracted subsequent to that date and prior to patent. Executions were issued and levied upon the homestead; and thereupon the proceeding under review was begun to declare asserted liens invalid and a cloud upon the title. The court below held the first judgment unenforceable against the land since it represented indebtedness which accrued prior to final entry. It further held the second judgment could be so enforced as it was based upon debts contracted after final entry, at which time the homesteader became legally entitled to his patent. 28 Idaho, 376.

The language of § 4 is clear and we find no adequate reason for thinking that it fails precisely to express the law-maker's intention.

Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? This question undoubtedly presents difficulties which we are not disposed to minimize. In *Wright* v. *Morgan*, 191 U. S. 55, 58, a similar point was suggested but not decided.

The Constitution declares "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and it is settled that Congress has plenary power to dispose of public lands. *United States* v. *Gratiot*, 14 Pet. 526, 537. They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the legislature owed to the public.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HOLMES:

This case involves a question of theory that may be important and I think it desirable to state the considerations that make me doubt. The facts needing to be mentioned are few. On August 26, 1912, the United States conveyed land in Idaho to Ruddy in fee simple, in pursuance of a homestead entry by Ruddy on August 6, 1903, final proof on October 4, 1909, and final receipt of the purchase price on November 12, 1909. In September, 1912, after the conveyance, Rossi began suits against Ruddy, attaching this land, and in June, 1914, levied executions upon the same. The debts for which the

suits were brought were incurred before the issue of the patent and the present proceeding is to prevent Rossi from selling the land to satisfy the judgments. The question arises under Rev. Stats., § 2296, providing that no lands acquired under that chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The Supreme Court of Idaho narrowed the issue to the case of debts contracted after final proof, but that distinction is not important to the difficulty in my mind.

My question is this: When land has left the ownership and control of the United States and is part of the territory of a State not different from any other privately owned land within the jurisdiction and no more subject to legislation on the part of the United States than any other land, on what ground is a previous law of Congress supposed any longer to affect it in a way that a subsequent one could not? This land was levied upon not on the assertion that any lien upon it was acquired before the title passed from the United States, but merely as any other land might be attached for a debt that Rossi had a right to collect, after the United States had left the premises. I ask myself what the United States has to do with that. There is no condition, no reserved right of reëntry, no reversion in the United States, saved either under the Idaho law as any private grantor might save it, or by virtue of antecedent title. All interest of the United States as owner is at an end. It is a stranger to the title. Even in case of an escheat the land would not go to it, but would go to the State. Therefore the statute must operate, if at all, purely by way of legislation, not as a qualification of the grant. If § 2296 is construed to apply to this case, there is simply the naked assumption of one sovereignty to impose its will after whatever jurisdiction or authority it had has ceased and the land has come fully under the jurisdiction of what for this purpose

is a different power. It is a pure attempt to regulate the alienability of land in Idaho by law, without regard to the will of Idaho, which we must assume on this record to authorize the levy if it is not prevented by an act of Congress occupying a paramount place.

I believe that this Court never has gone farther in the way of sustaining legislation concerning land within a State than to uphold a law forbidding the enclosure of public lands, which little, if at all, exceeded the rights of a private owner, although it was construed to prevent the erection of fences upon the defendants' own property manifestly for the sole purpose of enclosing land of the United States. *Camfield* v. *United States*, 167 U. S. 518. At most it was a protection of the present interests of the United States under a title paramount to the State. On the other hand, it is said in *Pollard* v. *Hagan*, 3 How. 212, 224, that no power in the nature of municipal sovereignty can be exercised by the United States within a State; that such a power is repugnant to the Constitution. This case was referred to in *Withers* v. *Buckley*, 20 How. 84, and it was decided that the act of Congress authorizing the formation of the State of Mississippi and providing that the Mississippi River should be forever free "could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government," and both these cases were cited upon this point with approval in *Ward* v. *Racehorse*, 163 U. S. 504, 511, 512. See also *Shively* v. *Bowlby*, 152 U. S. 1, 27. In *Irvine* v. *Marshall*, 20 How. 558, where it was held that the laws of a territory abolishing constructive trusts were ineffectual to protect the holder of a certificate from the United States against the establishment of such a trust, it was said that "when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it," and

later in the decision there is cited a passage from *Wilcox* v. *Jackson*, 13 Pet. 498, 517, to the same effect—a passage also cited and relied upon by the four justices who dissented and held that the territorial laws governed even then. It has been repeated ever since. *McCune* v. *Essig*, 199 U. S. 382, 390. *Buchser* v. *Buchser*, 231 U. S. 157, 161.

Coming to the precise issue, the question of the power of the United States to restrict alienation of land within a State after it had conveyed the land in fee was left open in *Wright* v. *Morgan*, 191 U. S. 55, 58, but it was said that the clearest expression would be necessary before it would be admitted that such a restriction was imposed. In *Buchser* v. *Buchser*, 231 U. S. 157, it was held that the laws of the United States did not prevent homestead land becoming community property at the moment that title was acquired, and it was said that, the acquisition under the United States law being complete, that law had released its control. The statement in *Wilcox* v. *Jackson*, *supra*, that when the title has passed the land "like all other property in the State is subject to the state legislation," was repeated. In *Alabama* v. *Schmidt*, 232 U. S. 168, following *Cooper* v. *Roberts*, 18 How. 173, it was held that land conveyed to the State by the United States for the use of schools could be acquired by adverse possession under state law, and that the trust, although as was said in the earlier case "a sacred obligation imposed on its public faith" imposed only an honorary obligation on the State. *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, was distinguished as having been decided on the ground that in the grant to the Railway there was an implied condition of reverter in case the company ceased to hold the land for the purpose for which it was granted, a ground, which, as I have said, is absent here.

It is said that where a statute is susceptible of two constructions, by one of which grave constitutional

questions arise and by the other of which they are avoided, our duty is to adopt the latter. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. I am aware that this principle like some others more often is invoked in aid of a conclusion reached on other grounds than made itself the basis of decision, but it seems to me that it properly should govern here. It might without violence. When the Act of 1862, now Rev. Stats., § 2296, was passed, the United States owned territories to which it could be applied with full scope. *Irvine* v. *Marshall*, 20 How. 558. The greater part of the public land was in those territories. Without stopping to suggest other possibilities of construction this fact is enough to explain and give validity to the act when passed. There is no need to import to it the intent to anticipate the future and to reach the States that were still in the bosom of time.

Of course the United States has power to choose appropriate means for exercising the authority given to it by the Constitution. But I see no sufficient ground for extending that authority to a case like this. It is not the business of the United States to determine the policy to be pursued concerning privately owned land within a State. According to all cases in this Court, so far as I know, when the patent issued its authority was at an end.

I am aware that my doubts are contrary to manifest destiny and to a number of decisions in the State Courts. I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic. But as I have a real difficulty in understanding how the congressional restriction is held to govern this case—a question which nothing that I have heard as yet appears to me to answer—I think it worth while to mention my misgivings, if only to show that they have been considered and are not shared.

PAYNE ET AL. *v.* STATE OF KANSAS EX REL. BREWSTER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 49. Argued November 15, 1918.—Decided December 9, 1918.

A state law forbidding sale of farm produce on commission without a license, to be procured upon a proper showing as to character, responsibility, etc., a bond conditioned to make honest accounting, and payment of a fee of ten dollars, *held* consistent with the Fourteenth Amendment.

98 Kansas, 465, affirmed.

THE case is stated in the opinion.

Mr. Ray Campbell, with whom *Mr. J. Graham Campbell* was on the brief, for plaintiffs in error.

Mr. J. L. Hunt, Assistant Attorney General of the State of Kansas, with whom *Mr. S. M. Brewster*, Attorney General of the State of Kansas, *Mr. S. N. Hawkes* and *Mr. T. F. Railsback*, Assistant Attorneys General of the State of Kansas, were on the brief, for defendant in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

The validity of c. 371, Laws of Kansas, 1915—"An act in relation to the sale of farm produce on commission"—is challenged by certain grain dealers carrying on business in that State. It forbids the sale of farm produce on commission without an annual license, to be procured from the State Board of Agriculture upon a proper showing as to character, responsibility, etc., and a bond conditioned to make honest accounting. A fee of ten dollars is required.

112. Counsel for Plaintiff in Error.

Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges, that it deprives them of the equal protection of the laws and also of their property without due process of law—all in violation of the Fourteenth Amendment.

Manifestly, the purpose of the State was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the States concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Brazee* v. *Michigan*, 241 U. S. 340; *Adams* v. *Tanner*, 244 U. S. 590.

The judgment of the court below is

Affirmed.

NICOULIN *v.* O'BRIEN.

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

No. 113. Submitted October 21, 1918.—Decided December 9, 1918.

The territorial limits of Kentucky extend across the Ohio River to low-water mark on the Indiana side, and no limitation on the power of Kentucky to protect fish within those limits by proper legislation resulted from the establishment of concurrent jurisdiction by the Virginia Compact.

172 Kentucky, 473, affirmed.

THE case is stated in the opinion.

Mr. Augustus Everett Willson for plaintiff in error. *Mr. Richard Priest Dietzman* and *Mr. Edmund Andrew Larkin* were also on the brief.

Mr. D. A. Sachs, Jr., for defendant in error. *Mr. Jos. G. Sachs, Jr.*, was also on the brief.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

Plaintiff in error was adjudged guilty of violating the prohibition of a Kentucky statute by seining for fish in the Ohio River south of low-water mark on the Indiana side. 172 Kentucky, 473. We are asked to hold that by reason of the Virginia Compact (13 Hening's Statutes at Large, c. 14, pp. 17, 19), Kentucky had no power to regulate fishing in the river at that point without Indiana's concurrence. The provision relied upon is this: "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. *Indiana* v. *Kentucky*, 136 U. S. 479, 519. And we think it clear that no limitation upon the power of that Commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact. See *Wedding* v. *Meyler*, 192 U. S. 573; *Central R. R. Co.* v. *Jersey City*, 209 U. S. 473; *Nielsen* v. *Oregon*, 212 U. S. 315; *McGowan* v. *Columbia River Packers' Assn.*, 245 U. S. 352.

The judgment below is

Affirmed.

STATE OF IOWA *v.* SLIMMER ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. —, Original. Argued April 15, 1918.—Decided December 9, 1918.

A motion to file an original bill will be denied when the complaining State is clearly not entitled to the relief sought. P. 120.

Where the only effective relief sought is to enjoin the administration by the courts of another State of personal property (in this case notes and bonds) located there at the time of the owner's death, relief must clearly be denied; because, even though the property may have been fraudulently placed there to avoid taxation in the complainant State, which is alleged to be the domicile of the owner, the State of the actual situs had the right to administer the property. *Id.*

Motion for leave to file bill of complaint denied.

THE case is stated in the opinion.

Mr. H. M. Havner, Attorney General of the State of Iowa, with whom *Mr. Burton E. Sweet* was on the brief, for complainant, contended:

That the decedent was at the time of his death and previously a resident of Iowa, and the property had been placed and kept in Minnesota, and the Minnesota proceedings set on foot, to defraud Iowa of her rights of taxation. This was alleged in the bill, whose allegations stood unchallenged. Looking at the matter from the international and interstate standpoints, correct doctrine required that original probate and principal administration be had in Iowa, the State of domicile. Iowa had a special interest in insisting that this be done because under her laws, upon the admitted facts, she was entitled to collect back taxes upon the property for five years during which they had been eluded, to tax it during administration, and to tax for collateral inheritance. And under the laws of

Iowa it required primary administration to avail of these rights.

Even assuming that Minnesota would entertain these claims in her courts, relief would depend on their finding as to domicile; and, Iowa, a sovereign State, should not be compelled to litigate her rights in a possibly hostile forum. Indeed, the very purpose of the Constitution, Art. III, § 2, par. 2, and the act of Congress (Jud. Code, § 233), concerning the original jurisdiction of this court, was to furnish an impartial tribunal in such cases. See *Chisholm* v. *Georgia*, 2 Dall. 419, 475; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 289. That jurisdiction depends upon the character of the parties and not upon the nature of the action. *California* v. *Southern Pacific Co.*, 157 U. S. 229. If the lower federal courts will entertain a bill between citizens with reference to a testator's domicile, where that question is material (*Harrison* v. *Nixon*, 9 Pet. 483), a sovereign State has a right to have that question determined here in an original action.

On the face of the bill, the original jurisdiction exists. It is no answer to say that Iowa may go to the courts of Minnesota. If she did so, there would be no right to have an adverse decision reviewed by this court, because there would be no federal question. Nor is it an answer that cases of this character would unnecessarily burden the docket of this court. If jurisdiction exists under the Constitution, Iowa has a right to a determination.

Mr. Thomas D. O'Brien, with whom *Mr. Edward T. Young* and *Mr. Alexander E. Horn* were on the brief, for defendants.

Mr. Clifford L. Hilton, Attorney General of the State of Minnesota, and *Mr. Egbert S. Oakley*, Assistant Attorney General of the State of Minnesota, in a separate brief on behalf of that State, contended:

It is for the state legislatures to prescribe how property

is to be assessed and to provide the remedies by means of which the payment of the taxes levied shall be accomplished. The legislative remedies are exclusive, and if they fail, the collection of the tax must also fail. *Plymouth County* v. *Moore*, 114 Iowa, 700; *Preston* v. *Sturgis Milling Co.*, 183 Fed. Rep. 1, 3; *Preston* v. *Chicago, St. Louis & N. O. R. R. Co.*, 183 Fed. Rep. 20, 22; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487.

The probate courts in Minnesota, under the state constitution and statutes, have exclusive jurisdiction to control and administer the personal assets within its borders of a resident or nonresident decedent. Schouler on Wills, 5th ed., § 1091; *Wilkins* v. *Ellett*, 108 U. S. 256, 258; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Hanson* v. *Nygaard*, 105 Minnesota, 30; *Byers* v. *McAuley*, 149 U. S. 608; *Borer* v. *Chapman*, 119 U. S. 587, 600; *Moran* v. *Sturges*, 154 U. S. 256, 274; Rev. Stats., § 720, now Jud. Code, § 265; *Whitney* v. *Wilder*, 54 Fed. Rep. 554; *Gregory* v. *Lansing*, 115 Minnesota, 73; *Putnam* v. *Pittman*, 45 Minnesota, 242; *New Orleans* v. *Stempel*, 175 U. S. 309; *Wheeler* v. *New York*, 233 U. S. 434.

Mr. Justice Brandeis delivered the opinion of the court.

With a view to collecting ultimately at least $13,750 for taxes which the State of Iowa alleges it is entitled to have assessed and levied against the property of Abraham Slimmer, deceased, it asks leave to file in this court an original bill of complaint against the State of Minnesota, Abraham Slimmer, Junior, and Charles Bechhoefer, citizens of Minnesota, and Adolph Lipman, a citizen of Wisconsin. The bill alleges in substance as follows:

1. Slimmer, who had for many years been a resident of and domiciled in Iowa, died there testate on August 15, 1917, leaving personal property valued at $550,000, and

consisting, with the exception of personal effects and a few United States Liberty Bonds, wholly of promissory notes. All of this property, except the personal effects and one note for $3,000, was then in Minnesota in the possession of Slimmer Junior, who had had custody of the decedent's property for at least five years before his death. The $3,000 note was brought by him and Bechhoefer into Minnesota immediately thereafter.

2. For the period of at least five years before his death, Slimmer Senior had conspired with Slimmer Junior and Bechhoefer to defraud the State of Iowa of taxes which, by reason of his domicil in Iowa, might and should have been assessed there against his property during his life time; and to this end he had arranged with them that his will (if he should leave one) should be probated in Minnesota; had placed in the custody of Slimmer Junior, in Minnesota, all his property except his personal effects and the one note for $3,000; and had concealed his property from the Iowa officials and refused to return the same for taxation there.

3. Pursuant to this conspiracy, Slimmer Junior and Bechhoefer filed his will for probate in Minnesota on or about August 21, 1917, and procured the appointment of Bechhoefer as special administrator; and by falsely claiming that decedent was domiciled there, secured *ex parte* a finding to that effect, the probate of the will, and the appointment of themselves as executors. From this decree, the defendant Lipman, claiming to be an heir, appealed; and this appeal, which is now pending, has the effect of suspending the decree and leaving the property in the hands of the special administrator. The State of Iowa has not become a party to these proceedings.

4. Under the laws of Iowa, omissions to list and assess property may be corrected and the taxes collected within five years from the date of such omission. But the amount properly payable for taxes by Slimmer's estate cannot be

collected without assessment and levy thereof against his personal representatives; and such assessment and levy must be made within the State of Iowa.

5. On January 7, 1918, the District Court of Dubuque County, Iowa, (in a proceeding begun apparently on or about that day) decreed, at the instance of the treasurer of that State, that Slimmer Senior was domiciled therein, and granted to one Mullany letters of administration of his estate. About the same date the State, learning that Slimmer Junior and Bechhoefer were about to come into it for the purpose of taking testimony in the Minnesota probate proceedings, obtained from said district court an injunction restraining the witness from testifying and the designated officers from taking their depositions. Slimmer Junior and Bechhoefer have not been served in the Iowa suit and have declared their purpose to avoid service within that State.

The bill prays that it be adjudged and decreed: (*a*) that Slimmer Senior had for more than five years prior to his death been domiciled in Iowa; (*b*) that his estate consisted of evidences of indebtedness to him and that no part of his estate was, at his death, in Minnesota; (*c*) that Iowa has, and Minnesota has not, jurisdiction to administer upon his estate; and prays also (*d*) that such order be entered as will ensure the dismissal of the Minnesota probate proceedings, and the administration of the estate in Iowa; and (*e*) that, pending this suit, an injunction issue restraining the prosecution of the Minnesota probate proceedings.

The motion for leave to file the bill was submitted *ex parte*. In view of doubt entertained as to the propriety of granting it, consideration of the application was postponed (as in *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, and *Washington* v. *Northern Securities Co.*, 185 U. S. 254) so that the parties might be heard; and the motion was fully argued orally and upon briefs. Both the State

of Minnesota and the individual defendants, other than Lipman, objected to the granting of leave to file the bill. The State objected on the grounds that the only effective relief sought was an injunction against a proceeding in a state court; that the Minnesota probate court had exclusive jurisdiction to administer assets of a decedent within its borders, regardless of his domicil; and also that there was no authority granted by the state legislature for such an action in the federal courts. The individual defendants objected on the grounds that the Iowa administrator was the proper party plaintiff; that he was in any event a necessary party and joining him would oust the court of jurisdiction; that the relief sought would deny to the action of the Minnesota court full faith and credit; and that plaintiff had an adequate remedy at law. The original jurisdiction of the court to entertain a bill of this character was also questioned. Only one of these objections need be considered, for it presents a conclusive reason why leave to file the bill of complaint should be denied.

Substantially the whole of decedent's estate consisted of notes and bonds. Under an arrangement which had been in force for five years or more, these securities were, at the time of his death, in Minnesota in the custody and possession of an agent resident there. Minnesota imposes inheritance taxes; and its statutes provide (Minnesota Gen. Stats., 1913, § 2281) that no transfer of the property of a nonresident decedent shall be made until the taxes due thereon shall have been paid. Regardless of the domicil of the decedent, these notes and bonds were subject to probate proceedings in that State and likewise subject, at least, to inheritance taxes. Minnesota Gen. Stats., 1913, §§ 7205, 2271; *Bristol* v. *Washington County*, 177 U. S. 133; *Wheeler* v. *New York*, 233 U. S. 434. Furthermore, so far as concerns the property of the decedent, located at his death in Minnesota, the probate courts of

that State had jurisdiction to determine the domicil. *Overby* v. *Gordon*, 177 U. S. 214. But even if decedent was not domiciled in Minnesota, its court had the power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicil to be disposed of by him. Minnesota Gen. Stats., 1913, § 7278; *Harvey* v. *Richards*, 1 Mason, 381. See *Wilkins* v. *Ellett*, 108 U. S. 256, 258.

On or about August 21, 1917, Slimmer's executors filed their petition in the probate court for Ramsey County, Minnesota; and the court, in the exercise of its jurisdiction, appointed the defendant Bechhoefer, special administrator. As such, he took and now holds, pending an appeal to the state district court, possession of the whole of decedent's estate, consisting of the notes and Liberty Bonds as well as the personal effects. The only effective relief sought here is to enjoin the further administration of the estate of the deceased by the courts of Minnesota. It is clear that the State of Iowa is not entitled to such relief.

The motion for leave to file the bill of complaint is, therefore,

Denied.

TEMPEL *v.* UNITED STATES.

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

No. 29. Argued November 5, 1917.—Decided December 9, 1918.

Not knowing that certain land on the Chicago River had become submerged through excavations privately made without the owner's consent, the Government, believing it to be within the *de jure* stream,

and not intending to exercise the power of eminent domain, dredged the submerged land, claiming then and thereafter that it did so under the power to improve navigation. *Held*, that there was no ground for implying a promise to compensate the owner; that his cause of action, if any, was in tort; and that an action by him against the United States was not within the jurisdiction of the District Court under the Tucker Act. *Hill* v. *United States*, 149 U. S. 593, followed. *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, distinguished. P. 128.

Reversed.

THE case is stated in the opinion.

Mr. Thomas B. Lantry, with whom *Mr. Timothy F. Mullen* was on the briefs, for plaintiff in error:

A riparian owner may maintain his bank in its original condition, or restore it.

Prescription seems to be the test of determining whether the owner loses his right to compensation.

The public has no proprietorship in soil under small streams which are navigable only in a modified sense, for the floatage of logs and lumber, as it has under navigable waters at common law, where the tide ebbs and flows.

The statute of limitations does not run against the landowner's action for a taking until the work has been completed.

Land is not taken, in the meaning of the Fifth Amendment, until compensation is paid and the title passes from the owner. The filing of the petition for compensation is an acceptance of the taking, and the right of action accrues upon such acceptance.

The right of the public to improve the navigability of a stream without compensation is confined to the natural bed.

The commencement of a suit for damages is the acceptance of the taking of the property held for public use.

In this case it is not questioned that the title was in the plaintiff, and that the Government had taken his prop-

erty for public use, nor was the value in dispute. An implied contract arose. *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 583, 597, 598; *Great Falls Mfg. Co.* v. *United States*, 112 U. S. 645, 656; *United States* v. *Lynah*, 188 U. S. 445, 463; *United States* v. *Welsh*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180.

The Solicitor General for the United States:

The Chicago River being a navigable stream in its natural state, there was no taking, because the submerged lands were subject to the paramount right of the Government to improve navigation.

In improving navigation the Government was not confined to the channel shown by the survey of 1837, but might dredge any portion of the river bed.

Such injury, if any, as claimant has suffered in this case was occasioned by the act of his lessee, and the remedy is in an action against him.

The District Court correctly held that it was without jurisdiction under the Tucker Act, because the suit was instituted more than six years after the alleged right of action accrued.

Mr. Justice Brandeis delivered the opinion of the court.

The Chicago River, its branches and forks lie wholly within the State of Illinois.[1] Their aggregate length is about 35 miles. Originally the stream was a sluggish creek, nearly stagnant during much of the year and, in part, navigable only for row boats and canoes or for

[1] The character of the river and rights incidental thereto have been frequently considered by this court. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 437; *Harman* v. *Chicago*, 147 U. S. 396; *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506, 520.

floating of logs. The United States surveyed the river in 1837, but made no improvement above its mouth until 1896. Before the latter date, however, extensive improvements had been made from time to time by the city and by riparian owners. The river had become the inner harbor of Chicago and, measured by its tonnage, was one of the most important waterways of the globe. In number of arrivals and departures of vessels it led all the harbors of the United States. In tonnage it was second only to New York.[1]

In 1896 Congress made an appropriation "For improving the Chicago River, in Illinois, from its mouth to the stock yards on the South Branch and to Belmont avenue on the North Branch, as far as may be permitted by existing docks and wharves, to be dredged to admit passage by vessels drawing sixteen feet of water." Act of June 3, 1896, c. 314, 29 Stat. 202, 228. This act was amended by the Act of June 4, 1897, c. 2, 30 Stat. 11, 47, which, as interpreted by the War Department, permitted a slight widening of the stream in certain places. The General Assembly of Illinois by resolution of April 22–23, 1897, [Laws, 1897, p. 308] gave assent to the United States' acquiring by purchase or condemnation "all lands necessary for widening the Chicago river and its branches." In 1899 Congress directed a survey with a view to creating a deeper channel and adopting 21 feet "as the project depth for the improvement in lieu of that fixed by the Act of June third, eighteen hundred and ninety-six." Act of March 3, 1899, c. 425, 30 Stat. 1121, 1156. No widening beyond the banks of the *de jure* stream was specifically authorized by this act, nor by any subsequent act. From time to time other appropriations were made by Congress for these improvements of the river, and work

[1] Reports, War Department, Engineers, for 1893, pp. 2794–2804; for 1897, pp. 2793–2801; for 1900, pp. 3865–3871; for 1914, pp. 1157–1160; for 1916, pp. 1350–1354.

was carried on thereunder.[1] About 12.5 miles of the river was improved by the Government; and of this about 5 miles consisted of that part of the North Branch which lies between the main river and Belmont Avenue.

Early in 1889 Tempel became the owner of certain land on the bank of the North Branch below Belmont Avenue. He leased his land for a brick yard; and by the terms of the lease the lessee was permitted to dredge the bottom of the river in front of the premises for the purpose of making brick from the clay thereunder. But the lessee was directed not to interfere with the upland; and he covenanted to deliver up the premises in the condition in which they were demised. Nevertheless, from time to time during a period of five years between 1889 and 1899, the lessee dug away, to a depth of from 6 to 14 feet, a large strip of the upland, extending in some places to a considerable width. In its natural state the stream opposite the plaintiff's property varied in width from probably fifty to a hundred and fifty feet, and could be used only for floating logs and for travel by row boats or canoes; but before 1889 riparian owners had dug a channel and possibly greatly widened the stream; and schooners navigated to a point beyond Belmont Avenue. Between 1890 and 1899 boats drawing 5 to 8 feet of water were navigating the North Branch up to Belmont Avenue. In 1896 the river in front of Tempel's property was in varying depths of from 6 to 14 or 15 feet.

The United States did not do any dredging in front of

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[1] Act of July 1, 1898, c. 546, 30 Stat. 597, 632; June 6, 1900, c. 791, 31 Stat. 588, 626; June 13, 1902, c. 1079, 32 Stat. 331, 363, which authorized the construction of turning basins, but the one in the North Branch was constructed at a point considerably below the land in controversy; March 2, 1907, c. 2509, 34 Stat. 1073, 1102; May 28, 1908, c. 213, 35 Stat. 429.

Reports, War Department, Engineers, for 1899, pp. 2826–2833; for 1900, pp. 3784–3788.

Tempel's property until 1899. Then it dredged a channel to the depth of 17 feet, about 30 feet wide—the excavation being made wholly in the then bed of the stream as submerged. Its next dredging there was in 1909, when this channel was deepened to 21 feet and widened to 60 feet, the excavation being again made wholly in the then bed of the stream as submerged. All of the dredging, both in 1899 and in 1909, which was not within the bed of the river in its natural state, was done within the limits of the strip of upland which had been submerged through the dredging done by the lessee prior to 1899. During the period from 1889 to 1899, the stream in front of Tempel's premises was in constant and increasing use for the purpose of public navigation. The Government does not appear to have had knowledge of the fact that dredging had been done before 1899 by the lessee without the consent of Tempel or that the river had been widened by excavation. The reports of the Secretary of War show that he never specifically authorized, for the purpose of widening the river, the appropriation of any of the property herein involved and that the Government believed, when it dredged in front of Tempel's property in 1899 and again in 1909, that the submerged land, in which the dredging was done, was either a part of the natural bed of the river, or that it had been dedicated by the owner for purposes of navigation, or that it had in some other manner become a part of the *de jure* stream.[1] No

[1] Reports, War Department, Engineers, for 1899, pp. 2828–2833; for 1900, pp. 3785–3788; for 1901, pp. 2993, 2995; for 1905, p. 545, show that, in the dredging under the project of 1896, the effort had been to secure title to all property necessary for the proposed development and that it was believed that (with exceptions not here material) this had been done. The property here involved was not included in the land which it was proposed to acquire. The reports also show that the Government was not aware that there was any property of a private owner which it was necessary to acquire in order to make the further improvement according to the 21-foot project; and in the

objection was made by Tempel, until 1910, to the use, for navigation, of the river in front of his property; and he did not file any complaint as to the dredging of 1899. He had no knowledge, until 1910, of the dredging which had been done by his lessee, nor of that done by the Government.

Promptly after learning of the dredging, Tempel demanded of the Government possession of that part of the land submerged which had formerly constituted a part of his upland. The demand was refused; and in 1911 he brought, in the District Court of the United States for the Northern District of Illinois, this suit, under the Tucker Act (Judicial Code, § 24, par. 20), to recover the value of property which he claimed had been taken by the Government. The complaint alleged that the river in front of his premises was, at the time he acquired the same and theretofore, a creek used only for surface drainage and was "not a navigable stream either in law or in fact"; that the Government "in the latter part of the year 1909 completely excavated a channel through the same" for the purpose of making said North Branch navigable; and that it holds possession thereof by virtue of the resolution of the General Assembly of Illinois above referred to; and that the reasonable value of the property taken was $10,000. The complaint did not refer either to the dredging done before 1889, when Tempel acquired the property, or to that done between 1889 and 1899 by Tempel's lessee, or to that done in 1899 by the Government. The answer denied that the stream in front of

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accounting of the division of funds between different objects none were assigned to the securing of land for widening the river. Reports, War Department, Engineers, for 1907, p. 627; for 1908, p. 672; for 1909, p. 709; for 1910, pp. 784–785; for 1911, p. 842; for 1912, p. 1009; for 1913, p. 1119; for 1914, pp. 1157–1160. Nowhere does it appear that the Secretary of War ever authorized the taking of the property involved in this suit.

Tempel's land was non-navigable when he purchased it or theretofore; asserted that all excavations by the Government were made in the center of the stream and were for the purpose of improving navigation; and denied that it had taken any of Tempel's property under the resolution of the Illinois Assembly or otherwise.

The trial court found as a fact, "That by reason of the changes in said river as aforesaid, the difference between the value of the premises of the petitioner at the time when he purchased the same as aforesaid, and the value of the same at the time that the demand as hereinbefore set forth was made, less the cost of reclaiming the same, were he entitled to make reclamation thereof, is $7,547.00." As conclusions of law the trial court found that the North Branch was navigable in its natural state; that it was navigable in fact as early as 1889; that Tempel, having failed to complain of the use by the public of the stream in front of his property for a period of at least ten years prior to the first dredging by the United States, was estopped from thereafter disputing the navigability of the river; and that the river being then a navigable stream, the dredging of the bed in 1899 and in 1909 did not constitute a taking of Tempel's property within the meaning of the Fifth Amendment. Judgment was entered for the United States; and the case comes here on writ of error.

First. This is a suit, like *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, to recover the value of property taken by the Government in making a river improvement. The property alleged to have been taken is land, part of which lies within the 30-foot channel first dredged by the Government in 1899; the balance within the additional 30 feet dredged by it in 1909, when the channel was widened to 60 feet; and all of which formed part of the river bed and was submerged when the Government commenced its improvement and has been since. But the property of Tempel,

if any, which the Government has taken, is only the right to keep his land submerged, to navigate over it, and to improve it further for purposes of navigation. This right in the land the Government claimed and claims that it already possessed at the time when it dredged on the property in question; and it is the same right which the Government possesses in that portion of the present river bed lying within the original meander lines and which originally constituted the whole river bed. Under the law of Illinois, neither the United States nor the State owns the lands under a navigable river. Riparian owners own the fee to the middle of the stream, *St. Louis* v. *Rutz*, 138 U. S. 226, 242; subject to the paramount right of the Government to use the same and to make improvements therein for purposes of navigation, without the payment of compensation, *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506, 520; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Willink* v. *United States*, 240 U. S. 572, 580. Included in such permissible improvement is dredging for the purpose of deepening the channel, *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82. It is only this right to use and improve for purposes of navigation that the Government claims here, a right which the Government undoubtedly possessed, if the land in question had been a part of the bed of the *de jure* stream, as was supposed.

If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded "upon any contract, express or implied"; and a remedy for claims sounding in tort is expressly denied. *Bigby* v. *United States*, 188 U. S. 400; *Hijo* v. *United States*, 194 U. S. 315, 323. As stated in *United States* v. *Lynah*, 188 U. S. 445, 462, 465: "The law will imply a promise to make the required compensation, where property to which the government asserts no title,

is taken, pursuant to an act of Congress, as private property to be applied for public uses"; or in other words: "Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor." But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff.

Second. The answer, specifically denying that the United States has taken plaintiff's land, excavated a channel through it, and claims possession thereof under the resolution of the Illinois Assembly or otherwise, asserts that in 1909 it did "excavate a channel in the Chicago river in the center of the stream and now claims possession thereof for the purpose of making more navigable the north branch." The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the Government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the Government is well-founded. The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. *Hill* v. *United States*, 149 U. S. 593, which both in its pleadings and its facts bears a strong resem-

blance to the case at bar, is conclusive on this point. See also *Schillinger* v. *United States*, 155 U. S. 163. The case at bar is entirely unlike both the *Lynah Case* and the *Cress Case*. In neither of those cases does it appear that, at the time of taking, there was any claim by the Government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the Government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the Government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the Government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41.

The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction.

Judgment reversed and case remanded to the District Court with directions to dismiss it for want of jurisdiction.

(MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.)

UNITED STATES *v.* SPEARIN.

SPEARIN *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 44, 45. Argued November 14, 15, 1918.—Decided December 9, 1918.

S agreed, for a lump sum, to build a dry-dock in a Navy Yard in accordance with plans and specifications prepared by the Government and which provided, *inter alia*, for reconstructing a sewer which intersected the site, and prescribed the new location, dimensions, and materials therefor. S rebuilt the sewer as so required, and it was accepted by the Government, but owing to a dam, unknown to both parties, existing in a connecting sewer, within the Yard but beyond the limits of the operations, and to general conditions of drainage, known to the Government but not to S, back waters burst the new sewer, during heavy rain and high tide, and flooded the dry-dock excavation, causing damage and menacing the work. S, having declined to proceed unless the Government paid or assumed the damage and made safe the sewer system or assumed responsibility for future damage due to insufficient capacity, location and design, the Government annulled the contract.

Held: (1) The provision for reconstructing the sewer was part of the dry-dock contract and not collateral to it. P. 136.

(2) The articles prescribing the character, dimensions, and location of the sewer imported a warranty that if so constructed the sewer would prove adequate. P. 137.

(3) Such warranty was not overcome by general clauses requiring the contractor to examine the site, check up the plans, and assume responsibility for the work until completion and acceptance. *Id.*

(4) Neither Rev. Stats., § 3744, providing that contracts with the Navy Department shall be reduced to writing, nor the parol evidence rule, precluded reliance on such warranty, implied by law. *Id.*

(5) The contractor, upon breach of the warranty, was not obliged to reconstruct the sewer and proceed at his peril, but, upon the Government's repudiation of responsibility, was justified in refusing to resume work on the dry-dock. P. 138.

(6) Having annulled the contract, the Government was liable for all damages resulting from the breach, including the contractor's proper

expenditures on the work (less receipts from the Government) and the profits he would have earned if allowed fully to perform. *Id.* 51 Ct. Clms. 155, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Thompson for the United States.

Mr. Charles E. Hughes, with whom *Mr. Frank W. Hackett* and *Mr. Alfred S. Brown* were on the brief, for Spearin.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Spearin brought this suit in the Court of Claims, demanding a balance alleged to be due for work done under a contract to construct a dry-dock and also damages for its annulment. Judgment was entered for him in the sum of $141,180.86; (51 Ct. Clms. 155) and both parties appealed to this court. The Government contends that Spearin is entitled to recover only $7,907.98. Spearin claims the additional sum of $63,658.70.

First. The decision to be made on the Government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for $757,800 a dry-dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the Government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert and relocate a section thereof before the work of constructing the dry-dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material, and location of the section to be

substituted. All the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the Government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry-dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry-dock, with a 7-foot sewer which emptied into Wallabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry-dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5½ feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue-prints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The Government officials concerned with the letting of the contract and construction of the dry-dock did not know of the existence of the dam. The site selected for the dry-dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these Government officials and others. But the fact had not been communicated to Spearin by anyone. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy

Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers nor special enquiry into the possibility of the work being flooded thereby; and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was $3,875. But it was unsafe to both Spearin and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry-dock, under radically changed and enlarged plans, was completed by other contractors, the Government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time $210,939.18 had been expended by Spearin on the work; and he had received from the Government on account thereof $129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of $60,000, and its judgment included that sum.

The general rules of law applicable to these facts are well

settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phœnix Bridge Co.* v. *United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson* v. *United States*, 172 U. S. 372; *Dermott* v. *Jones*, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co.* v. *The Mayor*, 160 N. Y. 72; *Filbert* v. *Philadelphia*, 181 Pa. St. 530; *Bentley* v. *State*, 73 Wisconsin, 416. See *Sundstrom* v. *New York*, 213 N. Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie* v. *United States*, 237 U. S. 234; *Hollerbach* v. *United States*, 233 U. S. 165, and *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the Government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry-dock proper. It was as necessary as any other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the Government that the present case is to be distinguished from the *Bentley Case*, *supra*, and other similar cases, on the ground that the contract with reference to the sewer is purely collateral, is clearly without

merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the dry-dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site,[1] to check up the plans,[2] and to assume responsibility for the work until completion and acceptance.[3] The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

Neither § 3744 of the Revised Statutes, which pro-

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[1] "271. *Examination of site.*—Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

[2] "25. *Checking plans and dimensions; lines and levels.*—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. . . . The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

[3] "21. *Contractor's responsibility.*—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. . . ."

vides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108. The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself, *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551–552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach.

Second. Both the main and the cross-appeal raise questions as to the amount recoverable.

The Government contends that Spearin should, as requested, have repaired the sewer and proceeded with the work; and that having declined to do so, he should be denied all recovery except $7,907.98, which represents the proceeds of that part of the plant which the Government sold plus the value of that retained by it. But Spearin was under no obligation to repair the sewer and proceed with the work, while the Government denied responsibility for providing and refused to provide sewer conditions safe for the work. When it wrongfully annulled the contract, Spearin became entitled to compensation for all losses resulting from its breach.

Spearin insists that he should be allowed the additional sum of $63,658.70, because, as he alleges, the lower court awarded him (in addition to $60,000 for profits) not the difference between his proper expenditures and his receipts from the Government, but the difference between such receipts and the *value* of the work, materials, and plant (as reported by a naval board appointed by the de-

fendant). Language in the findings of fact concerning damages lends possibly some warrant for that contention; but the discussion of the subject in the opinion makes it clear that the rule enunciated in *United States* v. *Behan*, 110 U. S. 338, which claimant invokes, was adopted and correctly applied by the court.

The judgment of the Court of Claims is, therefore,

Affirmed.

(MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.)

LUCKENBACH ET AL. *v.* W. J. McCAHAN SUGAR REFINING COMPANY AND THE INSULAR LINE.

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

No. 51. Argued November 18, 1918.—Decided December 9, 1918.

Where the bills of lading stipulated that the carrier should have the benefit of any insurance that might be effected by the shipper, but the shipper's policies provided that the insurers should not be liable for merchandise shipped under bills containing such stipulations or in the possession of any carrier who might be liable for its loss or damage, *held*, that an arrangement between the insurers and the shipper, whereby the former loaned to the latter the amount of a loss caused by the carrier's negligence, to be repaid only in so far as the shipper recovered from the carrier, otherwise to operate in effect as absolute payment under the policies, and whereby, as security, the shipper pledged such prospective recovery and the bills of lading and agreed to prosecute suit against the carrier at the expense and under the exclusive direction and control of the insurers,—was a lawful arrangement; that the loan was not a payment of the insurance and the carrier was not entitled to the benefit of it; and that a libel

brought in the shipper's name, for the benefit of the insurers, pursuant to the agreement, could be maintained against the carrier and the ship. P. 148.

Liability for unseaworthiness, resting on the personal contract of the shipowner, is not limited by Rev. Stats., § 4283, or the Act of June 26, 1884. P. 149.

A time charter characterizing the vessel as "tight, staunch, [and] strong," on delivery, and binding the owners to "maintain her in a thoroughly efficient state in hull and machinery for and during the service," imports a warranty, without limitation, of seaworthiness, not merely at delivery, but at the commencement of every voyage. P. 150.

A time charter, like a charter for a single voyage, is not a demise of the ship, and leaves the charterer without control over her maintenance and repair, though liable without limitation to shippers for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners. *Id.*

A charter party was signed by but one of the owners, but the rest, being impleaded with him, admitted that he acted for all, and the liability of all, if liability existed, was not controverted. *Held*, that a decree for damages should run against all. P. 151.

235 Fed. Rep. 388, modified and affirmed.

THE case is stated in the opinion.

Mr. Roscoe H. Hupper, with whom *Mr. Peter S. Carter* and *Mr. Charles C. Burlingham* were on the brief, for petitioners:

In this case (unlike *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. Rep. 847, and *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed. Rep. 350), we have complete evidence of the intentions of the underwriters when the moneys were advanced. The effect is to make the payments unconditional payments of insurance.

It may be that the cargo owners' acceptance of the bill of lading broke the warranty, and that the insurance companies could have refused to pay; but it is clear that any breach was waived and was always intended to be waived. This waiver cannot convert into something other

than insurance the money which the cargo owners received in return for their insurance premiums. So far as the carrier is concerned, there need have been no insurance policies at all, and it matters not in what form or under what arrangement the money is paid the cargo owner, so long as it is in fact a payment to him for his own benefit.

The only conclusion to be reached on the whole evidence is that there was an unconditional payment of insurance. This case is distinguished from *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. The insurance companies' right to demand repayment of the "loan" is merely their right of subrogation parading in disguise. The value of the two rights is the same: the amount received from the carrier. They depend upon the same condition: liability of the carrier. The only distinction is in name.

Since the insurance companies made their "loan" agreements with the cargo owners after they knew the latter were bound by contract to give the carrier the benefit of insurance, their rights are subordinate to those of the carrier, by analogy with the rule in equity that a second assignee taking with notice of the rights of a prior assignee is postponed. See Pomeroy's Equity Jurisprudence, 3d ed., §§ 713, 715. The situation is also similar to that presented by a prior equity, uniformly held to be a burden on the legal estate. *Id.*, § 730; *Great Lakes & St. L. T. Co.* v. *Scranton Coal Co.*, 239 Fed. Rep. 603, 609.

The authorities hold that the so-called "loans" are payments of insurance. Our contentions are supported by *Roos* v. *Philadelphia, Wilmington & Baltimore R. R. Co.*, 199 Pa. St. 378; *Lancaster Mills* v. *Merchants Cotton Press Co.*, 89 Tennessee, 1; *Deming & Co.* v. *Merchants Cotton Press Co.*, 90 Tennessee, 310.

The Limited Liability Statute applies to every case of liability on account of the vessel where the owner is free

from privity or knowledge. There is no principle of construction to justify the exclusion of specific cases falling within the language of the statute, which has always been liberally construed. That the statute contemplated contracts is made clear by the reference to property, goods and merchandise shipped or put on board the vessel, and by the reference in § 4286, Rev. Stats., to the chartering of a vessel. When the Limited Liability Act was passed in 1851, the transportation of goods was always pursuant to contract, just as now, either by bill of lading or charter-party, to which the warranties of seaworthiness attached. Ships do not move and no service is performed with or by means of ships except by virtue of a contract or an agreement on the part of the shipowner, and therefore the personal contract doctrine could be applied to prevent limitation of liability in every case, as to carriage of passengers and cargo.

This case is not similar to those where limitation of liability has been denied because of a "personal contract." *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. Rep. 11; *The Loyal*, 204 Fed. Rep. 930; *The Amos D. Carver*, 35 Fed. Rep. 665, and *Richardson* v. *Harmon*, 222 U. S. 96, 106, illustrate the meaning of "personal contract," and show that a personal contract is one to be performed by the owner entirely irrespective of the vessel. *Benner Line* v. *Pendleton*, 217 Fed. Rep. 497; 246 U. S. 353, involved a voyage charter-party containing a provision that the vessel should be "tight, staunch, strong, and in every way fitted" for the voyage, and the loss was found to have resulted from unseaworthiness existing when the schooner began the voyage. In this case the seaworthiness of the Julia Luckenbach when delivered under the time charter cannot be questioned. We cannot believe that the right to limitation depends on the accident of who signs the charter; it depends on the nature of the contract. Limitation has been granted notwithstand-

ing contracts which were as much personal contracts as the charter-party in the case at bar. See *The Republic*, 57 Fed. Rep. 240, affd. 61 Fed. Rep. 109; *LaBourgogne*, 144 Fed. Rep. 781, affd. 210 U. S. 95; *The Jane Grey*, 99 Fed. Rep. 582, 585.

Mr. Lawrence Kneeland for the W. J. McCahan Sugar Refining Co., respondent.

Mr. J. Parker Kirlin, with whom *Mr. Mark W. Maclay, Jr.*, was on the brief, for the Insular Line, respondent:

The provision in the contract of carriage, that the carrier was to receive the benefit of any insurance, is valid, and prevents either the owner or insurer from maintaining an action against the carrier upon any terms inconsistent therewith. *Phœnix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 325.

If the warranties had any effect at all, it was to avoid the policies when the libelant accepted the bill of lading with the provision giving the carrier the benefit of insurance. *Carstairs* v. *Mechanics Insurance Co.*, 18 Fed. Rep. 473; *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. Payment of the loss with full knowledge of the facts was a waiver. The transaction was intended, and operated, as a final settlement with the insured.

The so-called loan receipts do not evidence any loan justly so described, but merely secure to the insurers their ordinary rights of subrogation upon payment. In equity subrogation accrues to the insurer without any express stipulation, and he may assert it in his own name.

By making the advance and entering into the agreement the insurer adjusted and paid the loss as between him and the assured, and the whole transaction was at an end. It is in this respect that the case at bar differs from *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. The insurer's right of subrogation is limited by the benefit of insurance

clause in the bill of lading. *Wager* v. *Providence Insurance Co.*, 150 U. S. 99, 108.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The W. J. McCahan Sugar Refining Company shipped a cargo of sugar from Porto Rico to Philadelphia by the Julia Luckenbach, which was under charter to the Insular Line; and the cargo suffered severe damage. In the District Court of the United States for the Southern District of New York, a libel seeking damages was filed in the name of the shipper *in personam* against the Insular Line and *in rem* against the steamer. It alleged that the damages resulted from unseaworthiness of the hull, existing at the commencement of the voyage. The petitioners, owners of the ship, were impleaded. The bills of lading sued on contained a clause relieving the carrier from liability for damages arising from "any latent defect in hull, . . . or by unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager; . . ."

The libel alleged that the unseaworthiness would have been discovered, had due diligence been exercised. The District Court so found and held that the libelant was entitled to recover. The damages were agreed to be $87,526.65, with interest; and the value of the ship and pending freight was found or agreed to be $66,600. The owners duly moved for limitation of liability. The District Court found that the damages sustained were occasioned without the privity or knowledge of the owners; held that they were entitled to limit their liability, both as against the shipper and as against the charterer, who claimed indemnity; and ordered that the owners should pay the shipper's claim to the extent of the value of the

ship and pending freight; and that the balance should be paid by the Insular Line. 235 Fed. Rep. 388. Both the owners and the Insular Line appealed to the Circuit Court of Appeals. That court modified the decree, so as to award that payment of the full amount be made to the shipper primarily by the steamer and the owners; and that the charterer should be called upon to make payment only of the deficiency, if any. 235 Fed. Rep. 388. The case comes here on writ of certiorari granted on the petition of the owners. 242 U. S. 638.

It is urged, on three grounds, that the decision of the Circuit Court of Appeals should be reversed and that the District Court should be directed, either to dismiss the libel or to limit the owners' liability to the value of the ship and pending freight.

First. The owners contend that both lower courts erred in holding that the steamer was unseaworthy at the commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. *The Wildcroft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658.

Second. The owners (and also the charterer) contend that the libel should be dismissed, because the shipper had already been compensated for the loss by insurance which it effected; and that the carrier is entitled to the full benefit of this insurance.

The shipper had effected full insurance. The bills of lading sued on contain the following clause:

"In case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the

full benefit of any insurance that may have been effected upon or on account of said goods."

Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier. *Phœnix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312; *Wager* v. *Providence Insurance Co.*, 150 U. S. 99. In the case at bar, the shipper has received from the insurance companies an amount equal to the loss; but it is contended that the money was received as a loan or conditional payment merely, and that, therefore, the carrier is not relieved from liability. The essential facts are these:

The policies under which the shipper was insured contained the following, or a similar, provision:

"Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

The situation was, therefore, this: The carrier (including in this term the charterer, the ship, and the owners) would, in no event, be liable to the shipper for the damages occasioned by unseaworthiness, *unless* guilty of negligence. The insurer would, in no event, be liable to the shipper, *if* the carrier was liable. In case the insurer should refuse to pay until the shipper had established that recovery against the carrier was not possible—prompt settlement for loss (which is essential to actual indemnity and demanded in the interest of commerce) would be defeated. If, on the other hand, the insurers should settle the loss, before the question of the carrier's

liability for loss had been determined, the insurer would lose the benefit of all claims against the carrier, to which it would be subrogated in the absence of a provision to the contrary in the bill of lading, *The "Potomac,"* 105 U. S. 630, 634; and the carrier would be freed from liability to any one. In order that the shipper should not be deprived of the use of money which it was entitled to receive promptly after the loss, either from the carrier or from the insurers, and that the insurer should not lose the right of subrogation, agreements in the following (or similar) form were entered into between the insurers and the shipper:

"New York, Aug. 15, 1912.

"Received from the Federal Insurance Company, Twenty-three hundred four and 16/100 dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about ——— ———, 190—, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company.

The W. J. McCahan Sugar Refining Co.,

$2,304.16 R. S. Pomeroy, *Treasurer.*

"Description of property:—Sugar."

Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating

the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

Agreements of this nature have been a common practice in business for many years. *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. Rep. 847; *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed. Rep. 350. It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible

salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the parties to the transaction. Compare *The Kimball*, 3 Wall. 37, 44. The insurer could not have been obliged to pay until the condition of their liability (*i. e.*, non-liability of the carrier) had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier, until the insurers had paid. In consideration of securing them the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.

Third. The owners contend that, under § 4283 of the Revised Statutes and § 18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. *Pendleton* v. *Benner Line*, 246 U. S. 353.

It is also urged that, as between the owners and the Insular Line, the original warranty of seaworthiness was

exhausted upon delivery of the ship to the charterers and that the maintenance clause relied upon does not import a warranty of seaworthiness at the commencement of each voyage under a time charter, but merely an obligation to pay the expense of keeping her hull and machinery in repair throughout the service. Neither the language of the clause nor the character of time charters afford support for this contention. The charter of the vessel states clearly that the vessel "being, on her delivery, tight, staunch, [and] strong" the owners will "maintain her in a thoroughly efficient state in hull and machinery for and during the service"—*not pay the expense* of maintaining her. This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage. Compare *The Burma*, 187 Fed. Rep. 94; *Whipple* v. *Mississippi & Yazoo Packet Co.*, 34 Fed. Rep. 54; *McIver & Co., Ltd.*, v. *Tate Steamers, Ltd.*, [1903] 1 K. B. 362; *Park* v. *Duncan & Sons*, 35 Scottish Law Rep. 378. If *Giertsen* v. *Turnbull & Co.*, 45 Scottish Law Rep. 916, strongly relied upon by the owners, is inconsistent with this view, it should be disregarded.

Fourth. The vessel was owned 54/80ths by Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach; 10/80ths by Edgar F. Luckenbach, individually; and 16/80ths by John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach. All of these parties were impleaded as owners. The charter party was signed only by "Estate of Lewis Luckenbach,

per Edgar F. Luckenbach, *Trustee;*" but it was admitted by all the petitioners that Edgar F. Luckenbach, Trustee, in so signing the charter party, acted for all the owners and intended to bind all. The decree in the District Court declares that libelant was entitled to recovery "from the respondents Edgar F. Luckenbach et al., her owners." The decree in the Circuit Court of Appeals adjudged (presumably through inadvertence) that the payment should be made by "the Estate of Luckenbach." The right to recover against all the owners, for the full amount, in case any of them was so liable, was not controverted. The decree of the Circuit Court of Appeals should be modified so as to render all the owners liable. Compare *Pendleton* v. *Benner Line,* 246 U. S. 353. As so modified, the decree is

Affirmed.

MACMATH, ADMINISTRATRIX OF MACMATH, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 79. Argued November 22, 1918.—Decided December 9, 1918.

Revised Statutes, § 2621, authorizes Collectors to employ, with the approval of the Secretary of the Treasury, weighers at the several ports, and does not prescribe their number; the Act of July 26, 1866, c. 269, § 3, 14 Stat. 289, fixes their salaries at $2,500; Rev. Stats., § 2634, authorizes the Secretary to fix the number and compensation of clerks to be employed by any Collector. M received successive appointments as clerk "to act as acting U. S. weigher," at compensations less than $2,500 per annum, and took oath as such. *Held,* that the fact that he was assigned, and performed, the duties of weigher did not place him in that office and entitle him to its salary. 51 Ct. Clms. 356, affirmed.

THE case is stated in the opinion.

Mr. William E. Russell, with whom *Mr. Seward G. Spoor*, *Mr. Louis T. Michener* and *Mr. Perry G. Michener* were on the briefs, for appellant.

Mr. Assistant Attorney General Thompson, for the United States, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

When an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary prescribed by statute; and effect will not be given to any attempt to deprive him of the right thereto, whether it be by unauthorized agreement, by condition, or otherwise. *United States* v. *Andrews*, 240 U. S. 90; *Glavey* v. *United States*, 182 U. S. 595.

Section 3 of the Act of July 26, 1866, c. 269, 14 Stat. 289, provides, that weighers at the port of New York shall receive an annual salary of $2,500. Section 2621 of the Revised Statutes authorizes collectors to employ, with the approval of the Secretary of the Treasury, weighers at the several ports; and it does not prescribe their number. Section 2634 authorizes the Secretary of the Treasury to fix the number and compensation of clerks to be employed by any collector. The statutes appear to have made no specific provision for the appointment of assistant or acting United States weighers. On May 12, 1909, plaintiff's intestate (who had been appointed on August 1, 1896, "assistant weigher of customs" at a salary, "when employed," of $3 per diem and had later received a like appointment at $4 per diem) was appointed by the collector "clerk, class 3, new office, to act as acting U. S. weigher" with compensation at the rate

of $1,600 per annum. On August 18, 1911, he received a like appointment as clerk, class 4, at the rate of $1,800 per annum. He continued to perform the duties assigned and was paid the salary named until his death, October 8, 1913. In February, 1915, his administratrix filed with the Auditor of the Treasury a claim for salary of her intestate as "United States weigher of customs" at the rate of $2,500 per annum, from May 12, 1909, to and including October 7, 1913. Upon disallowance of the claim she brought this suit in the Court of Claims for the amount, namely, $11,013.89. The court found for the defendant and entered judgment dismissing the petition. The case comes here on appeal.

There is a fundamental objection to the allowance of the claim or any part thereof. MacMath was never appointed weigher and never held office as such. His only appointment was that of clerk; his oath of office being as "clerk and acting U. S. weigher, class 3." The Secretary of the Treasury clearly had the right to create and the collector to make appointment to the position of clerk and to designate duties of the appointee. The fact that the incumbent performed also some or all the duties of a weigher does not operate to promote him automatically to the statutory office of weigher. And the fact that his appointment as clerk in 1909 was made as a part of a reorganization of the service, whereby four of the five positions of United States weigher were abolished, is immaterial; except as showing even more clearly that it was the intention not to appoint him weigher. No contention is, or could successfully be, made that the weighing should be paid for as an extra service, even if it was not a duty attaching to his position as clerk. See *United States* v. *Garlinger*, 169 U. S. 316.

We have, therefore, no occasion to consider whether effect should be given to the agreement by the intestate not to make claim to compensation as acting weigher, or

to his acceptance of the lower compensation without protest during the entire term of his service; nor need we consider the effect of § 2 of the Act of July 31, 1894, c. 174, 28 Stat. 162, 205, which provides that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."

The judgment of the Court of Claims is

Affirmed.

PETRIE ET AL. *v.* NAMPA AND MERIDIAN IRRIGATION DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 47. Argued November 19, 1918.—Decided December 9, 1918.

Upon an application to an Idaho court for approval of a proposed contract for sale of water rights by the United States to an Irrigation District, and for sharing between them certain drainage expenses, landowners objected that the contract exceeded the powers of the United States, the Secretary of the Interior, and the District, that its execution would entail assessments on their land within the District otherwise supplied with sufficient water for irrigation, and that for this reason they would be deprived of property without due process of law, or compensation, in violation of the Fourteenth Amendment. *Held*, that a federal question was presented. P. 157.

But, since the Idaho Supreme Court, while holding that the contract would be valid and that its confirmation would not invade the landowners' constitutional rights as claimed, also decided that under the state law the objection was premature for the reason that such confirmation would not impose any burden upon their lands until assessments should be made upon them in subsequent pro-

ceedings on the basis of benefits conferred, and upon full notice and hearing with opportunity for plenary judicial review; *Held*, that the judgment was based upon an independent, non-federal ground, broad enough to support it, and that a writ of error from this court must be dismissed. P. 158.

Writ of error to review 28 Idaho, 227, dismissed.

THE case is stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. J. B. Eldridge* and *Mr. James H. Richards* were on the briefs, for plaintiffs in error.

Mr. B. E. Stoutemyer, with whom *Mr. H. E. McElroy* and *Mr. Will R. King* were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Board of Directors of the Nampa and Meridian Irrigation District, a quasi-municipal corporation, organized under the laws of Idaho (*Pioneer Irrigation District* v. *Walker*, 20 Idaho, 605; *Colburn* v. *Wilson*, 23 Idaho, 337), filed an amended petition in the District Court of that State, praying for the examination, approval and confirmation by the court of a contract which it desired to enter into with the United States Government acting through the Secretary of the Interior, which provided that the United States should sell and the Irrigation District should purchase, and in the manner prescribed pay for, a supply of water to irrigate an extensive tract of arid land within the District and to supplement an insufficient supply, for other lands, which the District had theretofore acquired from other sources. The proposed contract also provided that the United States and the District should share in the expense of constructing a system of drainage, to reclaim considerable areas of land within the District which had become "water-logged"

through seepage from both the Government and the District systems of irrigation, and to prevent threatened damage to other lands from such seepage.

The proceeding involved is prescribed by the state statutes, which provide that when such a petition is filed the court shall fix a day for hearing, and shall notify the persons interested therein by publication, for four weeks, in a newspaper published in the county. Any persons interested in the subject-matter may demur to or answer the petition, and the rules of pleading and practice prescribed in the Code of Civil Procedure of the State (Idaho Revised Codes, vol. I, title 14, c. 4, §§ 2397, 2398 and 2401) are made applicable.

The required notice having been given, the plaintiffs in error, owners of lands within the Irrigation District, filed an "answer and cross complaint" in which they denied many allegations of the petition and affirmatively alleged: That if the contract should be entered into they would be obliged to pay an assessment of $75 upon each acre of their land for water rights which they did not require because they had a sufficient supply from other sources; that neither the United States, nor the Secretary of the Interior nor the Irrigation District had authority under the laws of the United States to enter into the contract and that, for these reasons, if it were approved and entered into, the plaintiffs in error would be deprived of their property without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States. A permanent injunction was prayed for restraining the petitioners from entering into the proposed contract and from levying assessments to carry it into effect.

The District Court approved the contract, upon a full finding of facts, and its judgment was affirmed by the Supreme Court of the State in a judgment which we are asked to review upon this writ of error.

A motion to dismiss the writ of error was postponed until the hearing upon the merits which has now been had.

The statement which we have made of the issues presented by this record shows that the first ground of the motion—that a federal question was not presented—can not be sustained. *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179, 185.

But the second ground of the motion to dismiss is valid, viz: that, even if it be conceded that the Supreme Court decided a federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any federal question and broad enough to support the judgment, and for this reason the federal question involved will not be considered on this writ of error, under a series of decisions by this court extending at least from *Klinger* v. *Missouri*, 13 Wall. 257, 263, to *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

While the State Supreme Court finds that the United States, acting through the Secretary of the Interior, could lawfully enter into the proposed contract and that the approval and confirmation of it by the court would not deprive the plaintiffs in error of their property without due process of law or without compensation, yet the court also holds that the "cross complaint," in which these federal rights are asserted, was filed prematurely under the statutes and practice of the State of Idaho, and that no charge or burden would be imposed upon the lands of the plaintiffs in error by the approval of the contract, assuming that it should be executed. This for the reason that the state statute provides that any assessments upon such lands to carry into effect the purposes of the contract must subsequently be made by the Board of Directors of the Irrigation District on the basis of benefits conferred, at a meeting of the Board, to be held at a time and place of which the owners of the lands to be

charged must be notified by postal card and by newspaper publication (Idaho Revised Codes, vol. I, title 14, c. 4, § 2400). At such meeting the land owner may object to any proposed assessment on his land and if the objection is overruled by the Board, and he does not consent to the assessment as finally determined, such objection shall, without further proceeding, be regarded as appealed to the District Court and shall there again be heard in proceedings to confirm the assessment. It is expressly provided that upon such hearing the court shall disregard every error, irregularity or omission, which does not affect the substantial rights of any party and shall correct any error which may be found in such assessment or any injustice which may result from it.

For this reason the court held that the claims stated in the "cross complaint" were prematurely asserted, were "wholly immaterial," to the inquiry presented by the petition of the District, and "should have been stricken from the answer." We cannot doubt that this conclusion of the State Supreme Court, based as it is wholly on state statutes and procedure, is broad enough to sustain the judgment rendered, irrespective of the disposition of any federal question involved, and therefore the writ of error will be

Dismissed.

PURE OIL COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 74. Argued November 21, 22, 1918.—Decided December 9, 1918.

For the purpose of promoting the public safety and of protecting the public from fraud and imposition, a State, in the absence of conflicting regulation by Congress, may provide for inspection of illu-

minating oils and gasoline, while yet in interstate transit, and impose a charge upon the owner reasonably sufficient to cover the cost of inspection. P. 161.

Such inspection charges, fixed by a state legislature, are accepted as reasonable unless clearly shown to be obviously and largely beyond what is needed to pay for the inspection service rendered. P. 163.

Where the receipts from inspection fees through a number of years considerably exceeded the cost of inspection, but this was explained by increasing consumption of the product inspected, and the legislature during the period reduced the fee, *held*, that there was no ground to question the good faith of the legislature in enacting the law under which the fees were charged. P. 164.

Upon the question whether an inspection of gasoline served to promote public safety and protect against fraud and imposition, concurrent findings of state trial and supreme courts *held* conclusive. *Id.*

Whether oil and gasoline, imported into a State in tank cars, continued to be subjects of interstate commerce while awaiting state inspection at the owner's place of business, before they were unloaded and held for general sale and distribution—not decided. *Id.*

134 Minnesota, 101, affirmed.

THE case is stated in the opinion.

Mr. Nathan H. Chase, with whom *Mr. Clifford Thorne* was on the brief, for plaintiff in error.

Mr. Egbert S. Oakley, Assistant Attorney General of the State of Minnesota, with whom *Mr. Clifford L. Hilton*, Attorney General of the State of Minnesota, was on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this case the State of Minnesota sued the plaintiff in error, an extensive dealer in oils, to recover fees, which were charged for the inspection of oils and gasoline, between February 1, 1913, and April 25, 1915. The judgment of the State Supreme Court affirming that of the trial court in favor of the State is before us for review on writ of error.

The inspection involved was provided for by chapter 502 of the General Laws of the State of Minnesota for the year 1909, the title of which is: "An Act relating to the inspection of petroleum products, the appointment of chief inspector of oils and deputy inspectors, manner of inspection, establishing fees for inspection and salaries of inspectors, prohibiting the sale of adulterated oils, and providing penalties for the violation thereof," and the title of the chapter in which the original act is embodied in the General Statutes of the State is: "Inspector of Oils." Gen. Stats. of Minnesota, 1913, c. 20.

Section 3622 provides that no person shall sell or offer for sale in the State illuminating oil which has not been inspected as provided for by the act, or which will ignite at a temperature below 120° Fahrenheit. A method is prescribed for making this "fire test," and for determining the gravity of such oils and the results must be stenciled on each container of oil.

Section 3625 deals with gasoline, and requires that it shall be subject to the same inspection and control as is prescribed for illuminating oils "except that the inspectors are not required to test it other than to ascertain its gravity."

All containers of gasoline must be labeled conspicuously with the word "Gasoline," the gravity must be stenciled thereon and it is made unlawful to sell or offer it for sale until inspected and approved. Provision is also made (§ 3626) for the inspection of gasoline "receptacles" to keep them "free from water and all other foreign substances," and the sale of "adulterated" gasoline is prohibited (§ 3627). Obviously this is, in form, a not unusual type of inspection law.

The findings of fact by the trial court include the following:

During the period under discussion the State inspected 9,914 barrels of oil and 81,998 barrels of gasoline owned

by the plaintiff in error, all of which were brought into Minnesota from other States by common carriers in tank cars, which were held at the place of business of the plaintiff in error until inspected, and all were unloaded from the cars in which they arrived and were held for general sale and distribution. And this in terms:

"That the testing of gasoline in the manner provided by the statute . . . indicates to the public the degree of safety of such gasoline, and has a fair relation to the quality and value thereof. That such inspection protects the community, as applied to sales of gasoline in Minnesota, from frauds and impositions, and advises, informs and warns the public of the volatile character of said gasoline and the relative degree of care to be exercised in handling, storing and using the same."

On the case thus stated it is claimed that the Supreme Court of Minnesota erred in refusing to hold:

First, That the inspection fees imposed were so excessive in amount as to render the act a revenue rather than an inspection measure and that as such it offends against § 8, Article I of the Federal Constitution, as an attempt by the State to regulate interstate commerce; and

Second, That to the extent that the act applies to gasoline it is not a valid exercise of the police powers of the State, because it does not serve to protect or safeguard the health, morals or convenience of the public and therefore offends against the Fourteenth Amendment to the Federal Constitution by depriving the plaintiff in error of its property without due process of law to the extent of the fees which it in terms exacts.

The principles of law applicable to the decision of the case thus before us are few and they are perfectly settled by the decisions of this court.

In the exercise of its police power a State may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and

welfare or to protect the public from frauds and imposition when dealing in articles of general use, as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected. *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345, 357, 358, 361; *McLean & Co.* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Asbell* v. *Kansas*, 209 U. S. 251; *Patterson* v. *Kentucky*, 97 U. S. 501, 504; *Savage* v. *Jones*, 225 U. S. 501, 525.

Specifically, state laws providing for the inspection of oils and gasoline have several times been recognized as valid by this court. *Patterson* v. *Kentucky*, 97 U. S. 501; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture of North Carolina*, 222 U. S. 380, and *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159.

But if such inspection charge should be obviously and largely in excess of the cost of inspection, the act will be declared void because constituting, in its operation, an obstruction to and burden upon that commerce among the States the exclusive regulation of which is committed to Congress by the Constitution. *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64; *Foote & Co.* v. *Maryland*, 232 U. S. 494, 504, 508.

Plainly the application of the principles thus stated leaves open for consideration only the question as to whether the inspection charge is so excessive as to render the act a revenue measure, as the plaintiff in error claims that it is, and not an inspection law enacted in good faith to promote the public safety and prevent fraud and imposition upon the users of oil and gasoline. In the consideration of this question the discretion of the legislature in determining the amount of the inspection fee will not lightly be disturbed. Its determination is *prima facie* reasonable and the courts will not "enter into any nice

calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered." *Foote & Co.* v. *Maryland*, 232 U. S. 494, 504, and *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419.

The findings of fact give the following statement of receipts and expenses under the law assailed, from and including the year 1909, in which it was passed, to April 30, 1915, which includes the last day covered by the claim in suit, viz:

Year	Receipts	Expenses	Percentage of Receipts Used for Department Expenses
1909	$34,934	$30,288	87%
1910	50,667	40,044	79%
1911	56,852	40,494	71%
1912	63,354	39,999	63%
1913	72,656	47,117	65%
1914	81,565	52,467	64%
July 31, 1914, to April 30, 1915,	62,689	46,863	75%

This statement of expenses, however, does not include any charge for offices for the Oil Department, which were in the state capitol, for the services of the state auditor and treasurer in keeping accounts and making collections, for legal counsel, and for services of chemists, or for the Public Examiner's Department, these not being susceptible of exact determination. The reduced percentage of expenses to receipts in several of the years was obviously due to the rapid expansion in the use of gasoline without a corresponding increase in the expenses of administration. This percentage, however, was rising in 1915 and doubtless has increased greatly since, under war conditions. We take judicial notice also of the fact that in 1915 the inspection

fee on oil and gasoline in tank cars was reduced by the legislature from 10 to 7 cents and in 1917 from 7 to 5 cents. It was obviously impossible for the state legislature to determine accurately in advance either what the receipts from or the cost of inspection would be, and having regard to the period of rapid increase in the use of gasoline, through which the country was passing in the years under consideration, and to the action of the legislature in reducing the fee, we cannot consent to impute to that body a purpose other than to conform to the requirements of the Constitution when enacting this legislation.

The conclusion thus arrived at sustains the validity of the state law as an inspection measure and renders it unnecessary to consider the much argued question as to whether or not the oil and gasoline in question were in interstate transit when inspected. As an inspection law, under the decisions cited, the act is validly applicable, alike whether the property was in intra or in interstate commerce when inspected.

Neither is it necessary to consider whether the evidence sustains the contention that the inspection of gasoline provided for by the act was of a character such that it did not serve to promote the public safety or to protect the community against fraud and imposition. The finding of fact by the trial court, approved by the Supreme Court of the State, is accepted as conclusive by this court. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593.

It results that the judgment of the Supreme Court of Minnesota must be

Affirmed.

Counsel for Parties.

WELLS, FARGO & COMPANY *v.* STATE OF NEVADA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 40. Argued November 14, 1918.—Decided December 16, 1918.

Under a Nevada law providing only for an *ad valorem* tax on property, a state board valued the tangible and intangible personal property used within the State by a foreign express company at so much for each mile of its line employed there in local and in interstate commerce; and an assessor in listing the part within his county at the valuation per mile so fixed inaccurately characterized the property as consisting of the right to carry on an express business. Accepting as conclusive that his action must be construed under and controlled by the state statute and the action of the board, as decided by the state court, *held*, that the tax was not on the privilege of engaging in interstate commerce, but on the property in the county. P. 167.

In an action to enforce the tax, if the valuation was excessive and burdensome to interstate commerce, the company, under Nevada Rev. Laws, 1912, § 3664, was entitled to prove the facts and secure a reduction, but in this case it failed to do so. P. 168.

A tax is not wanting in due process, even if the valuation is originally made *ex parte*, if it is enforced only through a judicial proceeding affording notice and opportunity for full hearing. *Id.*

38 Nevada, 505, affirmed.

THE case is stated in the opinion.

Mr. Charles W. Stockton, with whom *Mr. Harry S. Marx* was on the brief, for plaintiff in error.

Mr. William C. Prentiss, with whom *Mr. George B. Thatcher*, Attorney General of the State of Nevada, was on the brief, for defendant in error.

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

This was an action to enforce a tax levied in Humboldt County, Nevada, against the express company. Several objections were interposed, some presenting local and others federal questions, but all were overruled and payment of the tax directed. 38 Nevada, 505. This writ of error was allowed prior to the Act of September 6, 1916, c. 448, 39 Stat. 726.

The federal questions are all that we can consider, and they are: Whether the tax was laid on the privilege or act of engaging in interstate commerce, whether the tax proceedings were without due process of law, and whether they otherwise were such as to make the tax a burden on interstate commerce.

The company is a Colorado corporation engaged in the express business in this and other countries. One of its lines extends through Humboldt and other counties in Nevada, over the Southern Pacific Railroad, and is used in both intrastate and interstate commerce, but principally the latter. The tax was for the year 1910.

As construed by the state court, the statute [1] under which the tax was imposed does not provide for a privilege or franchise tax, but only for an *ad valorem* property tax. Acting under the statute, a state board valued the company's personal property, tangible and intangible, used in its express business within the State, at $300 per mile of line; and it then became the duty of the assessor of Humboldt County to enter or list on the assessment roll at that valuation so much of the line as was in his county. In making the entry he accurately gave the length of the line in the county, the railroad over which the same was operated and the valuation fixed by the state board, but

[1] Revised Laws, 1912, §§ 3621, 3622, 3624, 3797–3801, 3807.

inaccurately described the property as consisting of the right to carry on an express business there.

Looking only at that entry there is strong ground for saying that the tax was laid on the privilege or act of doing an express business which was principally interstate. On the other hand, the action of the state board, on which the assessment concededly was predicated, indicates that what was taxed was the company's property in Humboldt County. The difference is vital, for, consistently with the commerce clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the State, although chiefly employed in such commerce. *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220; *s. c.* 166 U. S. 185, 218; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 225–227; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453.

The company insists that the State is concluded by the entry on the assessment roll. But the state court, as shown in its opinion, rejects that view and holds, in effect, that the entry must be construed in the light of the statute and the action of the state board, and that when this is done it is apparent that the tax was not laid on the privilege or act of engaging in interstate commerce, but on the company's property within the county. We perceive no ground for disturbing that ruling. In so far as it turns on the authority of the state board and the assessor under the statute and the relative effect to be given to their acts it is not reviewable here, and in so far as it relates to what really was the subject of the tax we think it was right. See *Cudahy Packing Co.* v. *Minnesota, supra*, p. 454. Evidently the company at one time took this view of the tax, for in an amendment to its answer we find an allegation that the state board "valued the property used by this defendant at the rate or sum of

$300 for every mile of railroad over which this defendant transacted business, and apportioned said assessment or tax to the various counties of the State in accordance with the number of miles of such railroads, so situated within said county, and that the tax herein sued for was not otherwise levied or assessed."

A want of due process of law in the sense of the Fourteenth Amendment is asserted because the valuation by the state board was made without notice to the company or according it an opportunity to be heard. Assuming that the premise is correct (as to which the record is not entirely clear), we are unable to accept the conclusion. In Nevada the mode of enforcing a tax such as this is by a judicial proceeding wherein process issues and an opportunity is afforded for a full hearing. Only after there is a judgment sustaining the tax is payment enforced. Rev. Laws, 1912, §§ 3659–3665. This, as repeatedly has been held, satisfies the requirements of due process of law. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Gallup* v. *Schmidt*, 183 U. S. 300, 307.

It also is asserted that the state board in valuing the property acted on inaccurate data and applied erroneous standards which resulted in a valuation so excessive as to make the tax a burden on interstate commerce. It is true that some inaccurate data and some computations following erroneous standards were presented to the board by a state officer in support of a suggestion that the property be valued at $500 or more per mile of line. But the suggestion was not adopted, and it is not shown that the board's valuation was based on the data and computations so presented. Besides, if the valuation was excessive, the company was entitled in the present suit to show the true value and to have the tax reduced accordingly. Rev. Laws, 1912, § 3664. An attempt at such a showing was made, but the state court concluded

therefrom that a valuation of $300 per mile, as fixed by the board, was not excessive. It may be that the showing was not complete, but, even if so, it was the company's showing and was all that was before the court. After examining it we think it discloses no ground for condemning the tax as a burden on interstate commerce.

Judgment affirmed.

CAMPBELL *v.* WADSWORTH ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 72. Argued November 21, 1918.—Decided December 16, 1918.

The Seminole Agreement of October 7, 1899, 31 Stat. 250, provides for enrollment by the Commission to the Five Civilized Tribes of "all children born to Seminole citizens," up to and including December 31, 1899, and of all Seminole citizens then living, and that the rolls so made, when approved by the Secretary of the Interior, shall constitute the final rolls of Seminole citizens, upon which allotment and distribution of lands, etc., of the Seminole Indians shall be made, "and to no other persons." The next paragraph prescribes that, if any member of the tribe die after December 31, 1899, the lands, etc., to which he would be entitled if living, "shall descend to his heirs who are Seminole citizens." A father, enrolled only as a Seminole, the roll referring to his wife and family as Creeks, died after that date, leaving a wife and daughters, who were enrolled only as Creeks, their roll describing him as an enrolled Seminole. Both rolls were final; and they, with other evidence, are here regarded as establishing a Creek custom assigning children of mixed marriages the tribal status of their mother. *Held*, that the father's share of Seminole lands, subsequently allotted, did not descend to the mother or the daughters.

53 Oklahoma, 728, reversed.

THE case is stated in the opinion.

Mr. C. Dale Wolfe, for plaintiff in error, submitted.

Mr. Samuel Herrick, with whom *Mr. John S. Severson* was on the brief, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The defendants in error brought suit to quiet title to the lands in controversy in this case, the facts involved being agreed upon as follows:

Louis Cox, whose name appears in the final rolls of the Seminole Tribe of Indians, died intestate, on July 4, 1901, and left surviving him the defendants in error, Annie Cox, his widow, now Annie Wadsworth, and two daughters, Maggie Cox, now Maggie Beamore, and Nancy Cox, now Nancy Alexander. These three women were all duly enrolled on the Creek tribal roll in 1890, and in July, 1901, after the death of Cox, upon an application made in May, 1901, they were enrolled as citizens of the Creek Nation by the Commission to the Five Civilized Tribes, but neither of the three appears on the Seminole rolls. Certified copies of the "final" Seminole roll bearing the name of Louis Cox and of the Creek roll bearing the names of his wife and daughters are in the record. On the former is the notation "Wife and family Creeks" and in the latter Louis Cox is described as an enrolled Seminole.

No allotment of land had been made to Cox at the time of his death, but subsequently the land in controversy was allotted by the United States as his distributive share of the Seminole tribal lands.

The plaintiff in error claims title through one Lucy Wildcat, the only surviving relative of Cox whose name appears on the approved Seminole roll. The widow and daughters claim as heirs of Louis Cox.

The decision of the case depends upon the application to the facts thus stated of the second paragraph of the

agreement between the Government of the United States and the Seminole Tribe of Indians, dated October 7, 1899, and ratified by Act of Congress June 2, 1900, c. 610, 31 Stat. 250, the essential parts of which are as follows:

"First. That the Commission to the Five Civilized Tribes, in making the rolls of Seminole citizens, pursuant to the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred and ninety-nine, and the names of all Seminole citizens then living: and the rolls so made, when approved by the Secretary of the Interior, as provided by said Act of Congress, shall constitute the final rolls of Seminole citizens, upon which allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made, and to no other persons.

"Second. If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, *shall descend to his heirs who are Seminole citizens*, according to the laws of descent and distribution of the State of Arkansas, and be allotted and distributed to them accordingly: *Provided*, That in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father."

Plainly the facts agreed upon bring the case within the scope of the second paragraph thus quoted, and whether Lucy Wildcat, the only surviving Seminole relative of the deceased, or the wife and daughters of Cox, inherited the land in controversy depends upon the effect to be given to the phrase, "shall descend to his heirs who are Seminole citizens."

The Supreme Court of Oklahoma seemingly had little difficulty in concluding that this expression excluded "heirs" who were not Seminoles, and it adopted unanimously as its own the opinion by the Commission which found in favor of the plaintiff in error, containing the following: [154 Pac. Rep. 60, 61].

"The act under consideration says that such property 'shall descend to his heirs who are Seminole citizens.' Who are Seminole citizens as here designated? Section 1 of the act set out above provides for the enrollment of the Seminole citizens and says that in making out this roll the names of all of the citizens living on the 31st day of December, 1899, and all the children born to Seminole citizens up to that date, shall constitute the final rolls of Seminole citizens. In section 21 of the Original Curtis Act (Act Cong. June 28, 1898, c. 517, 30 Stat. 502), which provided for the enrollment of the citizens of the Five Civilized Tribes, which included the Seminole Nation, there is a provision which reads as follows:

"'The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.'

"From the reading of these two sections last above set out it plainly appears that neither the widow of the decedent Louis Cox, nor their two children, can be denominated 'Seminole citizens.' The widow undoubtedly is not so included because she is of the Creek blood and a citizen of that tribe, and the two children are excluded because they were born before December 31, 1899, and were not enrolled as Seminole citizens, and thus do not come within the provisions defining Seminole citizens."

But upon a rehearing of the case the court "withdrew" its former opinion and held that Congress intended that

the words "Seminole citizens" in the second paragraph of the act should have a more elastic meaning than was in terms given to them in the first paragraph and, by interpreting them so as to include the wife and daughters of the deceased, it found the title to the lands to be in the latter subject to the dower estate of the former. [53 Oklahoma, 728].

This judgment, being within the provisions of § 7 of the Act approved September 6, 1916, amending § 237 of the Judicial Code (39 Stat. 726), is properly before us for review on writ of error.

The first paragraph of the agreement, which we have quoted, prescribes the persons whose names shall go upon the Seminole roll and it declares that the rolls so made, when approved by the Secretary of the Interior, "shall constitute the final rolls" of "Seminole citizens" and that to these "and to no other persons" shall allotment of property be made. This definition of "Seminole citizens" is followed in the second paragraph with the provision that the property of an intestate, such as we have in this case, shall descend to his heirs who are "Seminole citizens."

There is nothing in the act to indicate an intention on the part of Congress or of the tribe that the words, "Seminole citizens," as used in the second, shall have any other meaning than that specifically given to them in the first paragraph, but, on the contrary, both the natural and the legal inference from their being used in such juxtaposition is that the same meaning shall be given them and that if a different or more comprehensive meaning had been intended it would have been expressed.

But there are other cogent reasons why courts should not modify these final rolls by liberal interpretation of this statutory provision.

The rolls of the Seminole Tribe were compiled by the Commission to the Five Civilized Tribes, a quasi-judicial tribunal, to which large powers were given by statute for

that specific purpose, and the action of the Commission, when approved by the Secretary of the Interior, made "final" by the statute, so conclusively settles all questions within its jurisdiction as to membership in the tribe and as to the rights of the Indians to tribal property, that they are subject to attack, as the judgments of courts are, only for fraud and mistake—of which there is no suggestion in this record. *United States* v. *Wildcat*, 244 U. S. 111.

The principal reason given by the Oklahoma Supreme Court for its second conclusion is that, the daughters of Cox being children born to a Seminole citizen prior to the 31st day of December, 1899, were entitled to enrollment as Seminole Indians under the first paragraph of the agreement and if so enrolled would be strictly within the terms of the act and would inherit the land.

We think it very clear that this reason is not sound.

The Seminole Tribe was derived from the Creek, and the tribal customs and traditions of the two had much in common. While this record does not show specifically what the tribal custom of the Seminoles was with respect to tribal recognition of children born of mixed marriages, it does show definitely that by the Creek Indians, and it is with enrolled Creek Indians that we are dealing, the children of mixed marriages were treated and enrolled as members of the tribe of their mother, for the names of the daughters of Cox are found on the tribal roll of the Creek Indians of 1890, when they were very young children, and again in 1901, when Maggie was twenty years of age and Nancy was seventeen, apparently on their own application, they and their mother were placed by the Commission on the final roll of the Creek Tribe. This Creek roll also shows that the father of the children, Louis Cox, was a Seminole, and the Seminole roll on which Cox's name appears bears the notation, "Wife and family Creeks." Thus it is plain that it was not through any mistake or

oversight that the children of Cox were omitted by the Commission from the Seminole roll and were placed upon the Creek roll, but that this was done for the sufficient reason that tribal custom and tradition required their enrollment as Creeks, and the law nowhere provided for their enrollment in more than one tribe. The final rolls, alike of the Seminoles and of the Creeks, thus made up by the Commission, were placed by the act of Congress, as we have seen, beyond amendment by the courts on such a record as we have here, and it is impossible for us to conclude that the daughters of Cox were entitled to enrollment as members of the Seminole Tribe, or that having been enrolled as Creeks they may now be given the rights of enrolled "Seminole citizens."

The Supreme Court also says that only "the most powerful and impelling reasons" could induce it to hold that it was the intention of the Indians to exclude their own children from participation in the distribution of their property after death.

While it is true that it seems unnatural for the Indians to have preferred more distant relatives to their own children in providing for the descent and distribution of their property, yet from the terms of the act before us, and also from the provisions of the Supplemental Creek Agreement that "only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation" (32 Stat. 500), it is clear that with the Indians the interests of the tribe were paramount to those of the family and it was with a knowledge of the mode of life of their primitive people, better and more intimate than the courts can now command, that they determined that this paramount purpose would best be served by giving to children born of mixed marriages the tribal status of their mother.

As we have said, this record does not show affirmatively that the Seminoles had a custom similar to this one of

the Creeks, but such is believed to have been the fact. The Supreme Court of Oklahoma, in its first opinion, said [154 Pac. Rep, 60,61]:

"The defendants have presented the additional proposition here that, according to the custom of the Seminole Nation, the blood of the mother determined the tribe to which the offspring belonged, and the fact that the children, plaintiffs here, were not enrolled as Seminole citizens was not due to any neglect of the parents of the said children or of the Commission to have said children enrolled on the Seminole roll, but the law and the custom of the Seminole Tribe were that the children were of the blood of the mother and members of that tribe to which the mother belonged. While we do not find it necessary to pass upon this proposition, and will leave it, as far as this opinion is concerned, an open question, yet we will say that as far as our investigation has led us, we are of the opinion that this last proposition is a correct statement of the law so far as it applies to the facts as presented in the case at bar."

In *Hughes Land Co.* v. *Bailey*, 30 Oklahoma, 194, the same court in discussing the rights of two daughters born of the marriage of a Creek man to a Seminole woman, said (p. 196): "By virtue of the citizenship of their mother they [the daughters] were enrolled as citizens of the Seminole Nation." And it may be noted that this custom prevails with the Seminole Indians of Florida, from whom those of Oklahoma are derived. (Annual Report, Bureau of American Ethnology, 1883–4, p. 508.) But the most persuasive evidence of this custom is, that the Federal Commissioners with, as we have seen, all of the facts as to parentage before them and considered, enrolled the daughters of Cox in the Creek Tribe of their mother and not in the Seminole Tribe of their father. The Commissioners in making up the rolls which were to be "final" were given authority to consult tribal records and rolls

and "to adopt any other means by them deemed necessary to enable them to make such rolls," (30 Stat. 495, § 21) and in their conclusion, arrived at after many years of experience and painstaking investigation, may well be found a cogent and impelling reason for accepting the terms of the statutory agreement as they are plainly written and for refusing to enlarge them by interpretation.

On its surface this case is typical of those hard cases which proverbially make bad law, but in reality, since the widow and children of Cox, as enrolled Creeks, were entitled each to an allotment in the Creek lands and property (30 Stat. 495, § 21; 31 Stat. 861, §§ 3, 28; and 32 Stat. 500, §§ 7, 8 and 9), their being excluded from an inheritance which they did not attempt to claim for a dozen years after the death of Cox does not present a degree of hardship calling for a strained interpretation of a plain statutory provision limiting inheritances to enrolled Seminole citizens, so that it may include not only persons not so enrolled, but persons who were actually enrolled as Creek citizens.

The conclusion we are announcing is consonant with prior holdings of this court under similar statutes. Thus, in *Washington* v. *Miller*, 235 U. S. 422, under the proviso in the Supplemental Creek Agreement of June 30, 1902, 32 Stat. 500, that "only citizens of the Creek Nation, male and female, . . . shall inherit lands of the Creek Nation," a judgment was affirmed, holding the grantee of a Creek mother entitled, as against the claims of a Seminole father, to lands inherited from the child of their marriage enrolled as a Creek, when, if the father had been an enrolled Creek, he and the mother would have shared the land equally.

And in *McDougal* v. *McKay*, 237 U. S. 372, again under the Supplemental Creek Agreement, it was decided that the Creek father of a child born of his marriage with a non-Creek mother inherited the entire estate of the child,

which died intestate, although his wife would have taken equally with him had she been an enrolled Creek.

All statutes of descent and distribution are arbitrary expressions of the purpose of the law-making power; and that the provisions of such a statute do not happen to meet the notions of justice of a court is not sufficient reason for indulging in an interpretation which modifies their plain and unambiguous terms. Especially is this true of these Indian statutes which are a progressive development, embodying concessions to tribal custom and tradition necessary to be made in order to accomplish a practical, though perhaps not an ideal, dissolution of the tribal relation and distribution of the tribal property.

The rights of this Creek mother cannot rise higher than those of her daughters.

It results that the judgment of the Supreme Court of Oklahoma must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

CLEVELAND-CLIFFS IRON COMPANY ET AL. *v.* ARCTIC IRON COMPANY.

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

No. 75. Argued November 22, 1918.—Decided December 23, 1918.

A certificate from the Circuit Court of Appeals consisting of recitals of facts interblended with questions of law, or of recitals which fail in themselves to distinguish between ultimate and merely evidential facts, affords no basis under the statute (Jud. Code, § 239) either for answering the questions propounded or for exercising the discretionary power to call up the whole record, and must be dismissed.

Certificate dismissed.

THE case is stated in the opinion.

Mr. A. C. Dustin and *Mr. Horace Andrews*, with whom *Mr. W. P. Belden* was on the briefs, for Cleveland-Cliffs Iron Co. *et al.*

Mr. S. W. Shaull and *Mr. C. C. Daniels*, with whom *Mr. A. C. Angell* was on the briefs, for Arctic Iron Co.

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

The certificate upon which this case is before us contains what are denominated findings of fact grouped under eighteen paragraphs covering eight pages of the record. Upon these findings we are asked to instruct as to six propositions of law, really amounting to twelve since each is two-fold, that is, stated in the alternative. But we are of opinion that we may not instruct as to these propositions for the following reasons.

In the first place, because we think it is clear that the statements which are declared in the certificate to be findings of fact are in no true sense entitled to that characterization, since the statements amount but to a narrative of facts mixed with questions of law so interblended, the one with the other, as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two, a duty which we may not be called upon to perform in giving instructions upon questions of law propounded under the statute controlling that subject.

In the second place, because even if the admixture of law and fact which inheres in the recitals in the certificate be overlooked, the recitals nevertheless, in and of themselves, fail to distinguish between facts which are merely evidential and those which are ultimate and which for that reason would be susceptible of furnishing support

for the legal propositions as to which instructions are asked.

It is true, indeed, that the statute gives us the discretion, when a case is certified, to direct the sending up of the whole record, but obviously the exercise of that discretionary power is not called for by a case where the certificate is of such a character as not to be embraced by the statute.

It must be, therefore, that this case affords no ground for directing the sending up of the whole record since here the certificate is inadequate to sustain the right to answer the questions stated. To hold to the contrary would be to cause a mistaken exercise of the right to certify specific questions to become the instrument by which the division of powers made by the statute would be disregarded.

The views which we have stated are in accord with the settled rules concerning the power to certify which have prevailed from the beginning. See *Dillon* v. *Strathearn S. S. Co.*, *post*, p. 182, and the authorities therein cited. It follows that the certificate must be and is

Dismissed.

MR. JUSTICE CLARKE, dissenting.

I greatly regret that I cannot concur in the conclusion of the court just announced.

That the certificate of the Circuit Court of Appeals is longer and more detailed than is usual is sufficiently explained by the unusual character of the facts in the case and of the questions of law involved. The certificate concludes with this statement:

"However, we consider that No. 5 presents a question of law which is, in the view most favorable to plaintiff, the ultimate one; and we desire that this question be answered, without prejudice from the inclusion of others in this certificate, if it shall be thought that the inclusion of the

others is not in accordance with the practice of the supreme court in this respect."

Question No. 5 is in the alternative, viz:

"5a. When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or,

"5b. Was it the duty of Mather as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?"

While these two questions run into each other and could, perhaps, have been written as one, nevertheless, in my judgment, each presents a question of law, arising upon recited facts, and each is stated with sufficient precision to bring it within the terms of § 239 of the Judicial Code and Rule 37 of this court, and I therefore think that these two questions, at least, should have been answered, or that this court should have required that the whole record of the case be sent up for its consideration.

DILLON *v.* STRATHEARN STEAMSHIP COMPANY, CLAIMANT OF STEAMSHIP "STRATHEARN."

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

No. 361. Argued November 5, 1918.—Decided December 23, 1918.

A certificate under Jud. Code, § 239, Rule 37, must state the facts pertinent to the questions certified, and this cannot be dispensed with by reference to the transcript and briefs in the Circuit Court of Appeals, which are no part of the record in this court.

A certificate which fails to comply with the rule in this respect must be dismissed.

Certificate dismissed.

THE case is stated in the opinion.

Mr. W. J. Waguespack and *Mr. Silas B. Axtell* for Dillon.

Mr. Ralph James M. Bullowa, for Strathearn S. S. Co., submitted.

Mr. Assistant Attorney General Brown, with whom *Mr. Robert Szold* was on the brief, for the United States as *amicus curiæ*.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, for the British Embassy as *amicus curiæ*, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

John Dillon, a British subject, filed a libel in admiralty in the United States District Court for the Northern

District of Florida in which he claimed the sum of $125.00, alleged to be due him for wages as a carpenter on the steamship "Strathearn." The District Court dismissed the libel. 239 Fed. Rep. 583. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. The libel was filed under the provisions of § 4 of the Seaman's Act of 1915, 38 Stat. 1164, 1165.[1]

The Circuit Court of Appeals certifies two questions to this court:

"First. Is section 4530 of the Revised Statutes of the United States, as the same was amended by section 4 of the act of Congress, approved March 4, 1915, entitled 'An Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea,' violative of the Constitution of the United States?

"Second. Is section 4530 of the Revised Statutes of the

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[1] Sec. 4. That section forty-five hundred and thirty of the Revised Statutes of the United States be, and is hereby, amended to read as follows:

"'Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: . . . *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement.'"

United States, as the same was amended by the last-mentioned act of Congress, approved March 4, 1915, violative of the Constitution of the United States in so far as it provides 'That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement?'"

The certificate is made under § 239 of the Judicial Code which makes provision for the certification of questions of law to this court from a Circuit Court of Appeals. The section provides that this court may give instruction on the questions certified, or it may order the whole record sent up for consideration and decision. Rule 37 of this court provides that in such cases the certificate shall contain a proper statement of the facts on which the questions of law arise. The certificate in this case fails to comply with this rule of court. It contains a partial statement of Dillon's contract with the ship. It states that no part of the sum sued for was due under the shipping articles signed by Dillon. It does not state the terms of payment agreed upon, when or where payments were to be made under the contract, or what advancements, if any, were to be made during the voyage. The certificate concludes: "For information as to the facts of the case copies of the transcript and briefs are herewith transmitted." Counsel argue the case by reference to the transcript of the record in the Circuit Court of Appeals, and it is apparent that a proper consideration of the case requires such reference. This transcript is no part of our record. This court alone has authority to have it sent up. The briefs in the Circuit Court of Appeals are no part of the record here. The certificate is required to state the pertinent facts in order that this court may answer the questions of law certified with reference to such facts, and not by searching the records and briefs of the Circuit Court of Appeals itself.

The certificate therefore fails to comply with our rule,

and in accordance with the established practice must be dismissed. *Cincinnati, Hamilton & Dayton R. R. Co.* v. *McKeen,* 149 U. S. 259, 261; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 422, and cases cited.

Dismissed.

SANDBERG ET AL. *v.* McDONALD, CLAIMANT OF THE BRITISH SHIP "TALUS."

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

No. 392. Argued November 5, 1918.—Decided December 23, 1918.

Section 11 of the Seaman's Act of 1915, c. 153, 38 Stat. 1164, prohibits, under criminal penalties, the payment of wages in advance to any seaman; provides that in no case shall such advancements absolve vessel, master or owner from full payment of wages when actually earned, or be a defense to a libel or action for their recovery; applies "as well to foreign vessels while in waters of the United States, as to vessels of the United States;" makes the master, owner, consignee, or agent of any foreign vessel who violates its provisions liable to the same penalty as if the vessel were domestic; and, requiring exhibition of shipping articles, denies clearance from our ports to any vessel of either class, unless the provisions of the section have been complied with. *Held,* not to apply to advancements made to alien seamen shipping abroad on a foreign vessel, pursuant to contracts valid under the foreign law; and that such advancements may be allowed for in paying such seamen in a port of the United States. P. 195.

A provision in this act for the abrogation of inconsistent treaty provisions is not opposed to the above construction, since it may properly be referred to other parts of the act abolishing arrest for desertion and conferring jurisdiction on our courts over wage controversies arising in our jurisdiction. P. 196.

The construction here adopted is the same as that adopted by the State Department in consular instructions; and the reports and

proceedings attending the legislation in Congress, so far as they may be considered, do not require a different conclusion. P. 197.

248 Fed. Rep. 670, affirmed.

THE case is stated in the opinion.

Mr. Alex. T. Howard for petitioners:

It was the broad purpose of Congress to grant to the seaman personal liberty and to prohibit as to all vessels that came within our jurisdiction the evil of paying the seaman his wages in advance and thereby to promote the welfare of the American merchant marine and the American seaman by an equalization of wages.

The language of the act is broad enough to cover such an advance, and even if this were not the case the payment of such an advance ought not to be upheld by an American court, when it is passing upon the civil rights of the parties with the *res* before it, because so clearly opposed to our public policy. Senate Doc. No. 228, 65th Cong., 2d sess.; 41st Ann. Report, Legal Aid Society.

The legislative history of the act shows that its purpose was to equalize wages. Report No. 645, 62d Cong., 2d sess., p. 7; *id.* pt. 2, pp. 2, 3, 5; Report No. 852, 63d Cong., 2d sess., pp. 19, 20.

By changing § 11 of the bill so as to make it apply "as well to foreign vessels as to vessels of the United States" instead of merely "to seamen engaged in ports of the United States for service on foreign vessels," Congress showed its purpose to prohibit advances to the full extent and thereby to equalize wages and to make possible the enforcement of the other humane provisions of the act.

The language is unambiguous and should be given its ordinary meaning. It was erroneous to limit the construction of the section by constraining the civil to the same field as the criminal provisions. *United States* v. *Twenty-five Packages of Hats*, 231 U. S. 358.

Mr. W. J. Waguespack for petitioners:

The penalty provision of the statute under the rule of construction in *United States* v. *Freeman*, 239 U. S. 117, is within the scope of legislative authority. The intent that § 11 should apply to foreign vessels when they enter into the ports of the United States to load and unload cargo, and while they remain in the waters of the United States, is manifest, for the statute provides that any master or owner of a foreign vessel who *has* violated this provision shall be liable for the penalty.

It is obvious that § 11 forms part of the general plan which Congress has mapped out to elevate and better the condition of American seamen, to secure a higher standard of service, and to benefit the American merchant marine by equalizing the costs of operation between our ships and those of other nations, for, as said by this court in *The Eudora*, 190 U. S. 169, "no one can doubt that the best interests of seamen as a class are preserved by such legislation."

The immediate purpose which Congress had in view in adopting this criminal provision was evidently to prohibit the entry into the ports of the United States of vessels with seamen who were victims of "crimps," as they are called, and who, having been paid advance wages, stood in a state of continuous involuntary servitude, to the end that discrimination against American seamen, and American shipowners, might be avoided.

The penalty provision of the statute and the civil provision are separable and it is obvious that Congress would have enacted the legislation with the penalty provision eliminated. *McCullough* v. *Virginia*, 172 U. S. 102; *Railroad Co.* v. *Schutte*, 103 U. S. 118; *James* v. *Bowman*, 190 U. S. 127; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388; *New York* v. *Miln*, 11 Pet. 102.

Assuming that no special policy against the making of advances against foreign seamen in a foreign port can be

deduced from § 11, still a public policy against making such advances everywhere can be deduced from the fact that it would operate injuriously against the general interest and policy of our own citizens. *Bank* v. *Owens*, 2 Pet. 527–538; *Woodward* v. *Roane*, 23 Arkansas, 523; *Marshall* v. *Sherman*, 148 N. Y. 9; *Hill* v. *Spear*, 50 N. H. 253; *The Kensington*, 183 U. S. 263.

The court erred in concluding that libelants were deserters, and in decreeing their wages forfeited.

Mr. Palmer Pillans, with whom *Mr. J. N. McAleer* was on the brief, for the ship, reviewed the prior legislation, and held that, so far as the matter in question was concerned, no new purpose was evinced by the present act. The section, as in previous laws, applied only to advancements made in our own waters. It should be taken with the old construction. They cited and discussed the following: *The State of Maine*, 22 Fed. Rep. 734; *The Windrush*, 250 Fed. Rep. 180; *The Elswick Tower*, 241 Fed. Rep 706, 710; *Patterson* v. *Bark Eudora*, 190 U. S. 169, 178, 179; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *United States* v. *Freeman*, 239 U. S. 117, 120; *Kenney* v. *Blake*, 125 Fed. Rep. 672; *The Alnwick*, 132 Fed. Rep. 117; *The Neck*, 138 Fed. Rep. 144, 146; *The Bound Brook*, 146 Fed. Rep. 160, 162; *The Kestor*, 110 Fed. Rep. 432, 434, 438, 441, 442, 444; *The Troop*, 117 Fed. Rep. 557, 560; *The Meteor*, 241 Fed. Rep. 735; *The London*, 241 Fed. Rep. 863; affirming 238 Fed. Rep. 645; *The Antelope*, 10 Wheat. 66; *Northern Pacific Ry. Co.* v. *Babcock*, 154 U. S. 198.

There is necessarily and tacitly attached to every enactment declaring a particular act unlawful the idea that the act shall be one committed within the sovereignty of the sovereign making the enactment. Such must be the case here. As the United States could not make it unlawful for a British master to pay seamen on a British

ship advance wages in Great Britain it is only reasonable to intend that the act, with this idea in mind, not only may be, but must be read thus: "That it shall be and is hereby made unlawful in any case to pay any seaman wages (anywhere within the territorial jurisdiction of the United States) in advance of the time," etc. It ought to be manifest, that the words "in any case" do not mean "in any place" or "anywhere," but do mean "under any set of circumstances that may arise when advance payments are made within the territorial jurisdiction of the United States." *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. And see *United States* v. *Freeman*, 239 U. S. 117, 120.

It should be noted that it is not the payment of advance wages, without more, that it is declared shall in no case absolve the vessel, but the payment of "such advance wages," that shall in no case absolve, etc. What does the "such" refer to? Unlawful advancements, of course, and no advancements are such unlawful advancements unless they are made within the territorial jurisdiction of the United States.

Mr. Assistant Attorney General Brown, with whom *Mr. Robert Szold* was on the brief, for the United States as *amicus curiæ:*

The evil sought to be remedied was the handicap of higher wage cost under which the then decadent American merchant marine was laboring. President's Message of December 7, 1903; Report of Merchant Marine Commission, January 4, 1905 (39 Cong. Rec., pt. 1, pp. 437–439; Senate Report No. 2755, 58th Cong., 3d sess.); Annual Report, Commissioner of Navigation, 1915, p. 159; Act of June 26, 1884, c. 121, 23 Stat. 53, § 20.

The legislative purpose to equalize the wage cost of foreign and domestic vessels leaving our ports was accomplished by limiting the enforcement of foreign contracts.

The deliberate intent to cover contracts made abroad is shown by the committee reports and legislative history. House Report No. 645, 62d Cong., 2d sess.; House Report No. 852, 63d Cong., 2d sess.; H. R. 23673, 62d Cong., 2d sess., 48 Cong. Rec., pp. 5242, 9259, 9429, 9431, 9432, 9434, 9435, 9502, 9503; Report Commissioner of Navigation, 1906, pp. 64, 92; 49 Cong. Rec., pt. 5, pp. 4567, 4588, 4806, 4854; 50 Cong. Rec. 5749; 52 Cong. Rec. 4646.

A reading of the act as a whole also shows this intent.

Section 4 is valid as a condition upon the entry of foreign vessels into American ports. The power to impose such conditions is an incident to the sovereignty of the nation. Vattel, Law of Nations (Chitty, ed. 1863), p. 40; *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, 493; *Weber* v. *Freed*, 239 U. S. 325, 329; *Turner* v. *Williams*, 194 U. S. 279, 289.

It seems clear in this case that Congress was seeking to impose the wage requirement as a condition to the entry of foreign vessels. *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Patterson* v. *Bark Eudora*, 190 U. S. 169.

The statute declares a rule of policy of the forum forbidding the enforcement of such contracts. *The Kensington*, 183 U. S. 263; *Fonseca* v. *Cunard S. S. Co.*, 153 Massachusetts, 553.

There is no question of the validity with respect to contracts executed between foreign seamen and foreign masters within the United States.

Mr. Justice Day delivered the opinion of the court.

This case brings before us for consideration certain features of the so-called "Seaman's Act." (38 Stat. 1164.) The act is entitled: "An Act To promote the welfare of American seamen in the merchant marine of

the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." It contains numerous provisions intended to secure better treatment of seamen, and to secure for them better conditions of service.

The libel charges a demand in Mobile, Alabama, for one-half part of the wages then earned by the seamen, and the refusal of the master to pay the amount which the libelants claimed to be due. The master paid each of them what he conceived to be due, deducting certain advances made to the men at Liverpool, England, where the seamen were signed.

The facts are:

The "Talus" is a British ship and the libelants and petitioners citizens or subjects of nations other than the United States and at the time of employment by the ship and before boarding her they received certain advances at Liverpool by the ship or its agents, a practice usual and customary and not forbidden by the laws of Great Britain. The advance did not, as to any libelant, exceed the amount of a month's wages.

The libelants boarded the ship at Dublin, Ireland, December 1, 1916, and remained in her service until they left her at Mobile, Alabama.

The ship arrived in American waters on February 11, 1917, off Fort Morgan, from whence she proceeded immediately to Mobile, where she remained until after February 24, and unloaded and loaded cargoes. During the voyage and at Mobile prior to February 22, libelants received certain payments from the ship in cash and in articles purchased from it.

On February 22 libelants demanded of the master of the ship payment of one-half of the wages earned by them to that date. The master then paid to them a sum which, with the cash paid them and the price of the articles

purchased as stated above, together with the advances made in Liverpool, equaled or exceeded the one-half of the wages then earned by each of them from the commencement of his service for the ship. It was less, however, than such one-half wages if the advances at Liverpool had not been included in the credits. The master claimed that those advances should be deducted from the one-half wages, and did deduct them, and the sum or sums paid by the master to the libelants exceeded the amount of wages earned by them for the eleven days the ship had been in American waters. The libelants quit the ship February 24, 1917, and were logged as deserters on the same day.

Under the foregoing statement of facts the question for decision is: Was the master entitled to make deduction from the seamen's pay in the amount of the advancements made at Liverpool? The District Court held that these advancements could not be deducted. 242 Fed. Rep. 954. The Circuit Court of Appeals reached the opposite conclusion. 248 Fed. Rep. 670. The pertinent section of the act for consideration reads:

"'SEC. 10 (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the

owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.

* * * * * * * *

"'(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

"'The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with.'"

The genesis and history of this legislation are found in U. S. Compiled Statutes, 1916, vol. 7, § 8323, annotated.

The Dingley Act of 1884 (23 Stat. 55, 56), which is the origin of this section, contains terms much like those found in this act. That statute, as the present one, in the aspect now before us, was intended to prevent the evils arising from advanced payments to seamen, and to protect them against a class of persons who took advantage of their necessities and through whom vessels were obliged to provide themselves with seamen. These persons obtained assignments of the advanced wages of sailors. In many instances this was accomplished with

little or no service to the men who were obliged to obtain employment through such agencies. In the Dingley Act it was made unlawful to pay seamen's wages before leaving the port at which he was engaged. In the present act it is made unlawful to pay seamen's wages in advance of the time when he has actually earned the same. The Act of 1884 by its terms applied as well to foreign vessels as to the vessels of the United States, and masters of foreign vessels violating the law were refused clearance from any port of the United States. The present statute is made to apply as well to foreign vessels while in the waters of the United States as to vessels of the United States.

In the present statute, in the section from which we have just quoted, masters, owners, consignees, or owners of foreign vessels are made liable to the same penalties as are the like persons in case of vessels of the United States. Such persons in case the vessels are those of the United States or foreign vessels, seeking clearance in ports of the United States, are required to present their shipping articles at the office of clearance, and no clearance is permitted unless the provisions of the statute are complied with.

The Act of 1884 came before the United States District Court for the Southern District of New York in the case of *The State of Maine*, 22 Fed. Rep. 734. In a clear and well-reasoned opinion by Judge Addison Brown the law was held not to apply to the shipment of seamen on American vessels in foreign ports. After some amendments in 1898, not important to consider in this connection, the matter came before this court in the case of *Patterson* v. *Bark Eudora*, 190 U. S. 169, and it was held to apply to a British vessel shipping seamen at an American port, and, furthermore, that the act, as thus applied to a foreign vessel in United States waters, was constitutional.

While the Seaman's Act of 1915 contains many provisions for the amelioration of conditions as to employment and care of seamen, in the aspect now involved we have called attention to the state of legislation and judicial decision when that act was passed. Did Congress intend to make invalid the contracts of foreign seamen so far as advance payment of wages is concerned, when the contract and payment were made in a foreign country where the law sanctioned such contract and payment? Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted, that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States. The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases, except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels "while in waters of the United States."

Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co.* v. *United Fruit Co.* 213 U. S. 347, 357. In *Patterson* v. *Bark Eudora, supra,* this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that

there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress. *United States* v. *Freeman*, 239 U. S. 117, 120. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample application treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provision. See Treaties in Force, ed. 1904, index, p. 969.

It is said that the advances in foreign ports are against the policy of the United States and, therefore, not to be

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sanctioned here. As we have construed this section of the statute, no such policy as to foreign contracts legal where made, is declared.

We have examined the references in the briefs of counsel to the reports and proceedings in Congress during the progress of this legislation so far as the same may have weight in determining the construction of this section of the act. We find nothing in them, so far as entitled to consideration, which requires a different meaning to be given the statute. We may add that the construction now given has the sanction of the Executive Department as shown in Instructions to Consular Officers, promulgated through the medium of the State Department.

We are of opinion that the Circuit Court of Appeals reached the right conclusion as to the meaning and interpretation of this section of the act, and its judgment is

Affirmed.

MR. JUSTICE McKENNA, with whom concur MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE, dissenting.

This is a libel in admiralty under the Seamen's Act of 1915 (38 Stat. 1164–1168), especially involving § 11.

The libel was filed by petitioners here and others. It was dismissed as to the latter and they have acquiesced in the judgment. The facts are set out in the opinion of the court.

With this case were submitted others that present the act of Congress in different aspects. Among these was No. 361 [*Dillon* v. *Strathearn S. S. Co.*, *ante*, 182]. It was a libel by a seaman who had shipped on a British vessel and was based on a demand for wages not due at the time of the demand under the terms of the shipping articles signed by him. Section 4 of the act, *infra*, was especially involved in consideration and its constitu-

tionality was attacked by the ship. The Circuit Court of Appeals for the Fifth Circuit, to which the case had gone, presented the question to this court in two aspects, first generally, and, second, more particularly that provision which makes the section "apply to seamen on foreign vessels while in harbors of the United States."

In the present case the ship is also British and the libelants and petitioners citizens or subjects of nations other than the United States, and the controversy is as to the right of the master to deduct from the wages, of which the law authorizes the demand, advances made to the seamen in Liverpool, England. To make such advances was a practice usual and customary and not forbidden by English law. It would seem, therefore, that the constitutional question is as much involved in one case as in the other. But under the court's construction of the act that question can be pretermitted. Under our construction it would seem to be not only of ultimate but of first insistence. The court, however, is of opinion that the question of the constitutionality of the act was not certified in such manner as to be subject to its consideration. From that conclusion we are not disposed to dissent and shall assume, as the court does, that the legislation is valid and pass to its consideration.

The instant case, the facts not being in dispute, is brought to the question of the right of the master to deduct the Liverpool advances, the ship asserting the right and the libelants denying it. The solution of the question necessarily depends upon the construction of the act, or, more precisely, its application. It is conceded, yielding to the authority of *Patterson* v. *Bark Eudora,* 190 U. S. 169, that the act applies to American seamen shipping in an American port upon foreign vessels, but it is contended from that case and other cases that it ought "to seem plain on principle and authority that the advancements statute has no effect except upon advancements

made to seamen within the territorial jurisdiction of the United States." And, indeed, it is insisted that Congress "*ex industria* in terms confined the application to the waters of the United States." The conclusions are deduced from the cases which are reviewed and the language of the act is quoted. We give the quotation as it amplifies the contentions:

"That this section shall apply as well to foreign vessels *while in waters of the United States* [counsels' emphasis], as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

"The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with."

The quotation is but a part of § 11.[1] It is preceded by

[1] Section 11 was an amendment of § 24 of the Act of December 21, 1898, and § 24 was an amendment of § 10 of the laws of 1884 as amended in 1886, and, as it now stands as far as pertinent, is as follows:

"Sec. 10 (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense

the explicit declaration that it is "unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages." There is no limitation of place or circumstances and the universality of the declaration is given emphasis and any implication of exception is precluded with tautological care by the provision that "the payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages." To qualify these provisions or not to take them for what they say, would, in our opinion, ascribe to the act an unusual improvidence of expression. And § 4 should be considered in connection. It is hence important that we give it in full. And it may be said that it is an amendment to § 4530, Rev. Stats. It is as follows:

"'Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive and demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and

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to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500."

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he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: . . . *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement.'"

This section and the others we have quoted express something more than particular relations of ship and seaman; they express the policy of the United States which no private conventions, no matter where their locality of execution, can be adduced to contravene. *The Kensington*, 183 U. S. 263; *United States* v. *Chavez*, 228 U. S. 525; *United States* v. *Freeman*, 239 U. S. 117. Nor are we called upon to assign the genesis of the policy or trace the evolution of its remedy to the act in controversy; and besides it has been done elsewhere. It is enough to say that the act itself demonstrates that it is intended as a means in the development of the merchant marine and it hardly needs to be added, to quote counsel for the Government, "that the welfare of the seaman is remarkably interrelated with that of the merchant marine." This certainly was the conception of Congress and answers the contentions based on contrary opinion and deductions. It is manifest also from the title of the act, which declares its purpose to be "To promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." Its efficacy as a means or the policy of the means is not submitted to our judgment. Ours is the simple service of interpretation, and there is no reason to hesitate in its exercise because of supposed consequences. The policy

of the act was so insistent that Congress did not hesitate to abrogate opposing treaties. Certainly, therefore, we cannot give a controlling force to the suggestion that to construe the act as the ship construes it and others, supporting the ship, construe it, is to "impose our conception of the rights of seamen upon the whole world in violation of the comity of nations." The reply is immediate: It was for Congress to estimate this and other results and to consider how far they were counterpoised or overcome by other considerations. If the section was ambiguous the asserted results might be invoked to resolve its meaning; but we do not think it is ambiguous.

It must be conceded, indeed, it is conceded, that the words of the sections are grammatically broad enough to include all seamen, foreign as well as American, and advances and contracts, wherever made, and to the contention that Congress had in mind and was only solicitous for American seamen, the answer is again immediate: The contention would take us from the certainty of language to the uncertainties of construction dependent upon the conjecture of consequences; take us from the deck to the sea, if we may use a metaphor suggested by our subject. Language is the safer guide, for it may be defined; consequences brought forward to modify its meaning may be in fact and effect disputed—foreseen, it may be, and accepted as necessary to the achievement of the purpose of the law. And the purpose is resolute, has been maintained for many years with increasing care, and the ship, being in the waters of the United States, not the nationality of the seamen, selected as its test. And lest there might be impediment in treaties, they are declared, so far as they impede, to be abrogated.

But authority may be adduced against the contentions. In *Patterson* v. *Bark Eudora*, *supra*, the Seamen's Act came under consideration, and it was contended, as it is contended now, that the title determined against the body

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of the act and that therefore the act did not apply to foreign vessels notwithstanding its explicit words. The contention was declared untenable and the reasoning of the court exhausts discussion on that and the other contentions as to the purpose and power of Congress. Of the first it was said that it was to protect sailors against certain wrongs practiced upon them, one of the most common being the advancement of wages; of the second it was said, quoting Chief Justice Marshall: "The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself." *The Exchange*, 7 Cranch, 116. The nationality of the seamen does not appear, but the vessel was foreign, and the application of the statute to the latter constituted the ground of controversy.

Of course, the language of an act, though universal, may find limitation in the jurisdiction of the legislature; but certainly a ship within the harbors of the United States is within the jurisdiction of the United States, and making its exercise "apply to seamen on foreign vessels," and "the courts of the United States . . . open to such seamen for its enforcement" was the judgment of Congress of the way to promote its purpose.

These considerations, we think, answer as well other contentions, that is, that the act "should be construed as applicable only to seamen shipped in an American port on vessels which remain for a time in or afterwards return to an American port to load or deliver cargo" or "to seamen of American nationality upon foreign or domestic vessels, irrespective of the port of shipment."

It is enough to say of the contentions, in addition to what has been said, that they impose on the statute qualifications and limitations precluded by its words and the purpose they express. There is a great deal said, and ably said, upon these contentions and the more pretentious one that the act would violate the Constitution of the

United States unless so "construed as not to apply to foreign seamen shipped on a foreign vessel in a foreign port, under a contract, valid where made . . . "

We cannot concede the qualification nor doubt the power of Congress to impose conditions upon foreign vessels entering or remaining in the harbors of the United States. And we think that the case of *The Eudora* declares the grounds of decision. Its principle is broader than its instance and makes the vessel and its locality in the waters of the United States the test of the application of the act and not the nationality of the seamen nor their place of shipment, nor contravening conventions, and precludes deductions of advances.

Nor is there obstacle in the penal provisions of the act. They may be distributively applied and such application has many examples in legislation. It is justified by the rule of *reddendo singula singulis*. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction. *United States* v. *Simms*, 1 Cranch, 252; *Commonwealth* v. *Barber*, 143 Massachusetts, 560; *Quinn* v. *Lowell Electric Light Corp.*, 140 Massachusetts, 106. The Seamen's Act especially invokes the application of the rule. The act applies to foreign vessels as explicitly and as circumstantially as it does to domestic vessels. Let the foreign vessel be in the waters of the United States and every provision of the act applies to it as far as it can apply. In other words, it gives the right to a seaman on a foreign vessel to demand from the master one-half part of the wages which he shall have earned at every port and makes void all stipulations to the contrary. And the remedy of the seaman in such case is made explicit. If his demand be refused ("failure on the part of the master to comply" are the words of the act) the seaman is released from his contract and he is entitled to the full payment of wages earned. And he is

given a remedy in the courts of the United States. The defense of an advance payment is precluded and clearance of the foreign vessel is forbidden. And thus the act has completeness of right and remedy and, we think, precludes judicial limitation of either. Its provisions are simple and direct, there is no confusion in their command, no difficulty in their obedience. Of course, a "master, owner, consignee, or agent of" any foreign vessel, to quote the words of the act again, cannot violate any provision of it if he be not in the United States. If there be provisions that cannot reach him, that with which this case is concerned can reach him.

We are, therefore, of opinion that the District Court was right in refusing to allow the Liverpool advances and the Circuit Court of Appeals was wrong in reversing the ruling.

NEILSON ET AL. *v.* RHINE SHIPPING COMPANY, CLAIMANT OF THE SAILING SHIP "RHINE."

HARDY ET AL. *v.* SHEPARD & MORSE LUMBER COMPANY, CLAIMANT OF THE BARKENTINE "WINDRUSH."

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

Nos. 393, 394. Argued November 5, 1918.—Decided December 23, 1918.

Section 11 of the Seaman's Act of 1915, c. 153, 38 Stat. 1164, construed as not prohibiting advance payment of wages when made by an American vessel to secure seamen in a foreign port. P. 212. *Sandberg* v. *McDonald*, *ante*, 185.

250 Fed. Rep. 180, affirmed.

The cases are stated in the opinion.

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

A contract cannot be given legal effect in a court of the United States which is contrary to the declared public policy of the United States; and this rule is not affected by the fact that the objectionable parts of the contracts have been executed and that those remaining are innocuous. *Hope* v. *Hope*, 8 DeG. M. & G. 731; *The Kensington*, 183 U. S. 263.

The policy of a State is evidenced by its constitution and laws. It is also obvious that no State will give effect to the laws of another on the principles of comity when the effect would be injurious to the State or its citizens. *Woodward* v. *Roane*, 23 Arkansas, 523; *Marshall* v. *Sherman*, 148 N. Y. 9; *Hill* v. *Spear*, 50 N. H. 253, 262.

This practice of "crimping" is vile and pernicious, destructive of a free and clean class of seamen. It involves greater moral turpitude than gambling. See *Patterson* v. *Bark Eudora*, 190 U. S. 169.

The contract was one looking to a performance partly on board an American vessel while on the high seas and partly within the territorial jurisdiction of the United States; the law of the place of performance governs.

Congress intended the act to apply to all advances made in foreign ports where the satisfaction of the advance note might be made in the United States. The penal provisions of a statute do not necessarily make it penal in its whole intent or for all purposes. *Hyde* v. *Cogan*, 2 Doug. 699; *Short* v. *Hubbard*, 2 Bing. 349. Also a statute which is made for the good of the public, though it is penal, ought to receive an equitable and liberal construction. *Tyner* v. *United States*, 23 App. D. C. 324.

In affording relief in a civil suit under a statute, both remedial and penal, the court will not be bound by any

narrow technical or forced interpretation by which it might have been bound were the statute alone penal. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Twenty-five Packages of Panama Hats*, 231 U. S. 358.

A statute should also be read with reference to its leading idea, and its predominant purpose will prevail over the literal import of particular terms.

Even a cursory review of the various sections of this act reveals in Congress a zealous regard for the uplift, protection and emancipation of American seamen. The legislation against "crimping" is but one of the many reforms, sought by this and earlier laws which throw light on the meaning of this one.

If the act be regarded as strictly penal, Congress, under the commerce clause, has ample authority to punish for extra-territorial offenses. *United States* v. *Craig*, 28 Fed. Rep. 795, 801; *United States* v. *Gordon*, 5 Blatchf. 18. See *The Belgenland*, 114 U. S. 355; *The Brantford City*, 29 Fed. Rep. 373.

A comparison of the Dingley Act, of which the section in question was an amendment, reveals that the words now found in subsection (e) of the present act, "while in waters of the United States," were not in the original Dingley Act. It is a fair inference that Congress intended the new act to apply universally to American vessels. See dissenting opinion in court below, 250 Fed. Rep. 184.

Mr. Roscoe H. Hupper for respondents:

Under the Act of 1884 advances to seamen on shipment on an American vessel in a foreign country were not unlawful. *The State of Maine*, 22 Fed. Rep. 734; *Patterson* v. *Bark Eudora*, 190 U. S. 169.

The amendment of 1915 did not change the law with respect to advances in foreign ports, and some of the

changes made indicate more clearly than did the Act of 1884 that it was not intended to prohibit advances in foreign ports. The only language in the 1915 section which bears directly on locality of application is subdivision (e). The 1884 section provided: "This section shall apply as well to foreign vessels as to vessels of the United States."

The insertion in the 1915 section of the words "while in waters of the United States" clearly got its impetus from *Patterson* v. *Bark Eudora*, *supra*, which held that a British vessel while in waters of the United States was subject to the prohibition against advances. The purpose of this insertion was to make it plain to foreign shipowners, particularly in view of the abrogation of treaties provided for by the Act of 1915, that while their vessels were in our ports, our statute against advances would be applied to them. See *The Ixion*, 237 Fed. Rep. 142; *The London*, 238 Fed. Rep. 645; affd. 241 Fed. Rep. 863. This did not reflect an intention that as to American vessels the prohibition against advances should apply in foreign countries.

If it be assumed that Congress could have intended by this provision to make the prohibition apply to advances in foreign countries, we find it hard to imagine any more indirect or ambiguous method of effecting this result. The congressional debates and reports do not disclose that Congress was acquainted with or had in mind advances made in foreign countries. Nor, so far as we have been able to find, do they make any reference to Judge Brown's decision in *The State of Maine*, *supra*, or to the conditions which gave rise to that case and this. It was common knowledge, however, that foreign seaman's laws differed from our own and in many instances permitted advances, and undoubtedly for that reason it was deemed prudent (and only courteous to foreign nations in view of the proposed abrogation of treaties with respect to

seamen on foreign ships) to insert in the section a specific declaration of the time, *i. e.*, while they should be in United States waters, that foreign ships would be subject to this section.

The very fact that our law applies to foreign vessels while in our ports is one of the strongest arguments why it should be held not to apply to our vessels while in foreign ports. In other words, we should recognize the law of foreign countries with respect to our vessels in their ports, just as we expect foreign countries to recognize our law with respect to their vessels in our ports. This but accords with the general doctrine that when a merchant vessel of one country enters a port of another for the purposes of trade it subjects itself to the law of the place to which it goes. *Wildenhus's Case,* 120 U. S. 1, 11. The contracts between the ship and the seamen as well as the advances were made on shore at Buenos Ayres. "The general and almost universal rule is that the character of the acts as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356.

Questions concerning performance are governed by the law of the place of performance, but questions concerning the making and validity of the contract are governed by the law of the place where the contract is made. *Scudder* v. *Union National Bank,* 91 U. S. 406.

The penal provisions of the section show that it was not intended to apply to American vessels in foreign countries.

The title of the Act of 1915 indicates no different purpose from that of the Act of 1884, and the provision with respect to advance payments not being a defense is unchanged.

The 1884 section when amended and reënacted in 1915 carried with it into the 1915 section the interpretation

which had been given it by the courts and the executive department of the government.

Advances made to seamen in foreign countries are not against the public policy of the United States, and cannot be nullified on that ground.

Mr. Assistant Attorney General Brown, with whom *Mr. Robert Szold* was on the brief, for the United States as *amicus curiæ:*

Section 11 requires that in a libel for wages against an American vessel advances paid by the American master abroad shall not be treated as valid. It is submitted that the rule of prior executive and judicial construction is not applicable for various reasons.

The rule is not arbitrary. It affords a presumption operative in absence of countervailing evidence, but is of no avail where the true legislative intent otherwise is manifest. "It is not allowable to interpret what has no need of interpretation." *United States* v. *Graham,* 110 U. S. 219, 221.

In the present case the environment in which the act was passed and the legislative history demonstrate the intent to cover all foreign-made advances by vessels, foreign and domestic, coming into our ports. The prime purpose to aid the merchant marine is otherwise defeated.

The Act of 1915, moreover, amended the statute which had previously been construed, by words designed to do away with any previous misconception.

It added the words "while in waters of the United States" to qualify the words "foreign vessels." Thus, the validity of the advance by foreigners abroad was not sought to be affected, but only its recognition and enforcement in libels for wages in our courts against foreign boats which come into our waters. By omitting the qualifying words with reference to "vessels of the United States," the actual validity of the advance made abroad

by American masters was, however, touched. The decision in *The State of Maine*, 22 Fed. Rep. 734, disregards the settled principle that the law governing the shipment of seamen abroad is the law of the flag, and it disregards also the requirements of Rev. Stats., § 4517. And a custom of an executive department, however long continued, must yield to the positive language of a statute. *Houghton* v. *Payne*, 194 U. S. 88, 100.

Congress may impose in its discretion conditions upon the entry into American ports of American vessels as well as of foreign vessels. The citizen has no more vested right to engage in foreign trade without regard to legislative conditions, than the foreigner. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Weber* v. *Freed*, 239 U. S. 325. The courts, moreover, may apply the national law to determine the validity of contracts made abroad between seaman and master on national vessels. *The Belgenland*, 114 U. S. 355, 364; Hall, International Law, 6th ed., p. 199; *United States* v. *Rodgers*, 150 U. S. 249.

The statutes of the United States have regulated the payment of wages by American vessels to American seamen in foreign ports from the beginning.

Mr. Justice Day delivered the opinion of the court.

These cases were considered together in the courts below and may be disposed of in like manner here.

The facts are:

In the first case Paul Neilson and nine other seamen sue for the recovery of wages claimed to be due them from the bark "Rhine." It appears that they shipped on the American bark "Rhine" at Buenos Ayres, October 7, 1916, for a voyage to New York, at the rate of $25 per month. It is stipulated that the shipping of seamen on sailing vessels at Buenos Ayres is controlled by certain shipping masters, to one of whom the libelants, in ac-

cordance with the usual custom and as a means of securing employment, signed a receipt or advance note for one month's wages. These advance notes were presented to the American Vice-Consul at Buenos Ayres before the libelants signed the articles, were by him noted on the articles and, in the presence of the libelants, directed to be paid on account of the wages of the respective libelants. It was further stipulated that in directing the master of the "Rhine" to honor such advance notes, the Consul was acting in accordance with § 237 of the Consular Regulations of the United States. When the bark arrived at New York the libelants were paid the wages earned, less the $25 advanced. They now seek to recover the sum thus deducted, by virtue of the terms of § 11 of the Act of March 4, 1915, entitled "An Act To promote the welfare of American seamen in the merchant marine of the United States," upon the theory that such advances are unlawful and of no effect.

The facts in relation to the case of the Barkentine "Windrush" differ from the above only in respect of the fact that the advance notes are not in evidence, but are noted on the articles.

The District Court decided in favor of the libelants. 244 Fed. Rep. 833. The Circuit Court of Appeals reversed the decrees. 250 Fed. Rep. 180. The cases are here on writs of certiorari.

The section of the statute is the same as that involved in the case of *The Talus* [*Sandberg* v. *McDonald*], No. 392, *ante*, 185. The difference is that the advances were made by the master of an American vessel in a South American port, whereas in *The Talus* the advancements were made to foreign seamen in a British port. The same general considerations as to the interpretation of the statute which controlled in the decision of the case of *The Talus* are applicable here and need not be repeated.

That American vessels might be controlled by con-

gressional legislation as to contracts made in foreign ports may, for present purposes at least, be conceded. It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage.

The statute itself denies clearance papers to vessels violating its terms. This provision could only apply to domestic ports and is another evidence of the intent of Congress to legislate as to advances made in our own ports.

Affirmed.

MR. JUSTICE McKENNA, with whom concur MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE, dissenting.

These cases were submitted with Nos. 361 [*Dillon* v. *Strathearn S. S. Co.*, *ante*, 182,] and 392, [*Sandberg* v. *McDonald*, *ante*, 185,] and, like them, are proceedings in admiralty under the Seamen's Act of 1915, 38 Stat. 1164–1168.

The facts are set out in the opinion of the court. In these cases, as in others, we are constrained to dissent. The principle of decision should be, we think, that declared in our dissent in *The Talus*, *ante*, 185. The facts of these cases put more tension upon it, that is, an adhesion to the words of the statute as determinative of its purpose rather than some of its consequences. We have here the somewhat appealing force of a picture

of an American ship only able to escape practical internment in a foreign port by a violation of the law, if it be as we have declared it. And this under the sanction of the United States Consul acting under the following regulation of the Department of State:

"237. Advances to Seamen Shipped in Foreign Ports.—The shipment of seamen in foreign ports cannot be considered as within the intention, and hence not within the proper construction, of the Act referred to in the next preceding paragraph [inserted in the margin].[1] The final clause of the Act, which declares that this section shall apply as well to foreign vessels as to those of the United States, and that in case of violation a clearance shall be refused them, is a clear indication that Congress did not in this section refer to the shipment of seamen in foreign ports, but had in view acts done in the United States alone. The provision of the statute as to payment of advance wages is not intended to apply to seamen shipped in foreign ports. In the settlement of wages due seamen in such cases, therefore, consular officers will take into account what has been paid in advance. 22 Fed. Rep. 734."

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[1] "236. No Advance Wages.—Except in case of whaling vessels, it is not lawful to pay any seaman wages before leaving the port at which such seaman may be engaged in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay to any one except an officer authorized by Act of Congress to collect fees for such service, any remuneration for the shipment of a seaman. If any such advance wages or remuneration shall have been paid or contracted for, the Consul, in making up the account of wages due the seaman upon his discharge, will disregard such advance payment or agreement and award to the seaman the amount to which he would be entitled if no such payment or agreement had been made. Nor should Consuls permit the statute to be evaded indirectly, as by part payment in advance and then stating rate of wages too small. R. S., §§ 4532, 4533; 23 Stat. L. 55, § 10; 24 *Id.* 80, § 3; 27 Fed. Rep. 764."

We are unable to assent. We regard the act of Congress as clear and that the theatre of its injunction is the harbors of the United States. It is misleading to dwell upon the jurisdiction of other places, which is but another name for control. The jurisdiction, control, is in and by the United States and the command is that advances shall not be deducted from wages of seamen on vessels, American or foreign, while in the waters of the United States. Where they were made or under what circumstances made are not factors in judgment. They are the mere accidents of the situation and if they reach the importance and have the embarrassment depicted by counsel, the appeal must be to Congress, which no doubt will promptly correct the improvidence, if it be such, of its legislation. We have already expressed our view of the control of the language of the law and that it is a barrier against alarms and fault-finding.

It hence follows that we are of opinion the judgment of the Circuit Court of Appeals in each case should be reversed and that of the District Court affirmed.

INTERNATIONAL NEWS SERVICE *v.* THE ASSOCIATED PRESS.

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

No. 221. Argued May 2, 3, 1918.—Decided December 23, 1918.

An incorporated association of proprietors and representatives of many newspapers, engaged in gathering news and distributing it to its members for publication, is a proper party to represent them in a suit to protect their interests in news so collected against the illegal acts of a rival organization. Equity Rule, 38. P. 233.

The right to object to the non-joinder of parties may be treated as

waived if not made specifically in the courts below. Equity Rules, 43, 44. P. 233.

A news article in a newspaper may be copyrighted under the Act of March 4, 1909, but news, as such, is not copyrightable. P. 234

As against the public, any special interest of the producer of uncopyrighted news matter is lost upon the first publication. *Id.*

But one who gathers news, at pains and expense, for the purpose of lucrative publication, may be said to have a *quasi* property in the results of his enterprise, as against a rival in the same business, and the appropriation of those results at the expense and to the damage of the one and for the profit of the other is unfair competition against which equity will afford relief. P. 236.

An incorporated association of newspaper publishers gathered news, at pains and expense, and without applying for copyright telegraphed it daily to its members throughout the country, for their exclusive use in publication, they paying assessments therefor; a rival corporation, serving other newspapers for pecuniary returns, made a practice of obtaining this news through early publications in newspapers and on bulletins of the first company's members, and of sending it by telegraph, either as so taken or in rewritten form, to its own customers, thus enabling them to compete with the newspapers of the first company in the prompt publication of news obtained for the benefit of the latter by their exclusive agency and at their expense. *Held*, that the first company, and its members, as against the second company, had an equitable *quasi* property in the news, even after the early publications; that the use made of it by the second company, not as a mere basis for independent investigation but by substantial appropriation, for its own gain and at the expense and to the damage of their enterprise, amounted to unfair competition which should be enjoined, irrespective of the false pretense involved in rewriting articles and in distributing the news without mentioning the source; for this, while accentuating the wrong, was not of its essence. Pp. 237, *et seq.*; 242.

Upon the pleadings and proofs in this case, *held*, that complainant was not debarred from relief upon the ground of unclean hands by the fact that, following a practice engaged in by the defendant also and by news agencies generally, it had used the defendant's news items, when published, as "tips" for investigations, the results of which it sold. P. 242.

245 Fed. Rep. 244, affirmed.

THE case is stated in the opinion.

215. Argument for Petitioner.

Mr. Samuel Untermyer and *Mr. Hiram W. Johnson*, with whom *Mr. Louis Marshall*, *Mr. William A. DeFord* and *Mr. Henry A. Wise* were on the briefs, for petitioner:

Facts are public and not private property. *Davies* v. *Bowes*, 209 Fed. Rep. 53, 56; *Tribune Co.* v. *Illinois Publishing Co.*, 76 Publishers' Weekly, 643, 947; *Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922; *West Pub. Co.* v. *Thompson Co.*, 176 Fed. Rep. 839; *Clayton* v. *Stone*, 2 Paine, 382; *Baker* v. *Selden*, 101 U. S. 99.

As respondent does not copyright its news, and as the decree is not grounded on any statutory right, respondent must stand or fall on a common-law right. Its position cannot be said to be more favorable than that of the creator of a work of literary or artistic merit. Yet, by the common law, the publication of such works amounts to a dedication to the public and confers a universal right of reproduction and use whether for purposes of gain or otherwise. *Wheaton* v. *Peters*, 8 Pet. 591, 657; *Jeffreys* v. *Boosey*, 4 H. L. Cas. 815, 962, 965, 967; *Holmes* v. *Hurst*, 174 U. S. 85; *Jewelers' Mercantile Agency* v. *Jewelers' Publishing Co.*, 155 N. Y. 241.

As long ago as 1774, the House of Lords in *Donaldson* v. *Beckett*, 4 Burr, 2408, note; 2 Brown's P. C. 129, laid down principles which indicate that there can be no ownership in news at common law after publication. To the same effect are: *Tribune Co. of Chicago* v. *Associated Press*, 116 Fed. Rep. 126; *New York Times Co.* v. *Sun Publishing Co.*, 204 Fed. Rep. 586; *Tribune Co.* v. *Illinois Publishing Co.*, 76 Publishers' Weekly, 643, 947; *Walter* v. *Steinkopff* [1892], L. R. 3 Ch. Div. 489. See also Drone, Copyright, pp. 169, 170; Bowker, Copyright, pp. 88, 89.

A bill to protect news for 24 hours failed of passage in Congress; the decree below recognizes a right in the respondent which Congress deemed it wise to withhold.

That the posting of bulletins and the issuance of early editions of newspapers by its members were regarded by respondent as a publication is clearly shown by the bill, and in Arts. VII and VIII of its by-laws.

If, with respondent's consent, the news which the petitioner is claimed to have copied had been printed in the form of an uncopyrighted book, petitioner undoubtedly could have multiplied and circulated copies without violating respondent's rights. The situation is no different where the publication is in a daily newspaper and the subject-matter is one of passing interest.

The principle that applies to literary property is equally applicable to any idea, trade secret, or business plan, which one may conceive or originate. See *Peabody* v. *Norfolk*, 98 Massachusetts, 452; *Bristol* v. *Equitable Life Assurance Society*, 132 N. Y. 264; *Stein* v. *Morris*, 91 S. E. Rep. 177; *Hamilton Mfg. Co.* v. *Tubbs*, 216 Fed. Rep. 401; *Haskins* v. *Ryan*, 71 N. J. Eq. 575. *Cf. Westcott Chuck Co.* v. *Oneida National Chuck Co.*, 199 N. Y. 247; *Montegut* v. *Hickson*, 178 App. Div. 94.

Upon publication, the news becomes the common possession of all to whom it is accessible; private property therein dies with its publication, as in the case of a trade secret. Publication, being expressly authorized, constitutes no breach of trust or confidence by respondent's members. Neither its charter nor its by-laws required that news gathered by it remain confidential until its publication has been accomplished by all members. But even such a provision would not bind the public. No limitation of the use, by contract or otherwise, is imposed upon the purchaser of the newspaper or the reader of a bulletin. He does not receive the news as a confidential communication, or as a secret or impressed with a trust. The petitioner occupied no contractual or fiduciary relation toward the respondent; nor did it receive the information confidentially or under the seal of secrecy.

Whatever information it obtained it secured in common with the public.

The holding of the Court of Appeals that respondent and its members have a property right in the news until the reasonable reward of each member is received, is a mere conclusion, unsupported by reason. It confounds the corporation and its members. We are not here concerned with the rights of the latter, whose individual interests cannot be enforced in an action by the corporation. To admit respondent's ownership not only of all despatches published in papers of its members and credited to the respondent or not otherwise credited, and also of the local news collected and published by its members, would result in assuring to that organization absolute dominion over the news of the country. Its service is not available to any newspaper that may desire to avail itself of it or to anyone not a member who may wish to embark in the newspaper business. By its carefully guarded by-laws, the respondent restricts its service against such use. In holding that there can be no "publication" until each of respondent's members has been enabled to publish the news, the court below disregards the definition of that term as laid down by the lexicographers and authorities,—the act by which a thing is made public or is given publicity. *Tribune Co. of Chicago* v. *Associated Press*, 116 Fed. Rep. 126; *LeRoy* v. *Jameson*, 15 Fed. Cas. 373, 376; *United States* v. *Williams*, 3 Fed. Rep. 484, 486; *United States* v. *Comerford*, 25 Fed. Rep. 902, 903; *D'Ole* v. *Kansas City Star Co.*, 94 Fed. Rep. 840, 842; *Hale* v. *Grey*, 21 Nevada, 278; *Sproul* v. *Pillsbury*, 72 Maine, 20, 21. If publication does not convert the news into public property, it is difficult to understand how respondent's property right continues until its full commercial news value has been utilized, or how its existence as a right should be measured by the arbitrary term of "three or four hours." A property right is not de-

pendent upon its commercial value. The contention that no publication, however general, can destroy the property of the collector of news in the information he has gathered is in direct conflict with the doctrines applicable to authors, inventors and artists, who, upon publication without seeking statutory protection, lose whatever property rights they may have. And with respect to capital and expenditures involved, the gatherer of news is in no different position than is the author or inventor.

None of the elements of unfair competition is to be found in this case. The respondent had no ownership in the facts. The petitioner did not in any way sail under false colors or pretend that the news which it distributed was that of the respondent. In fact, the complaint proceeds upon the very converse of that theory. Nor did the petitioner resort to any of the methods which have been held to constitute unfair competition. *McLean* v. *Fleming*, 96 U. S. 245; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 675; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Diamant* v. *Lewis*, 144 Iowa, 509, 517. In no case has the doctrine of unfair competition been extended to a case where there is no element of deception, misrepresentation or confusion. The rule applied in *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 185, to an expired patent or copyright is *a fortiori* applicable where there has been no patent or copyright. See also *Dover Stamping Co.* v. *Fellows*, 163 Massachusetts, 191; *Bamford* v. *Douglass Post Card Machine Co.*, 158 Fed. Rep. 355.

The acts charged against respondent's predecessor in *Tribune Co. of Chicago* v. *Associated Press*, 116 Fed. Rep. 126, were held to be lawful when committed by it. What is it that converts the same acts, when charged against the petitioner, into *dolus* or unfair competition? Nor is

it clear how the respondent's reading and using as a "tip" of petitioner's news, sent out to respondent's members in the form of news, differs from the act charged against the petitioner. When the verified "tip" is sent out, it in reality disseminates for the benefit of respondent and its members the petitioner's news. Unfair competition cannot be predicated upon a universal custom in which the respondent and all other news agencies and newspapers participate. If the petitioner is chargeable with unfair competition, he who, for profit and in competition with an author or inventor who fails to take out a copyright or patent, makes use of the book, machine, process, etc., is equally guilty of unfair competition.

If it was wrong for the petitioner to utilize news published with the consent of the respondent, it was equally wrong for the respondent to utilize the news of the petitioner published by its subscribers. He who comes into equity must come with clean hands. *Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.*, 135 N. Y. 24; *Uri* v. *Hirsch*, 123 Fed. Rep. 568; and other cases.

Mr. Frederick W. Lehmann, with whom *Mr. Frederic B. Jennings*, *Mr. Winfred T. Denison* and *Mr. Peter S. Grosscup* were on the briefs, for respondent:

News as a business commodity is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay. Its sole elements of value are its novelty, its accuracy and its presence in the place where there are people interested enough to pay for knowing it, and at the time when they are so interested. The respondent at large cost has established and operates an organization of labor and capital covering the whole world, and the product

of this effort and expense is its property, because it made it. This is not to say that, if it first discovers the happening of an event and transforms that discovery into a thing of commercial value, it has an exclusive right to all announcement of that happening. Any other organization has the same right to whatever message it may itself create, but it can have no right to appropriate the message which another has secured and created by his exclusive effort and expense. See *Bleistein* v. *Donaldson*, 188 U. S. 249.

That there is a property right in news, as a business commodity, is settled in this court by *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333, and *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250. The latter case affirmed *Board of Trade* v. *Kinsey Co.*, 130 Fed. Rep. 507, 513, which held directly that there is a property right in news in the form of price quotations which is entitled to protection against appropriation. See also *Board of Trade* v. *Tucker*, 221 Fed. Rep. 305; *National Tel. News Co.* v. *Western Union Tel Co.*, 119 Fed. Rep. 294; *Board of Trade* v. *McDearmott Co.*, 143 Fed. Rep. 188; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed. Rep. 705; *Board of Trade* v. *Cella Commission Co.*, 145 Fed. Rep. 28; *Dodge Co.* v. *Construction Information Co.*, 183 Massachusetts, 66; *Kiernan* v. *Manhattan Quotation Tel. Co.*, 50 How. Pr. 194, 196, 198. This principle has also been recognized in England. *Exchange Telegraph Co.* v. *Howard*, 22 Times Law Rep. 375; *Exchange Telegraph Co.* v. *Gregory & Co.* [1896], 1 Q. B. 147; *Exchange Telegraph Co.* v. *Central News, Ltd.* [1897], 2 Ch. 48; *Cox* v. *Land & Water Journal Co.*, L. R. 9 Eq. 324.

To hold that respondent has this property right, and yet is entitled to but one exclusive publication by one of its members, would be to destroy the property the instant its value is commercially available, and set up an artificial doctrine of law under which the business of

news collection and distribution cannot live. By the very inherent nature of this property right it continues to exist, as a matter of law, and to be entitled to protection until the full commercial value of the news has been realized. The cases cited *supra* base the recognition of the right in news as a property right upon its value as a commercial product, resulting from the use of capital and labor, and possessing value capable of being realized only by sale and purchase. The courts have recognized this right by adjusting the time of the protection in such a way as to make it effective for the particular circumstances. See *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 251; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294. The present case is like the trade-mark cases, and analogous to *Fonotipia* v. *Bradley*, 171 Fed. Rep. 951, 960; *Prest-O-Lite Co.* v. *Davis*, 209 Fed. Rep. 917; *Universal Film Co.* v. *Copperman*, 218 Fed. Rep. 577; and *Ferris* v. *Frohman*, 223 U. S. 424.

Nothing short of an intentional transfer and surrender of respondent's property right by its own act will destroy it. No such voluntary surrender for purposes of sale by a competing news agency can be predicated upon the publication of its news by one of its members in the first edition of a newspaper. Such publication is not an abandonment for all purposes. It was not intended, nor can it be implied, that the public could take the news and sell it in competition with the respondent.

The rule by which literary property is supposed to cease upon an unrestricted publication, without copyright, is inapplicable to the conditions which make and support the status of news as property. See *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294; and *Dodge Co.* v. *Construction Information Co.*, 183 Massachusetts, 66. Assuming that news is "literary property," and circumscribed by all the limitations imposed by law upon such property, the petitioner's claim of a right

of unrestrained piracy would be invalid, because the publication here is not unrestricted and also because at common law an author had a permanent right of exclusive publication. Slater on Copyright, p. 9; Story on the Constitution, § 1152; Drone on Copyright, p. 116; *Miller* v. *Taylor*, 4 Burrows, 2303; *Donaldson* v. *Beckett*, 2 Bro. P. C. 129; *French* v. *Maguire*, 55 How. Pr. 471, 479; *Holmes* v. *Hurst*, 174 U. S. 82, 85; and the only question has been whether this right is superseded by the copyright statutes. As to publications such as are involved in the case at bar, which cannot be copyrighted, the common-law rights, not being superseded by statute, still persist. Indeed, this court has held that the copyright statute does not apply to "a work of so fluctuating and fugitive a form as that of a newspaper." *Baker* v. *Selden*, 101 U. S. 99, 105.

News has no resemblance of any kind to literary property, and the reasons which exist for limiting the life of a copyright are wholly inapplicable to news. News is not locked in the brain of the producer, but is the event to which all persons have equal access. The right of the owner of a certain report of an event to prevent its appropriation by others in no sense deprives the public of the benefit of knowledge of the event. Others by their own efforts may develop a similar report and even use the report of the person who first acquires the knowledge as a guide. This conserves the interests of the respondent and all interest of public policy, and imposes upon the petitioner no burden except that of making no unearned profit at the expense of the respondent. This is a complete answer to the contention that the injunction will result in the creation of a monopoly in the respondent.

In cases arising under the copyright statute, as well as in some of the news ticker and other cases not affected by the statute, the courts have based their construction of what constitutes such a publication as will destroy the

property right upon a conception of voluntary dedication to the public; and where a restriction is made either expressly or by implication the owner's rights continue, however broad and unlimited the publication may otherwise be. This doctrine, so far as applied to cases outside the statute, has been seized upon by courts apparently as a means of adjusting the law of literary property and copyright to the business necessities of news service. See *National Tel. News Co.* v. *Western Union Tel. Co., supra; Board of Trade* v. *Hadden-Krull Co.*, 109 Fed. Rep. 705; *Board of Trade* v. *Tucker*, 221 Fed. Rep. 305, 307; *Board of Trade* v. *McDearmott Commission Co.*, 143 Fed. Rep. 188. In fact from the decision in *Kiernan* v. *Manhattan Quotation Tel. Co.*, 50 How. Pr. 194, in 1876, down to this date, no case can be found where an injunction has been denied for lack of express or implied restriction in the publication of news or matters analogous to news. *Tribune Co. of Chicago* v. *Associated Press*, 116 Fed. Rep. 126, which was decided prior to the *National Telegraph* and *Hadden-Krull Cases*, was decided upon special grounds of copyright, which are inapplicable here. None of the ticker cases are really cases of restriction in the number and identity of the persons who are to be allowed to read the report, excepting as they are restricted by fundamental principles of fair dealing and the restraints against misappropriation. And if it be material to find a restriction it is that which is implied against the use to which the readers may put the ticker news; nobody is intended to be given any right to take the news from the ticker tape for commercial sale as news.

The publication of Associated Press news by its members is no more a dedication of that news to the readers for all purposes than are the performances of plays which, however public, have been held not to include a dedication for purposes of reproduction from memory, *Tompkins* v. *Halleck*, 133 Massachusetts, 32; *Aronson* v. *Baker*,

43 N. J. Eq. 365; *Boucicault* v. *Fox*, 5 Blatchf. 87; *Boucicault* v. *Hart*, 13 Blatchf. 47; *Crowe* v. *Aiken*, 2 Biss. 215; *Universal Film Co.* v. *Copperman*, 218 Fed. Rep. 577; *Ferris* v. *Frohman*, 223 U. S. 424; or the public delivery of lectures, even with provision of printed copies for students, *Drummond* v. *Altemus*, 60 Fed. Rep. 338; *Abernethy* v. *Hutchinson*, 3 L. J. (O. S.) Ch. 209; *Bartlette* v. *Crittenden*, 4 McLean, 300; *Bartlett* v. *Crittenden*, 5 McLean, 32; *Nicols* v. *Pitman*, L. R. 26 Ch. D. 374; *Caird* v. *Sime*, L. R. 12 App. Cas. 326; or the exhibition of pictures and publication of engravings, *Werckmeister* v. *American Lithographic Co.*, 134 Fed. Rep. 321; 207 U. S. 299; *Turner* v. *Robinson*, 10 Ir. Eq. Rep. 121.

The practice of taking respondent's news from early editions and bulletins and selling and distributing it without any original investigation and without any expense is unfair business competition. It makes the respondent's collecting agencies the direct servant and source of supply for business goods to be distributed and sold by the petitioner. Complete country-wide publication of the news collected by the respondent is the only possible way in which it can "gain its reward" for its expenditure, and it is the very foundation upon which the whole business rests. The collecting labor and expense cannot be severed from the distribution and reimbursement. Furthermore, the public has an interest in the efficiency of industry, as its means of supporting life; the public interest can never be promoted by encouraging unfair, inequitable or dishonorable practices, which must inevitably result in the destruction of the producing work; and moreover, where one news agency takes its news from another the public does not get the benefit of news collected by two independent associations.

It is immaterial in what manner the petitioner gets respondent's news, so long as the use it makes of the

news is to compete unfairly. It is no defense that petitioner sold it as its own, as if gathered by its own independent efforts. The appropriation and use is just as unfair as if it were frankly accredited to the respondent. As well might a manufacturer argue that he was entitled to use his rival's trade-mark for competitive commercial purposes, merely because he may lawfully purchase a package marked with it. Acts which might be innocent and lawful if done under other circumstances are injurious and unlawful if they operate unfairly in competition. *Aikens* v. *Wisconsin*, 195 U. S. 194, 200; *United States* v. *Eastman Kodak Co.*, 226 Fed. Rep. 62, 74; 230 Fed. Rep. 522, 524; *United States* v. *American Can Co.*, 230 Fed. Rep. 859, 887, 888; *Tuttle* v. *Buck*, 107 Minnesota, 145; *Dunshee* v. *Standard Oil Co.*, 152 Iowa, 618, 626; "Trust Laws and Unfair Competition," U. S. Bureau of Corporations, March 15, 1915, pp. 463–486, 496, 497, 117, 118; 20 Harvard Law Review, 420; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 614. The "fighting ship" cases are based on the same principle. *United States* v. *Hamburg American S. S. Line*, 216 Fed. Rep. 971, 973, 974: *United States* v. *Hamburg, etc., Gesellschaft*, 200 Fed. Rep. 806; *United States* v. *American-Asiatic S. S. Co.*, 220 Fed. Rep. 235. Even free speech is subject to the condition that it should not be used unfairly in competition. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 437, 438. While a competitor can further his business by selling below other men's prices or below cost for the purpose of reducing loss of excess stock, he cannot do either of these acts in such a manner, and for such a purpose, as will drive a competitor out of business. *Nash* v. *United States*, 229 U. S. 373, 376; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 43; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *United States* v. *Great Lakes Towing Co.*, 208 Fed. Rep. 733, 743–745; *United States* v. *Pacific Co.*,

228 U. S. 87; *United States* v. *American Can Co.*, 230 Fed. Rep. 859, 887, 888; *Ware-Kramer Co.* v. *American Tobacco Co.*, 180 Fed. Rep. 160, 167.

The "unclean hands" doctrine does not mean that whenever a complainant has been guilty of inequitable conduct the courts will refuse to grant him relief; it means merely that equity will refuse to aid a complainant in protecting any right acquired or retained by inequitable conduct. This distinction is made in the *Christie Case, supra;* and in *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 172. In *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.*, 135 N. Y. 24; *Fetridge* v. *Wells*, 4 Abb. Pr. 144; and *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, the court refused to protect the plaintiff's trade name on the ground that an injunction would directly further the inequitable practices of the plaintiff. The principle upon which courts of equity will apply this doctrine is illustrated by *Primeau* v. *Granfield*, 180 Fed. Rep. 851; *Chute* v. *Wisconsin Chemical Co.*, 185 Fed. Rep. 115; *Bentley* v. *Tibbals*, 223 Fed. Rep. 247, 252; *Talbot* v. *Independent Order of Owls*, 220 Fed. Rep. 660.

No showing has been made that the practices were authorized or approved by those responsible for the policies of the Associated Press. *Vulcan Detinning Co.* v. *American Can Co.*, 72 N. J. Eq. 387.

The petitioner's contention that the respondent has obtained news by the same methods as those used by defendant was not sustained in fact. "Tipping off" has been a recognized practice among all news agencies and has existed by common consent, and, as found by the District Court, is the only one authorized or adopted by the respondent. When the "tip" is received, it is independently investigated, and the news obtained in this way is as much the product of respondent's effort and entitled to protection as its property as if it had been obtained without any "tip." This practice is not

in any sense unjust or unlawful, and does not constitute unfair competition. The right of another news agency to use the report as a "tip" for investigation on its own account is vital to the public need of correct information. The legality of similar practices in other businesses has been recognized. *Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922; *West Publishing Co.* v. *Thompson Co.*, 176 Fed. Rep. 833, 838; *Pike* v. *Nicholas*, L. R. 5 Ch. App. 263; *Morris* v. *Wright*, L. R. 5 Ch. App. 287; *Moffatt* v. *Gill*, 86 Law Times Rep. 465.

Mr. Justice Pitney delivered the opinion of the court.

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a coöperative organization, incorporated under the Membership Corporations Law of the State of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (Laws N. Y. 1901, c. 436). Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to $3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through

the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit anyone in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the State of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has wide-spread news-gathering agencies; the cost of its operations amounts, it is said, to more than $2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or earlier than similar information can be furnished to competing newspapers

by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer: "Prompt knowledge and publication of world-wide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through coöperation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business."

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; Second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and Third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The District Court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads; but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was

one of first impression it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. Rep. 983, 996. Both parties having appealed, the Circuit Court of Appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. 245 Fed. Rep. 244, 253. The present writ of certiorari was then allowed. 245 U. S. 644.

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: 1. Whether there is any property in news; 2. Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and 3. Whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United

States. Complainant's news matter is not copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, according to complainant's contention, news is not within the operation of the copyright act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act be complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news by any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the Circuit Court of Appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived. See Equity Rules 38, 43, 44.

In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 and 1802 (*Clayton* v. *Stone*, 2 Paine, 382; 5 Fed. Cas. No. 2872). But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076. Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917), pp. 7, 14, 16–17.

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const., Art I, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

We need spend no time, however, upon the general

question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure

that of the other. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 254.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. See *Morison* v. *Moat*, 9 Hare, 241, 258. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*In re Sawyer*, 124 U. S. 200, 210; *In re Debs*, 158 U. S. 564, 593); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. *Truax* v. *Raich*, 239 U. S. 33, 37–38; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 742;

Barr v. *Essex Trades Council*, 53 N. J. Eq. 101. It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

The question, whether one who has gathered general information or news at pains and expense for the purpose of subsequent publication through the press has such an interest in its publication as may be protected from interference, has been raised many times, although never, perhaps, in the precise form in which it is now presented.

Board of Trade v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust.

In *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294, the Circuit Court of Appeals for the Seventh Circuit dealt with news matter gathered and transmitted by a telegraph company, and consisting merely of a notation of current events having but a transient value due to quick transmission and distribution; and, while declaring that this was not copyrightable although printed on a tape by tickers in the offices of the recipients, and that it was a commercial not a literary product, nevertheless held that the business of gathering and communicating the news—the service of purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business

world, and partaking of the nature of property in a sense that entitled it to the protection of a court of equity against piracy.

Other cases are cited, but none that we deem it necessary to mention.

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.

The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the City of New York, and because of this, and of time differentials due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service

of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest

of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur., § 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibitive if the reward were to be so limited. No single

newspaper, no small group of newspapers, could sustain the expenditure. Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. The practical needs and requirements of the business are reflected in complainant's by-laws which have been referred to. Their effect is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures.

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim *sic utere tuo*, etc.

It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140. But we cannot concede that

the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as *quasi* property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived.

The doctrine of unclean hands is invoked as a bar to relief; it being insisted that defendant's practices against which complainant seeks an injunction are not different from the practice attributed to complainant, of utilizing defendant's news published by its subscribers. At this point it becomes necessary to consider a distinction that is drawn by complainant, and, as we understand it, was recognized by defendant also in the submission of proofs in the District Court, between two kinds of use that may be made by one news agency of news taken from the

bulletins and newspapers of the other. The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. This form of pirating was found by both courts to have been pursued by defendant systematically with respect to complainant's news, and against it the Circuit Court of Appeals granted an injunction. This practice complainant denies having pursued, and the denial was sustained by the finding of the District Court. It is not contended by defendant that the finding can be set aside, upon the proofs as they now stand. The other use is to take the news of a rival agency as a "tip" to be investigated, and if verified by independent investigation the news thus gathered is sold. This practice complainant admits that it has pursued and still is willing that defendant shall employ.

Both courts held that complainant could not be debarred on the ground of unclean hands upon the score of pirating defendant's news, because not shown to be guilty of sanctioning this practice.

As to securing "tips" from a competing news agency, the District Court (240 Fed. Rep. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals (245 Fed. Rep. 247) found that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no difficulty in discriminating between the utilization of 'tips' and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after

rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information. In *Kelly* v. *Morris*, L. R. 1 Eq. 697, 701, 702, Vice Chancellor Sir William Page Wood (afterwards Lord Hatherly), dealing with such a case, said that defendant was "not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained." This was followed by Vice Chancellor Giffard in *Morris* v. *Ashbee*, L. R. 7 Eq. 34, where he said: "In a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road." A similar view was adopted by Lord Chancellor Hatherly and the former Vice Chancellor, then Giffard, L. J., in *Pike* v. *Nicholas*, L. R. 5 Ch. App. Cas. 251, and shortly afterwards by the latter judge in *Morris* v. *Wright*, L. R. 5 Ch. App. Cas. 279, 287, where he said, commenting upon *Pike* v. *Nicholas:* "It was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's

book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book."

A like distinction was recognized by the Circuit Court of Appeals for the Second Circuit in *Edward Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922, and in *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. Rep. 833, 838.

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled.

There is some criticism of the injunction that was directed by the District Court upon the going down of the mandate from the Circuit Court of Appeals. In brief, it restrains any taking or gainfully using of the complainant's news, either bodily or in substance, from bulletins issued by the complainant or any of its members, or from editions of their newspapers, "*until its commercial value as news to the complainant and all of its members has passed away.*" The part complained of is the clause we have italicized; but if this be indefinite, it is no more so than the criticism. Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its

publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the District Court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose.

The decree of the Circuit Court of Appeals will be

Affirmed.

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

MR. JUSTICE HOLMES:

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them—in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind

which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained in that way. Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's, but the same evil may follow from the opposite falsehood—from saying, whether in words or by implication, that the plaintiff's product is the defendant's, and that, it seems to me, is what has happened here.

Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news-collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong

enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

MR. JUSTICE MCKENNA concurs in this opinion.

MR. JUSTICE BRANDEIS dissenting.

There are published in the United States about 2,500 daily papers.[1] More than 800 of them are supplied with domestic and foreign news of general interest by the Associated Press—a corporation without capital stock which does not sell news or earn or seek to earn profits, but serves merely as an instrumentality by means of which these papers supply themselves at joint expense with such news. Papers not members of the Associated Press depend for their news of general interest largely upon agencies organized for profit.[2] Among these agen-

[1] See American Newspaper Annual and Directory (1918), pp. 4, 10, 1193–1212.

[2] The Associated Press, by Frank B. Noyes, Sen. Doc. No. 27, 63d Cong., 1st sess. In a brief filed in this court by counsel for the Associated Press the number of its members is stated to be 1030. Some members of the Associated Press are also subscribers to the International News Service.

Strictly the member is not the publishing concern, but an individual who is the sole or part owner of a newspaper, or an executive officer of a company which owns one. By-laws, Article II, § 1.

cies is the International News Service which supplies news to about 400 subscribing papers. It has, like the Associated Press, bureaus and correspondents in this and foreign countries; and its annual expenditure in gathering and distributing news is about $2,000,000. Ever since its organization in 1909, it has included among the sources from which it gathers news, copies (purchased in the open market) of early editions of some papers published by members of the Associated Press and the bulletins publicly posted by them. These items, which constitute but a small part of the news transmitted to its subscribers, are generally verified by the International News Service before transmission; but frequently items are transmitted without verification; and occasionally even without being re-written. In no case is the fact disclosed that such item was suggested by or taken from a paper or bulletin published by an Associated Press member.

No question of statutory copyright is involved. The sole question for our consideration is this: Was the International News Service properly enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins or papers purchased by it in the open market) merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members, or because it did not reveal the source from which it was acquired?

The "ticker" cases, the cases concerning literary and artistic compositions, and cases of unfair competition were relied upon in support of the injunction. But it is admitted that none of those cases affords a complete analogy with that before us. The question presented for decision is new; and it is important.

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge

of such occurrences of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes. The inventions and discoveries upon which this attribute of property is conferred only by statute, are the few comprised within the patent law. There are also many other cases in which courts interfere to prevent curtailment of plaintiff's enjoyment of incorporeal productions; and in which the

right to relief is often called a property right, but is such only in a special sense. In those cases, the plaintiff has no absolute right to the protection of his production; he has merely the qualified right to be protected as against the defendant's acts, because of the special relation in which the latter stands or the wrongful method or means employed in acquiring the knowledge or the manner in which it is used. Protection of this character is afforded where the suit is based upon breach of contract or of trust or upon unfair competition.

The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of its acquisition or use nor the purpose to which it is applied, such as has heretofore been recognized as entitling a plaintiff to relief.

First: Plaintiff's principal reliance was upon the "ticker" cases; but they do not support its contention. The leading cases on this subject rest the grant of relief, not upon the existence of a general property right in news, but upon the breach of a contract or trust concerning the use of news communicated; and that element is lacking here. In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, the court said the Board "does not lose its rights by communicating the result [the quotations] to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach." And it is also stated there, (page 251): "Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward." The only other case in this court which relates to this subject is *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S.

322. While the opinion there refers the protection to a general property right in the quotations, the facts are substantially the same as those in the *Christie Case*, which is the chief authority on which the decision is based. Of the cases in the lower federal courts and in the state courts it may be said, that most of them too can, on their facts, be reconciled with this principle, though much of the language of the courts cannot be.[1] In spite of anything that may appear in these cases to the contrary it seems that the true principle is stated in the *Christie Case*, that the collection of quotations "stands like a trade secret." And in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 402, this court says of a trade secret: "Any one may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract." See *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. Rep. 24, 29.

The leading English case, *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, is also rested clearly upon a breach of contract or trust, although there is some

[1] *Board of Trade of City of Chicago* v. *Tucker*, 221 Fed. Rep. 305; *Board of Trade of City of Chicago* v. *Price*, 213 Fed. Rep. 336; *McDearmott Commission Co.* v. *Board of Trade of City of Chicago*, 146 Fed. Rep. 961; *Board of Trade of City of Chicago* v. *Cella Commission Co.*, 145 Fed. Rep. 28; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294; *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed. Rep. 301; *Board of Trade of Chicago* v. *Hadden-Krull Co.*, 109 Fed. Rep. 705; *Cleveland Tel. Co.* v. *Stone*, 105 Fed. Rep. 794; *Board of Trade of City of Chicago* v. *Thomson Commission Co.*, 103 Fed. Rep. 902; *Kiernan* v. *Manhattan Quotation Telegraph Co.*, 50 How. Pr. 194. The bill in *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Mass. 62, was expressly based on breach of contract or of trust. It has been suggested that a board of trade has a right of property in its quotations because the facts reported originated in its exchange. The point has been mentioned several times in the cases, but no great importance seems to have been attached to it.

reference to a general property right. The later English cases seem to have rightly understood the basis of the decision, and they have not sought to extend it further than was intended. Indeed, we find the positive suggestion in some cases that the only ground for relief is the manner in which knowledge of the report of the news was acquired.[1]

If the news involved in the case at bar had been posted in violation of any agreement between the Associated Press and its members, questions similar to those in the "ticker" cases might have arisen. But the plaintiff does not contend that the posting was wrongful or that any papers were wrongfully issued by its subscribers. On the contrary it is conceded that both the bulletins and the papers were issued in accordance with the regulations of the plaintiff. Under such circumstances, for a reader of the papers purchased in the open market, or a reader of the bulletins publicly posted, to procure and use gainfully, information therein contained, does not involve inducing anyone to commit a breach either of contract or of trust, or committing or in any way abetting a breach of confidence.

Second: Plaintiff also relied upon the cases which hold that the common-law right of the producer to prohibit copying is not lost by the private circulation of a literary composition, the delivery of a lecture, the exhi-

[1] In *Exchange Telegraph Co., Ltd.*, v. *Howard*, 22 Times Law Rep. 375, 377, it is intimated that it would be perfectly permissible for the defendant to take the score from a newspaper supplied by the plaintiff and publish it. And it is suggested in *Exchange Telegraph Co., Ltd.*, v. *Central News, Ltd.*, [1897] 2 Ch. 48, 54, that there are sources from which the defendant might be able to get the information collected by the plaintiff and publish it without committing any wrong. Copinger, Law of Copyright, 5th ed., p. 35, explains the *Gregory Case* on the basis of the breach of confidence involved. Richardson, Law of Copyright, p. 39, also inclines to put the case "on the footing of implied confidence."

bition of a painting, or the performance of a dramatic or musical composition.[1] These cases rest upon the ground that the common law recognizes such productions as property which, despite restricted communication, continues until there is a dedication to the public under the copyright statutes or otherwise. But they are inapplicable for two reasons. (1) At common law, as under the copyright acts, intellectual productions are entitled to such protection only if there is underneath something evincing the mind of a creator or originator, however modest the requirement. The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection.[2] (2) At common law, as under the copyright acts, the element in intellectual productions which secures such protection is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, "some new collocation of visible or audible points,—of lines, colors, sounds, or

[1] *Ferris* v. *Frohman*, 223 U. S. 424; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 299; *Universal Film Mfg. Co.* v. *Copperman*, 218 Fed. Rep. 577; *Werckmeister* v. *American Lithographic Co.*, 134 Fed. Rep. 321; *Drummond* v. *Altemus*, 60 Fed. Rep. 338; *Boucicault* v. *Hart*, 13 Blatchf. 47; Fed. Cas. No. 1692; *Crowe* v. *Aiken*, 2 Biss. 208; Fed. Cas. No. 3441; *Boucicault* v. *Fox*, 5 Blatchf. 87; Fed. Cas. No. 1691; *Bartlett* v. *Crittenden*, 5 McLean, 32; Fed. Cas. No. 1076; *Bartlette* v. *Crittenden*, 4 McLean, 300; Fed. Cas. No. 1082; *Tompkins* v. *Halleck*, 133 Mass. 32; *Aronson* v. *Baker*, 43 N. J. Eq. 365; *Caird* v. *Sime*, L. R. 12 App. Cas. 326; *Nicols* v. *Pitman*, L. R. 26 Ch. D. 374; *Abernethy* v. *Hutchinson*, 3 L. J. (O. S.) Ch. 209; *Turner* v. *Robinson*, 10 Ir. Eq. Rep. 121.

[2] Compare *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 250; *Higgins* v. *Keuffel*, 140 U. S. 428, 432; *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 58–60; *Baker* v. *Selden*, 101 U. S. 99, 105, 106; *Clayton* v. *Stone*, 2 Paine, 382; Fed. Cas. No. 2872; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294, 296–298; *Banks Law Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 169 Fed. Rep. 386, 391.

words." See *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 19; *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 63. An author's theories, suggestions, and speculations, or the systems, plans, methods, and arrangements of an originator, derive no such protection from the statutory copyright of the book in which they are set forth; [1] and they are likewise denied such protection at common law.[2]

That news is not property in the strict sense is illustrated by the case of *Sports and General Press Agency, Ltd.*, v. *"Our Dogs" Publishing Co., Ltd.*, [1916] 2 K. B. 880, where the plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against defendant who had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And, it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him. If, when the plaintiff creates the event recorded, he is not entitled to the exclusive first publication of the

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[1] *Baker* v. *Selden*, 101 U. S. 99; *Perris* v. *Hexamer*, 99 U. S. 674; *Barnes* v. *Miner*, 122 Fed. Rep. 480, 491; *Burnell* v. *Chown*, 69 Fed. Rep. 993; *Tate* v. *Fullbrook*, [1908] 1 K. B. 821; *Chilton* v. *Progress Printing & Publishing Co.*, [1895] 2 Ch. 29, 34; *Kendrick & Co.* v. *Lawrence & Co.*, L. R. 25 Q. B. D. 99; *Pike* v. *Nicholas*, L. R. 5 Ch. App. 251.

[2] *Bristol* v. *Equitable Life Assurance Society*, 132 N. Y. 264; *Haskins* v. *Ryan*, 71 N. J. Eq. 575.

news (in that case a photograph) of the event, no reason can be shown why he should be accorded such protection as to events which he simply records and transmits to other parts of the world, though with great expenditure of time and money.

Third: If news be treated as possessing the characteristics not of a trade secret, but of literary property, then the earliest issue of a paper of general circulation or the earliest public posting of a bulletin which embodies such news would, under the established rules governing literary property, operate as a publication, and all property in the news would then cease. Resisting this conclusion, plaintiff relied upon the cases which hold that uncopyrighted intellectual and artistic property survives private circulation or a restricted publication; and it contended that in each issue of each paper, a restriction is to be implied that the news shall not be used gainfully in competition with the Associated Press or any of its members. There is no basis for such an implication. But it is also well settled that where the publication is in fact a general one, even express words of restriction upon use are inoperative. In other words, a general publication is effective to dedicate literary property to the public, regardless of the actual intent of its owner.[1] In the cases dealing with lectures, dramatic and musical performances, and art exhibitions,[2] upon which plaintiff relied, there was no general publication in print comparable to the issue of daily newspapers or the unrestricted public posting of bulletins. The principles governing those cases differ more or less in application, if not in theory, from the principles governing the issue of printed copies;

[1] *Jewelers' Mercantile Agency* v. *Jewelers' Publishing Co.*, 155 N. Y. 241; *Wagner* v. *Conried*, 125 Fed. Rep. 798, 801; *Larrowe-Loisette* v. *O'Loughlin*, 88 Fed. Rep. 896.

[2] See cases in note 1, p. 254, *supra;* Richardson, Law of Copyright, p. 128.

and in so far as they do differ, they have no application to the case at bar.

Fourth: Plaintiff further contended that defendant's practice constitutes unfair competition, because there is "appropriation without cost to itself of values created by" the plaintiff; and it is upon this ground that the decision of this court appears to be based. To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions indicated above, the law has heretofore sanctioned the practice. Thus it was held that one may ordinarily make and sell anything in any form, may copy with exactness that which another has produced, or may otherwise use his ideas without his consent and without the payment of compensation, and yet not inflict a legal injury; [1] and that ordinarily one is at perfect liberty to find out, if he can by lawful means, trade secrets of another, however valuable, and then use the knowledge so acquired gainfully, although it cost the original owner much in effort and in money to collect or produce.[2]

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[1] *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83; *Bristol* v. *Equitable Life Assurance Society*, 132 N. Y. 264; *Keystone Type Foundry* v. *Portland Publishing Co.*, 186 Fed. Rep. 690.

[2] *Chadwick* v. *Covell*, 151 Massachusetts, 190; *Tabor* v. *Hoffman*, 118 N. Y. 30, 36; *James* v. *James*, L. R. 13 Eq. 421. Even when knowledge is compiled, as in a dictionary, and copyrighted, the suggestions and sources therein may be freely used by a later compiler. The copyright protection merely prevents his taking the ultimate data while avoiding the labor and expense involved in compiling them. *Pike* v. *Nicholas*, L. R. 5 Ch. App. 251; *Morris* v. *Wright*, L. R. 5 Ch. App. 279; *Edward Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922; *West Pub. Co.* v. *Edward Thompson Co.*, 176 Fed. Rep. 833. It is assumed that in the absence of copyright, the data compiled could be freely used. See *Morris* v. *Ashbee*, L. R. 7 Eq. 34, 40. Compare also *Chilton* v. *Progress Printing & Publishing Co.*, [1895] 2 Ch. 29.

Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him. The unfairness in competition which hitherto has been recognized by the law as a basis for relief, lay in the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud or force or the doing of acts otherwise prohibited by law. In the "passing off" cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. See *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 412–413. In the other cases, the diversion of trade was effected through physical or moral coercion, or by inducing breaches of contract or of trust or by enticing away employees. In some others, called cases of simulated competition, relief was granted because defendant's purpose was unlawful; namely, not competition but deliberate and wanton destruction of plaintiff's business.[1]

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[1] "Trust Laws & Unfair Competition" (U. S. Bureau of Corporations, March 15, 1915), pp. 301–331, 332–461; Nims, Unfair Competition & Trade-Marks, c. XIX; *Sperry & Hutchinson Co.* v. *Pommer*, 199 Fed. Rep. 309, 314; *Racine Paper Goods Co.* v. *Dittgen*, 171 Fed. Rep. 631; *Schonwald* v. *Ragains*, 32 Oklahoma, 223; *Attorney General* v. *National Cash Register Co.*, 182 Michigan, 99; *Witkop & Holmes Co.* v. *Great Atlantic & Pacific Tea Co.*, 124 N. Y. Supp. 956, 958; *Dunshee* v. *Standard Oil Co.*, 152 Iowa, 618; *Tuttle* v. *Buck*, 107 Minnesota, 145.

The cases of *Fonotipia, Limited*, v. *Bradley*, 171 Fed. Rep. 951, and *Prest-O-Lite Co.* v. *Davis*, 209 Fed. Rep. 917, which were strongly relied upon by the plaintiff, contain expressions indicating rights possibly broad enough to sustain the injunction in the case at bar; but both cases involve elements of "passing off." See also *Prest-O-Lite Co.* v. *Davis*, 215 Fed. Rep. 349; *Searchlight Gas Co.* v. *Prest-O-Lite Co.*, 215 Fed. Rep. 692; *Prest-O-Lite Co.* v. *H. W. Bogen, Inc.*, 209

That competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit.[1] He who makes a city known through his product, must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later. *Canal Co.* v. *Clark*, 13 Wall. 311; *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 673. He who has made his name a guaranty of quality, protests in vain when another with the same name engages, perhaps for that reason, in the same lines of business; provided, precaution is taken to prevent the public from being deceived into the belief that what he is selling was made by his competitor. One bearing a name made famous by another is permitted to enjoy the unearned benefit which necessarily flows from such use, even though the use proves harmful to him who gave the name value. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 544; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267; *Waterman Co.* v. *Modern Pen Co.*, 235 U. S. 88. See *Saxlehner* v. *Wagner*, 216 U. S. 375.

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted.

Fed. Rep. 915; *Prest-O-Lite Co.* v. *Avery Lighting Co.*, 161 Fed. Rep. 648. In *Prest-O-Lite Co.* v. *Auto Acetylene Light Co.*, 191 Fed. Rep. 90, the bill was dismissed on the ground that no deception was shown.

[1] *Magee Furnace Co.* v. *Le Barron*, 127 Massachusetts, 115; *Ricker* v. *Railway*, 90 Maine, 395, 403.

No breach of contract such as the court considered to exist in *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 254; or of trust such as was present in *Morison* v. *Moat*, 9 Hare, 241; and neither fraud nor force, is involved. The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. See *Bamforth* v. *Douglass Post Card & Machine Co.*, 158 Fed. Rep. 355; *Tribune Co. of Chicago* v. *Associated Press*, 116 Fed. Rep. 126. That, they have a legal right to do; because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested, that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopyrighted matter is reproduced. The International News Service is said to mislead its subscribers into believing that the news transmitted was originally gathered by it and that they in turn mislead their readers. There is, in fact, no representation by either of any kind. Sources of information are sometimes given because required by contract; sometimes because naming the source gives authority to an otherwise incredible statement; and sometimes the source is named because the agency does not wish to take the

responsibility itself of giving currency to the news. But no representation can properly be implied from omission to mention the source of information except that the International News Service is transmitting news which it believes to be credible.

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. The suit is, as this court declares, in substance one brought for the benefit of the members of the Associated Press, who would be proper, and except for their number perhaps necessary, parties; and the plaintiff conducts the suit as representing their interest. It thus appears that the protection given by the injunction is not actually to the business of the complainant news agency; for this agency does not sell news nor seek to earn profits, but is a mere instrumentality by which 800 or more newspapers collect and distribute news. It is these papers severally which are protected; and the protection afforded is not from competition of the defendant, but from possible competition of one or more of the 400 other papers which receive the defendant's service. Furthermore, the protection to these Associated Press members consists merely in denying to other papers the right to use, as news, information which, by authority of all concerned, had theretofore been given to the public by some of those who joined in gathering it; and to which the law denies the attributes of property. There is in defendant's purpose nothing on which to base a claim for relief.

It is further said that, while that for which the Associated Press spends its money is too fugitive to be recognized as property in the common-law courts, the defendant cannot be heard to say so in a court of equity, where the question is one of unfair competition. The case presents no elements of equitable title or of breach of trust. The only possible reason for resort to a court of equity in a case like this is that the remedy which the law gives is inadequate. If the plaintiff has no legal cause of action, the suit necessarily fails. *Levy* v. *Walker*, L. R. 10 Ch. D. 436, 449. There is nothing in the situation of the parties which can estop the defendant from saying so.

Fifth: The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the

boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, "a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public" was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with the Associated Press the latter's foreign news service. For aught that

appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto.[1] It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they can not procure prompt access to papers served by the Associated Press.

A legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate enquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate which reported unfavorably a bill to give news a few

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[1] According to the by-laws of the Associated Press no one can be elected a member without the affirmative vote of at least four-fifths of all the members of the corporation or the vote of the directors. Furthermore, the power of the directors to admit anyone to membership may be limited by a right of protest to be conferred upon individual members. See By-laws, Article III, § 6. "The members of this Corporation may, by an affirmative vote of seven-eighths of all the members, confer upon a member (with such limitations as may be at the time prescribed) a right of protest against the admission of new members by the Board of Directors. The right of protest, within the limits specified at the time it is conferred, shall empower the member holding it to demand a vote of the members of the Corporation on all applications for the admission of new members within the district for which it is conferred except as provided in Section 2 of this Article."

hours' protection; [1] and which ratified, on February 15, 1911, the convention adopted at the Fourth International American Conference; [2] and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908; [3] as both these conventions expressly exclude news from copyright protection.

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[1] Senate Bill No. 1728, 48th Cong., 1st sess. The bill provides:

"That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the Territories thereof, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words.

"Sec. 2. That for any infringement of the copyright granted by the first section of this act the party injured may sue in any court of competent jurisdiction and recover in any proper action the damages sustained by him from the person making such infringement, together with the costs of suit."

It was reported on April 18, 1884, by the Committee on the Library, without amendment, and that it ought not to pass. Journal of the Senate, 48th Cong., 1st sess., p. 548. No further action was apparently taken on the bill.

When the copyright legislation of 1909, finally enacted as Act of March 4, 1909, c. 320, 35 Stat. 1075, was under consideration, there was apparently no attempt to include news among the subjects of copyright. Arguments before the Committees on Patents of the Senate and House of Representatives on Senate Bill No. 6330 and H. R. Bill No. 19853, 59th Cong., 1st sess., June 6, 7, 8, and 9, and December 7, 8, 10, and 11, 1906; Hearings on Pending Bills to Amend and Consolidate Acts Respecting Copyright, March 26, 27 and 28, 1908.

[2] 38 Stat. 1785, 1789, Article 11.

[3] Bowker, Copyright: Its History and its Law, pp. 330, 612, 613. See the similar provisions in the Berne Convention (1886) and the Paris Convention (1896). *Id.*, pp. 612, 613.

In 1898 Lord Herschell introduced in Parliament a bill, § 11 of which provides: "Copyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations therein, *and to such news and information as have been specially and independently obtained.*"

Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels,[1] and for other reasons decline to protect by injunction mere political rights;[2] and as Congress has prohibited courts from enjoining the illegal assessment or collection of federal taxes.[3] If a legislature concluded to recognize property in published news to the extent of permitting recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.[4]

Or again, a legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protec-

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(Italics ours.) House of Lords, Sessional Papers, 1898, vol. 3, Bill No. 21. Birrell, Copyright in Books, p. 210. But the bill was not enacted, and in the English law as it now stands there is no provision giving even a limited copyright in news as such. Act of December 16, 1911, 1 and 2 Geo. V, c. 46.

[1] *Boston Diatite Co.* v. *Florence Mfg. Co.*, 114 Massachusetts, 69; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. App. 142.

[2] *Giles* v. *Harris*, 189 U. S. 475. Compare *Swafford* v. *Templeton*, 185 U. S. 487; *Green* v. *Mills*, 69 Fed. Rep. 852, 859.

[3] Revised Statutes, § 3224; *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118.

[4] Act of March 4, 1909, § 25, c. 320, 35 Stat. 1075, 1081, provides as to the liability for the infringement of a copyright, that, "in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars"; and that in the case of infringement of a copyrighted newspaper the damages recoverable shall be one dollar for every infringing copy, but shall not be less than $250 nor more than $5,000.

tion of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a legislature concluded, (as at least one court has held, *New York & Chicago Grain & Stock Exchange* v. *Board of Trade*, 127 Illinois, 153) that under certain circumstances news-gathering is a business affected with a public interest, it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it, at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for ensuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.

FARSON, SON & COMPANY *v.* BIRD, AS COUNTY TREASURER OF SHELBY COUNTY, ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 54. Submitted November 15, 1918.—Decided January 7, 1919.

Petitioners sought by mandamus to compel a county treasurer to devote the proceeds of a special tax toward satisfaction of their county warrants, claiming that their contract rights in the fund were impaired by the action of the county board of revenue in levying the tax for another object, in violation of the Constitution. The state court decided the treasurer had no discretion under the state law but to follow the levy, and that petitioners' remedy, if any, was against the board or the county. *Held*, that this court had no jurisdiction to review the judgment, because it was based on considerations of state law sufficient to sustain it without reference to the federal questions.

Writ of error to review 197 Alabama, 384, dismissed.

THE case is stated in the opinion.

Mr. G. W. L. Smith for plaintiff in error.

No brief filed for defendant in error.

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

But a single question is required to be decided. We state the case only to the extent essential to make this clear and to elucidate the issue to be considered.

In 1905 and 1907 the County of Shelby contracted to build and furnish a court house. It was stipulated that the price for the work should be evidenced by interest-bearing warrants, maturing during a series of years. By the constitution and laws of Alabama the power of taxa-

tion of the county for general purposes was limited, but, in addition, the constitution and laws authorized counties to levy annually a special tax of one-fourth of one per cent. to be applied to the erection or repair of county buildings, the construction of roads, bridges, etc. The warrants under the contract were in terms secured by an agreement of the county to levy this one-fourth of one per cent. tax annually and apply it to the payment of the warrants. The state law contained a provision authorizing the registry of county warrants and making such registration operate as a lien on the proceeds of the taxes dedicated to the payment of the warrants. The court house was completed, furnished, and accepted, and the warrants were issued in conformity with the contract and according to law.

In 1916, Farson, Son & Co., alleging themselves to be holders of warrants issued under the contract as above stated, filed their suit for mandamus against the county treasurer. The petition alleged the contract for the court house and averred that the board of revenue of the county, the governing body which had succeeded to the county commissioners previously in authority, while continuing the levy of the one-fourth of one per cent. tax, had, in impairment of the obligation of the court house contract, dedicated the proceeds of that tax, as collected, to roads or bridges, thus depriving the warrant holders under the court house contract of the means of payment to which they were entitled. It was alleged that, in consequence of such action, the county treasurer had refused to pay any of the proceeds of the one-fourth of one per cent. tax to the court house warrant holders, and had, in further violation of his duty, credited the same to other funds and paid them out accordingly. It was moreover charged that the treasurer had in his hands, despite such wrongful payments to others, the sum of about $12,000, derived from the one-fourth of one per cent. tax collected in 1915, which it was

his duty to apply as far as necessary to the discharge of a sum of $1,565, with interest, due on the court house warrants, and which he had refused to pay although demand had been made on him to do so. The petition expressly counted upon the protection of the contract rights which it asserted, not only by the constitution of the State but also by the contract clause of the Constitution of the United States, alleging impairment thereof by action of the board of revenue, legislative in character; and the prayer was that the county treasurer be mandamused to pay out of the one-fourth of one per cent. tax for 1915 in his hands the sum of $1,565, with interest. A demurrer to the petition, as stating no cause for relief, was sustained, and the case is before us upon the ground of the deprivation of federal right which arose from the action of the court below in affirming the trial court.

The court below conceded that under the state law mandamus was appropriate if the county treasurer had capacity to stand in judgment. It moreover conceded that, if the contract had been entered into as alleged, the attempt to violate it by dedicating the proceeds of the one-fourth of one per cent. tax to any purpose other than to the payment of court house warrants was, in so far as such proceeds were necessary to pay said warrants, void as an impairment of the obligation of a contract forbidden both by the state constitution and that of the United States. But from these premises it nevertheless decided that there was no right to the mandamus against the county treasurer. It rested its conclusion on provisions of the state constitution and laws, which it held defined the duty of that officer and absolutely deprived him of all power to apply or pay money coming into his hands by taxation levied for a particular purpose to another and different purpose. It decided, therefore, that if under the theory that the board of revenue had wrongly directed the appropriation of the one-fourth of one per cent. tax, ac-

tion against that body and not merely against the county treasurer was appropriate and necessary under the state law. The court said:

"If the facts alleged in this petition are true, they [the court house warrant holders] ought to have relief, and the county ought to be required to carry out its contract, or to answer in damages for the breach thereof, if the contract was valid and binding; but the relief must be had by different proceedings and against different officers, or the county itself, and not against the county treasurer. Mandamus may be petitioners' remedy, but under the facts alleged it must be against different officers than the county treasurer." 197 Alabama, 384.

Thus resting its decision exclusively upon the question of procedure and the power of the particular officer against whom the mandamus was asked as limited and defined by the state law, we see no basis for the contention that the action of the state court gave effect to the impairment of the obligation of a contract in violation of the contract clause of the Constitution. On the contrary, we are of opinion that when correctly tested it becomes apparent that the action of the court below involved only a ruling upon a question of remedy resting upon considerations of state law broad enough to sustain the conclusion reached without any reference to the federal questions which were raised and relied upon.

And any possible doubt on this subject, we are of opinion, is removed by the subsequent action of the court below in the case of *Board of Revenue, Shelby County*, v. *Farson, Son & Co.*, 197 Alabama, 375, cited in the brief of the plaintiff in error. In that case, which was an action against the board of revenue of Shelby County to compel the levy of the one-fourth of one per cent. tax, as provided in the court house contract, for the purpose of paying, not only certain warrants which were past due in 1916, but to provide for the warrants falling due in 1917, the court

awarded the mandamus sought. In doing so, it not only held that the court house contract was valid and that the agreement to levy the tax as therein stipulated was lawful, but, moreover, that the subsequent action of the board of revenue in diverting the fund to the detriment of the court house warrant holders was an impairment of the obligations of the contract and was void because of repugnancy to the constitution of the State and to the contract clause of the Constitution of the United States.

It is true, indeed, that in that case the court referred to its ruling in this case with approval, but the relief which was denied in the one and afforded in the other leaves no support upon which to rest the contention that contract rights secured by the Constitution were impaired by the ruling which was made in this case.

As our conclusion is that the federal question relied upon as the basis for the writ of error had no foundation, it follows that our decree must be, and it is

Writ of error dismissed for want of jurisdiction.

ANDREWS, ADMINISTRATRIX OF ANDREWS, *v.* VIRGINIAN RAILWAY COMPANY.

ERROR TO THE ROANOKE COUNTY CIRCUIT COURT, STATE OF VIRGINIA.

No. 82. Argued December 16, 17, 1918.—Decided January 7, 1919.

A judgment of the Circuit Court of Virginia is not final for the purpose of review in this court while reviewable at discretion by the Court of Appeals of the State.

Therefore, a case by its nature reviewable here only by certiorari under the Act of September 6, 1916, c. 448, 39 Stat. 726, in which the Virginia Court of Appeals did not finally deny a writ of error

until November 13, 1916, cannot be brought here by writ of error, although the judgment of the Circuit Court preceded the act and the act excepts judgments rendered before it became operative, *i. e.*, 30 days from its date.

Writ of error dismissed.

To recover for the wrongful death of Andrews, a locomotive engineer in the employ of the defendant in error, the plaintiff in error, the representative of his estate, commenced this suit in April, 1914. Both the Employers' Liability Act and the act of Congress providing for the inspection of boilers of locomotives were alleged. Act of April 22, 1908, c. 149, 35 Stat. 65; Act of February 17, 1911, c. 103, 36 Stat. 913. On October 12, 1914, there was a judgment on a verdict in favor of the plaintiff. A writ of error having been allowed by the Court of Appeals of Virginia, the judgment was, on January 13, 1916, reversed and the case remanded for a new trial. *Virginian Ry. Co.* v. *Andrews' Admx.*, 118 Virginia, 482. The Circuit Court of Montgomery County, in which the case was tried, thereupon, by consent of the parties, transmitted it for trial to the Circuit Court of Roanoke County, in which court, on the 16th day of June, 1916, there was judgment in favor of the defendant. Thereupon a petition for writ of error to review this judgment was separately and out of term presented to the judges of the Court of Appeals and was denied, and on the opening of the term was, in accordance with the Virginia law, presented to the court, and was there finally denied on November 13, 1916. Then, on the 27th of November, 1916, a petition was presented to the presiding judge of the Circuit Court of Roanoke County for the allowance of a writ of error from this court, to review the judgment of that court of June 16, 1916, which was allowed, resulting in the case which is before us.

Mr. A. P. Staples and *Mr. A. B. Hunt* for plaintiff in error.

Mr. H. T. Hall and *Mr. G. A. Wingfield*, with whom *Mr. E. W. Knight* and *Mr. W. H. T. Loyall* were on the brief, for defendant in error.

Mr. Chief Justice White, after making the foregoing statement of the case, delivered the opinion of the court.

At the threshold, there arises a question of our jurisdiction which we may not overlook and which we must therefore decide. The question is, has this court power by writ of error to review the judgment below; or, in other words, is the authority of the court to review that judgment confined by the Act of September 6, 1916, c. 448, 39 Stat. 726, to the right to do so by certiorari in the mode and time provided by that act? Considering the subject only from the character of the controversy, it is indisputable that the case comes within the generic class as to which the power to review by writ of error was taken away by the Act of 1916 and the authority to certiorari substituted. It results that, unless the judgment in question comes under some limitation or exception provided by the statute to the general rule which it establishes, we have no jurisdiction.

There is no room for such exception unless it results from the provision in the statute taking out of the reach of its terms judgments rendered before it became operative. The act was approved on September 6, 1916, and was made operative thirty days thereafter. In form, the judgment to which the writ of error was addressed was rendered on June 16, 1916, before the operation of the statute, and was therefore outside of its provisions. But the question remains, Was the judgment a final judgment at the date named, or did it become so only by the exercise by the Court of Appeals of its power as manifested by its declining to take jurisdiction on November 13, 1916,

after the passage of the act. Undoubtedly, before the action of the Court of Appeals, the judgment was not final and was susceptible of being reviewed and reversed by that court. Undoubtedly, also, until the Court of Appeals acted, the trial court was not the court of last resort of the State whose action could be here reviewed. The contention, therefore, that the judgment of the trial court was a final judgment susceptible of being here reviewed by writ of error must rest upon the impossible assumption that the finality of that judgment existed before the happening of the cause by which alone finality could be attributed to it.

It is true that under the law of Virginia, in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. That this is true, would seem to be demonstrated by considering that if it were not so a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power and begetting the possibility of conflict and confusion.

From this it follows that the judgment to which the writ of error was addressed was in substance a judgment

rendered after the going into effect of the Act of 1916, and was only reviewable by certiorari, as provided in that act. The writ of error, therefore, must be and it is

Dismissed for want of jurisdiction.

MISSOURI PACIFIC RAILWAY COMPANY *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 14. Submitted November 13, 1918.—Decided January 7, 1919.

The provision of the Constitution requiring a vote of two-thirds of each house to pass a bill over a veto (Art. I, § 7, cl. 2), means two-thirds of a quorum of each house (*i. e.*, of a majority of its members, Art. I, § 5), not two-thirds of all the members of the body. P. 280.

This conclusion results from the context, proceedings in the Convention, and the early and consistent practice of Congress, especially under the similar provision made for submitting constitutional amendments. It is further confirmed by the practice of the States before and since the adoption of the Constitution. *Id.*

Webb-Kenyon Liquor Act sustained.

96 Kansas, 609, affirmed.

THE case is stated in the opinion.

Mr. W. P. Waggener and *Mr. J. M. Challiss* for plaintiff in error:

In view of the nature of the veto power and the extraordinary importance which must be attached to the function of the President in exercising it, it may well be assumed that the framers of the Constitution meant that a veto should challenge the attention of the members of the Congress and bring about a full and careful reconsideration of the matter affected; and, on the face of it, it would

seem that a considerably larger proportion of the members should be required to reënact a measure when so condemned than the number needed for its original enactment in the ordinary way. Hence we find the Constitution distinctly stating that to pass the bill upon such reconsideration there shall be an affirmative vote of two-thirds of "that house," *i. e.*, two-thirds of the members who compose the house in which the action is being taken. Had any less majority been intended, the Constitution would have said so. A Senator or Representative, upon election, becomes a member of the Senate or House and is accredited as such. He is not accredited to the majority, or to a constitutional quorum; in referring to "that house," the Constitution must refer not to a majority of the members, or to a quorum authorized to transact ordinary business, but to the membership in its entirety.

This part of the Constitution was evidently modeled upon the New York Constitution of 1777 (see *United States* v. *Weil*, 29 Ct. Clms. 538), in every respect save that there it was provided expressly that two-thirds of the members present could override a veto. The failure to follow the New York precedent in this respect is significant of an intention to require two-thirds of the entire membership, as the words used in the Constitution naturally imply.

Compare § 3 of Art. I, which requires only "two-thirds of the members present" in impeachment cases, and § 2 of Art. II, empowering the President to make treaties "provided two-thirds of the Senators present concur." On the other hand, Art. V provides against hasty amendment of the Constitution by requiring a vote of two-thirds of both houses. A reduced vote is allowed for treaties, notwithstanding their solemn character, because in their enactment the President and the Senators are working together. But the overriding of a veto, and the proposal of amendments to the Constitution, are of such extraordinary importance as to require the larger vote. It would have

made the intention no stronger or clearer if two-thirds of all the members of the house had been specified in so many words.

The remarks made by Gouverneur Morris in the Convention, as reported by Madison (Documentary History of the Constitution of the United States, vol. 3, pp. 721–723), support our contention.

Should it be held that an act may be passed over the Presidential veto by two-thirds of a quorum, it is possible for a bill to become a law notwithstanding expressed executive disapproval by a markedly less vote than it received upon its original passage.

Mr. Jas. P. Coleman, *Mr. S. M. Brewster*, Attorney General of the State of Kansas, and *Mr. Wayne B. Wheeler* for defendant in error.

Mr. Everett P. Wheeler and *Mr. Eliot Tuckerman*, by leave of court, filed a brief as *amici curiæ*, in support of the construction rejected in this case. See *post*, p. 599.

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

To avoid penalties sought to be imposed upon it for illegally carrying intoxicating liquors from another State into Kansas, the defendant railroad, plaintiff in error, asserted as follows: (1) That the state law was void as an attempt by the State to regulate commerce and thus usurp the authority alone possessed by Congress; (2) that if such result was sought to be avoided because of power seemingly conferred upon the State by the Act of Congress known as the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), such act was void for repugnancy to the Constitution of the United States because in excess of the power of Congress to regulate commerce and as a usurpation of rights reserved by the Constitution to the

States; (3) because, even if the Webb-Kenyon Law was held not to be repugnant to the Constitution for the reasons stated, nevertheless, that assumed law afforded no basis for the exertion of the state power in question, because it had never been enacted by Congress conformably to the Constitution, and therefore, in legal intendment, must be treated as non-existing.

It is conceded that the ruling of this court, sustaining the Webb-Kenyon Law as a valid exercise by Congress of its power to regulate commerce (*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 325), disposes of the first two contentions and leaves only the third for consideration. In fact, in argument it is admitted that such question alone is relied upon. The proposition is this: That as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it received in the Senate only a two-thirds vote of the Senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body.

Granting the premise of fact as to what the face of the journal discloses, and assuming for the sake of the argument (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143; *Rainey* v. *United States*, 232 U. S. 310, 317,) that the resulting question would be justiciable, we might adversely dispose of it by merely referring to the practice to the contrary which has prevailed from the beginning. In view, however, of the importance of the subject, and with the purpose not to leave unnoticed the grave misconceptions involved in the arguments by which the proposition relied upon is sought to be supported, we come briefly to dispose of the subject.

The proposition concerns clause 2 of § 7 of Article I of

the Constitution, providing that in case a bill passed by Congress is disapproved by the President—" . . . he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. . . ."

The extent of the vote exacted being certain, the question depends upon the significance of the words "that house;" that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum, (a majority of the members of each house; § 5, Art. I); or whether they refer to a body which must be assumed to embrace, not a majority, but all its members, for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it.

But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (History of the Constitution, vol. 2, p. 267, note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the Article fixing the quorum of the two houses for the purpose of exerting legislative power and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws

of the several States existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged. Indeed, the absolute identity between the body having authority to pass legislation and the body having the power in case of a veto to override it, was clearly shown by the constitution of New York, [1777] since that constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the Senate or House in which it originated, "but if after such re-consideration, two thirds of the said senate or house of assembly, shall, notwithstanding the said objections, agree to pass the same, it shall . . . be sent to the other branch of the legislature, where it shall also be re-considered, and if approved by two thirds of the members present, shall be a law," thus identifying the bodies embraced by the words "senate" and "house" and definitely fixing the two-thirds majority required in each as two-thirds of the members present.

The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other.

At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body

pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made. The Senate record was as follows:

"Resolved: That the Senate do concur in the resolve of the House of Representatives, on 'Articles to be proposed to the legislatures of the states, as amendments to the constitution of the United States,' with amendments; two-thirds of the Senators present concurring therein." 1st Cong., 1st sess., September 9, 1789, Senate Journal, 77.

And the course of action in the House and the record made in that body is shown by a message from the House to the Senate which was spread on the Senate Journal as follows:

"A message from the House of Representatives. Mr. Beckley, their clerk, brought up a resolve of the House of this date, to agree to the . . . amendments, proposed by the Senate, to 'Articles of amendment to be proposed to the legislatures of the several states, as amendments to the constitution of the United States,' . . . ; two-thirds of the members present concurring on each vote; . . . " 1st Cong., 1st sess., September 21, 1789, Senate Journal, 83.

When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated.

But this is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two-thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under consideration there were also pending other proposed amendments, dealing with the treaty and law-making power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a larger proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the law-making power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the States and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it. The ruling was made under these circumstances. When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the Speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision

of the Constitution says 'two-thirds of both Houses.' What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. . . . " Hinds' Precedents of the House of Representatives, vol. 5, pp. 1009–1010.

This occurrence demonstrates that there is no ground for saying that the adherence to the practice settled in both houses in 1789 resulted from a mere blind application of an existing rule; a conclusion which is also clearly manifested, as to the Senate, by proceedings in that body in 1861 where, on the passage of a pending amendment to the Constitution, as the result of an inquiry made by Mr. Trumbull relative to the vote required to pass it, it was determined by the Senate by a vote of 33 to 1 that two-thirds of a quorum only was essential. 36th Cong., 2nd sess., March 2, 1861, Senate Journal, 383.

In consequence of the identity in principle between the rule applicable to amendments to the Constitution and that controlling in passing a bill over a veto, the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before but came from conviction expressed, after deliberation, as to its correctness by many illustrious men.

While there is no decision of this court covering the sub-

ject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle, that in the absence of an express command to the contrary the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties. *Farmers Union Warehouse Co.* v. *McIntoch,* 1 Ala. App. 407; *State* v. *McBride,* 4 Missouri, 303; *Southworth* v. *Palmyra & Jackson R. R. Co.,* 2 Michigan, 287; *Smith* v. *Jennings,* 67 S. Car. 324; *Green* v. *Weller,* 32 Mississippi, 650. We say that the decisions have been without difference, for the insistence that the ruling in *Minnesota ex rel. Eastland* v. *Gould,* 31 Minnesota, 189, is to the contrary, is a wholly mistaken one, since the decision in that case was that as the state constitution required a vote of the majority of all the members elected to the house to pass a law, the two-thirds vote necessary to override a veto was a two-thirds vote of the same body.

Any further consideration of the subject is unnecessary, and our order must be, and is

Judgment affirmed.

WEIGLE *v.* CURTICE BROTHERS COMPANY.

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

No. 83. Argued December 17, 1918.—Decided January 7, 1919.

As respects domestic retail sales of secondary packages, or the contents thereof, out of the original packages in which they were imported in interstate commerce, state laws forbidding sale of food articles containing benzoate of soda are not inconsistent with the commerce

clause or the purpose of the Federal Food and Drugs Act, although the preservative, as used, is allowed by the federal act and regulations and the containers are labeled in conformity therewith.

Reversed.

THE case is stated in the opinion.

Mr. Walter H. Bender, Deputy Attorney General of the State of Wisconsin, with whom *Mr. Spencer Haven*, Attorney General of the State of Wisconsin, and *Mr. J. E. Messerschmidt*, Assistant Attorney General of the State of Wisconsin, were on the brief, for appellant.

Mr. H. O. Fairchild for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by Curtice Brothers Company, a New York corporation, to restrain Weigle, the Dairy and Food Commissioner of Wisconsin, from enforcing certain laws of the State, especially Statutes of 1913, § 4601g. That section makes it unlawful to sell any article of food that contains benzoic acid or benzoates, with qualifications not material here. The plaintiff makes such articles from fruit, and adds benzoate of soda as a preservative. It puts them up in glass bottles and jars properly labelled under the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768), packs the bottles and jars in wooden cases containing a number of the same, and ships the cases from its factory in New York to customers in Wisconsin among others. Of course the single bottles are sold in the retail trade, and their contents are served to guests in restaurants and hotels. The defendant disavowed any contention that the state laws affected or purported to affect sales by the importer in the unbroken wooden packages containing the bottles and the decree

treated that subject as taken out of the case. But the bill went farther and setting up a decision, incorporated in a regulation under the Food and Drugs Act, that benzoate of soda is not injurious to health and that objection would not be raised to it under the act if each container should be plainly labelled, contended that under the Food and Drugs Act and the Commerce Clause of the Constitution, the Wisconsin law was invalid even as applied to domestic retail sales of single bottles or the contents of single bottles of the plaintiff's goods. The defendant stood on a motion to dismiss and the District Court made a decree following the prayer of the bill. The defendant appealed.

The argument in support of the decree contends in various forms that the sale of the individual bottles, when removed from the original package after entering the State, still is a part of commerce among the States, since the act of Congress as to misbranding applies to them. But the Food and Drugs Act does not change or purport to change the moment at which an object ceases to move in interstate commerce. It imposes an obligation to label the bottles severally, although contained in one original package, as of course it may. *Seven Cases of Eckman's Alterative* v. *United States,* 239 U. S. 510, 515, 516. It provides for seizure and condemnation of misbranded or adulterated articles that have been transported from one State to another, although the transit is at an end, while the articles remain unsold or in original unbroken packages, as again it may. There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57, 58. Finally, the duty to retain the label upon the single bottles does not disappear at once. For reasons stated in *McDermott* v. *Wisconsin,* 228 U. S. 115, if the State could require the label to be removed while the bottles remained in the importer's hands unsold, it could

interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the State. The law upon that point has undergone no change.

The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress if it passed from State to State, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 362. When objects of commerce get within the sphere of state legislation the State may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 517; *McDermott* v. *Wisconsin*, 228 U. S. 115, 131. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the States.

Decree reversed.

FLEXNER *v.* FARSON ET AL., PARTNERS UNDER THE NAME AND STYLE OF FARSON, SON & COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 101. Submitted December 18, 1918.—Decided January 7, 1919.

A State has no power to provide that nonresident individuals, in suits growing out of their business transacted within the State through a local agent, shall be bound by process served upon him after the agency is at an end; and a judgment against a firm of nonresidents, based upon such service, is void. P. 293.

The power to make such provision as against foreign corporations springs from the power to exclude such corporations from local business, whence, by fiction, the continued agency to receive service is attributed to the corporation's implied consent; but there is no room for implying consent in the case of nonresident natural persons, since the power to exclude from local business does not exist as to them. *Id.*

268 Illinois, 435, affirmed.

THE case is stated in the opinion.

Mr. Jos. S. Laurent for plaintiff in error. *Mr. Ralph D. Stevenson* and *Mr. Robert G. Gordon* were also on the brief:

Subsection 6 of § 51, Kentucky Civil Code,[1] affords due process of law and is not violative of the Federal Constitution.

"Due process of law" is not susceptible of any restricted definition, but can be adapted to the changing conditions

[1] "In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

of society and business. Any legal proceeding which is consonant with natural justice in the light of present conditions affords due process of law. It does not require adherence to fixed rules of procedure. Magna Charta, §§ XXXIX and XL; Daniel Webster's Definition of "due process of law;" *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389; Black, Constitutional Law, pp. 571–572; *Hurtado* v. *California*, 110 U. S. 516; 2 Words & Phrases (N. S.), p. 167; *State* v. *Sponaugle*, 45 W. Va. 415; *Davidson* v. *New Orleans*, 96 U. S. 97; *Tenement House Department* v. *Weil*, 134 N. Y. Supp. 1062; *Ballard* v. *Hunter*, 204 U. S. 241; *Guenther* v. *American Steel Hoop Co.*, 116 Kentucky, 580. The decision of the Supreme Court of Illinois that personal service of summons is essential to due process of law is illogical and unsound when applied to different states of fact. There are many proceedings which afford due process of law although personal service of summons is not made on the defendant. We refer to the proceedings *in rem* for the attachment and sale of property (*Pennoyer* v. *Neff*, 95 U. S. 714), and proceedings under the power of eminent domain; also to proceedings under the taxing power (*Ballard* v. *Hunter*, *supra*); and to suits against infants and lunatics where the summons is served on the guardian or committee. It has likewise been held that summons may be left at the regular place of abode in the State of a resident defendant and that such service constitutes due process of law. *McDonald* v. *Mabee*, 243 U. S. 90. The facts and circumstances of each case must be considered, and, if the proceeding is appropriate, reasonable and just, it will be upheld by the courts whether it be a judgment *in rem* or *in personam*, and although personal service was not made on the defendant.

Any nonresident who carries on business in the State through an agent impliedly assents and agrees that, in suits growing out of the business, process may be served upon him by service as provided in the statute;

the statute is impliedly written into every contract entered into in Kentucky under circumstances which make it applicable. *Edwards* v. *Kearzey*, 96 U. S. 595; *Grannis* v. *Ordean*, 234 U. S. 385; *Guenther* v. *American Steel Hoop Co.*, 116 Kentucky, 580; *Johnson* v. *Westfield's Admr.*, 143 Kentucky, 10; *Alaska Commercial Co.* v. *Debney*, 141 Fed. Rep. 1; *Pennoyer* v. *Neff*, 95 U. S. 714, 734; *In re Grossmayer*, 177 U. S. 48; *Wilson* v. *Seligman*, 144 U. S. 41; *Kane* v. *New Jersey*, 242 U. S. 160; *Continental National Bank* v. *Folsom*, 78 Georgia, 449; *Vallee* v. *Dumergue* (1849), 4 Exch. 290; *Copin* v. *Adamson* (1874), L. R., 9 Exch. 345; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717; *Thomas* v. *Matthiessen*, 232 U. S. 221; *Mutual Reserve Fund Life Assn.* v. *Phelps*, 190 U. S. 147.

Under the Fourteenth Amendment no distinction can be made as to the validity of the judgment in the State of rendition and in other States; if valid at home it is valid everywhere. *McDonald* v. *Mabee*, 243 U. S. 90.

The Kentucky law does not deny equal privileges and immunities to the citizens of the several States. It applies to all citizens alike who are nonresidents of the State. It is well settled that a State may provide a mode of service for nonresidents different from that which applies to residents. *Blake* v. *McClung*, 172 U. S. 239; *Conner* v. *Elliott*, 18 How. 591; *Ballard* v. *Hunter*, 204 U. S. 241; *Watson* v. *Nevin*, 128 U. S. 578; *Hayes* v. *Missouri*, 120 U. S. 68.

A State may validly provide by statute that process against the members of a nonresident partnership may be served on the agent who was in charge of their business in said State and transacted the business in the State out of which the suit arose, although such agent had ceased to represent his principals at the time of the institution of the suit; provided there be no other agent in the State on whom process can be served. *Nelson Morris* v. *Rehkopf & Sons*, 25 Ky. Law Rep. 352; *International Harvester*

Co. v. *Commonwealth*, 147 Kentucky, 664; *Fireman's Ins. Co.* v. *Thompson*, 155 Illinois, 204; *Mutual Reserve Fund Life Assn.* v. *Phelps*, 190 U. S. 147.

Mr. Harry P. Weber and *Mr. George W. Miller* for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the plaintiff in error upon a judgment for money rendered by a Kentucky Court. The declaration alleges that the transaction in respect of which the judgment was rendered took place at Louisville, Kentucky, and that at that time the defendants were doing business there as partners through Washington Flexner, who was and continued to be their agent until the time of this suit. It further alleges that the defendants were nonresidents and that the service of summons of the Kentucky suit was made upon Washington Flexner in accordance with a Kentucky statute authorizing it to be made in that way. The defendant William Farson was the only one served with process in the present action and he pleaded that the defendants in the former suit did not reside in Kentucky, were not served with process and did not appear; that Washington Flexner was not their agent at the time of service upon him; that the Kentucky statute relied upon was unconstitutional; that the Kentucky Court had no jurisdiction, and that its judgment was void under the Constitution of the United States. The plaintiff demurred to the pleas, and stood upon his demurrer when it was overruled, whereupon judgment was entered for the defendants. There was an appeal to the Supreme Court of the State on the ground that the Court below did not give full faith and credit to the Kentucky judgment and erred in holding the Kentucky statute as to service unconstitutional. The Supreme Court affirmed the judg-

ment below. 268 Illinois, 435. The same errors are alleged here.

It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co.* v. *French*, 18 How. 404. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 522, 523.

Judgment affirmed.

CITY OF ENGLEWOOD *v.* DENVER & SOUTH PLATTE RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 106. Submitted December 19, 1918.—Decided January 7, 1919.

An ordinance provision respecting the service to be rendered by a street car company (in this case respecting the transfer privileges to be accorded passengers,) will not be adjudged to have created a contract obligation beyond legislative control if the power of the municipality under the state law, and its intention, to create such an obligation do not clearly appear.

Writ of error to review 62 Colorado, 229, dismissed.

THE case is stated in the opinion.

Mr. L. F. Twitchell for plaintiff in error. *Mr. S. D. Crump* and *Mr. H. C. Allen* were also on the brief:

The Act of 1913, known as the Public Utilities Act, if given the construction placed upon it by the majority of the state court, is a violation of the constitutional inhibition against impairing the obligation of contracts. *Atlantic Coast Elec. Ry. Co.* v. *Public Utility Commrs.*, 89 N. J. L. 407, 413; *Reed* v. *Trenton*, 80 N. J. Eq. 503–506; *Detroit* v. *Detroit United Railway*, 173 Michigan, 314; *Peoria Ry. Co.* v. *Peoria Ry. Terminal Co.*, 252 Illinois, 73; *Southern Bell Telephone Co.* v. *Mobile*, 162 Fed. Rep. 532; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *North Wildwood* v. *Public Utility Commrs.*, 88 N. J. L. 81; *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417; *Monett Electric Light Co.* v. *Monett*, 186 Fed. Rep. 364; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Shreveport Traction Co.* v. *Shreveport*, 122 Louisiana, 1; *Omaha Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 536.

Mr. Fred Farrar for defendant in error:

A federal question cannot be raised for the first time in a petition for a rehearing in the state court unless in the consideration of that petition that court rules upon the federal question in denying the application. *McCorquodale* v. *Texas*, 211 U. S. 432.

The case is controlled by a long line of decisions, both state and federal, which recognize the distinction between cases in which the municipality has been granted the power to enter into irrevocable contracts with utility companies, and those in which the municipality either had no direct authority to enter into such a contract, or, having the power to contract, the contract was subject to revocation whenever the latent power of the State was called into action and the supervision of rates and fares undertaken. *Milwaukee &c. Co.* v. *R. R. Commission of Wisconsin*, 238 U. S. 174; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273; *Wyndotte County Gas Co.* v. *Kansas*, 231 U. S. 622; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574; *Benwood* v. *Public Service Comm.*, 75 W. Va. 127; *State ex rel. Webster* v. *Superior Court*, 67 Washington, 37; *Manitowoc* v. *Manitowoc & Northern Traction Co.*, 145 Wisconsin, 13; *Minneapolis, St. Paul &c. R. R. Co.* v. *Menasha Wooden Ware Co.*, 159 Wisconsin, 130; *Woodburn* v. *Public Service Comm.*, 82 Oregon, 114; *Seattle Electric Co.* v. *Seattle*, 206 Fed. Rep. 955; *California-Oregon Power Co.* v. *City of Grants Pass*, 203 Fed. Rep. 173.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to compel the defendant to arrange for passengers on its road to be transported without extra fare over the line of the Denver City Tramway Company from a point of connection and in like manner for

passengers on that company's line to be carried over the defendant's line without additional charge. The defendant operates a street railway under a franchise granted by the plaintiff while a town. By § 6 of the ordinance making the grant the grantees were allowed to charge certain fares provided that they should make the arrangement stated above. The defence pleaded against being required to comply with these terms is that the Denver City Tramway Company charges five cents, the maximum fare allowed, for its part of the service, so that the defendant gets nothing, and that the defendant filed a schedule of rates with the State Public Utilities Commission which now are the defendant's established rates and charges. On demurrer the Supreme Court of the State held that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature, that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy, that it had done so, and that this proceeding should be dismissed.

Of course we do not go behind the decision of the Court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the State could confer that power. The plaintiff says that the State could not confer it since to do so would impair the obligation of a contract. Upon that point we agree with the Court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control. *Milwaukee Electric Ry. & Light Co.* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, 180. The cases generally are cases where the railroad or other company sets up contract rights against the city. Whether when the railroad consents a legislature would not have all the power that the city could have to modify even a constitutionally protected contract need not be considered

here. If we deal with the present case on the merits there seems to be no sufficient reason why the writ of error should not be dismissed. It is giving the plaintiff the benefit of a very great doubt if we assume that the question on the merits was saved.

Writ of error dismissed.

THE HEBE COMPANY ET AL. *v.* SHAW, SECRETARY OF AGRICULTURE OF OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 664. Argued December 11, 12, 1918.—Decided January 7, 1919.

The General Code of Ohio, § 12725, forbids, under criminal penalty, the manufacture, sale, etc., of condensed milk, unless made from unadulterated milk from which the cream has not been removed and in which the milk solids are equivalent to 12% of those in crude milk and 25% of them fat, and unless the container is distinctly labeled, stamped or marked with its true name, brand and by whom and under what name made; by § 5778 a food is adulterated if a valuable ingredient has been wholly or in part abstracted; and § 12720 allows skimmed milk to be sold only under restrictions. Appellants' product, assumed to be wholesome and nutritious, and consisting of condensed skimmed milk combined with cocoanut oil, was imported from another State in cases each containing a number of the one pound or six ounce cans in which it was retailed, each can being labeled "Hebe A Compound of Evaporated Skimmed Milk and Vegetable Fat Contains 6% Vegetable Fat, 24% Total Solids," with the place of manufacture and address of the company, and the words "For Coffee and Cereals For Baking and Cooking."

Held: (1) That the product was within the prohibition of § 12725. P. 302.

(2) That, as so construed and applied, the statute did not violate the Fourteenth Amendment. P. 303.

(3) That, as applied to the cans containing the product, the prohibition

of local sale was not invalid as a direct burden on interstate commerce; in this aspect the cases in which the cans were shipped, and not the cans, were the "original packages." P. 304.

(4) That the Federal Food & Drugs Act did not prevent such regulation. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Charles E. Hughes, with whom *Mr. Brode B. Davis*, *Mr. Thomas E. Lannen* and *Mr. Augustus T. Seymour* were on the briefs, for appellants:

The food product in question, being pure and wholesome, plainly and fairly labeled, is not within the condemnation of the legislation of the State of Ohio, and may be lawfully sold there. *United States* v. *Frank*, 189 Fed. Rep. 195, 198; *Caha* v. *United States*, 152 U. S. 211, 221; *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153; *Commonwealth* v. *Boston White Cross Milk Co.*, 209 Massachusetts, 30; *Genesee Valley Milk Products Co.* v. *J. H. Jones Corporation*, 143 App. Div. 624, 626, 627; *State* v. *Crescent Creamery Co.*, 83 Minnesota, 284; *Rose* v. *State*, 11 Ohio Cir. Ct. Rep. 87; *J. M. Sealtz Co.* v. *State of Ohio*, decided by Ct. of Appeals, Allen County, Ohio, Dec. 28, 1917.

The statute is penal and it should not be extended by construction. *Bolles* v. *Outing Company*, 175 U. S. 262, 265; *Commonwealth* v. *Boston White Cross Milk Co.*, *supra.*

The statute does not embrace a compound such as "Hebe." *Hutchinson Ice Cream Co.* v. *Iowa*, *supra.*

If the legislation can be deemed applicable, the prohibition of the sale of this product in Ohio is an unconstitutional interference with interstate commerce. The appellants are entitled to be protected against interference with sales in the original packages. The prohibition of the statute is repugnant to the Federal Food and

Drugs Act. *Savage* v. *Jones*, 225 U. S. 501, 519, 520; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30; *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Rhodes* v. *Iowa*, 170 U. S. 412, 424; *May* v. *New Orleans*, 178 U. S. 496; *Austin* v. *Tennessee*, 179 U. S. 343; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 98; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Erie R. R. Co.* v. *New York*, 233 U. S. 671, 683; *McDermott* v. *Wisconsin*, 228 U. S. 115, 132–137; *Corn Products Refining Co.* v. *Weigle*, 221 Fed. Rep. 998; *United States* v. *779 Cases of Molasses*, 174 Fed. Rep. 325; *Curtice Brothers Co.* v. *Weigle*, D. C. U. S., Western District of Wisconsin, decided October 30, 1916, [not reported—see 248 U. S. 285].

The prohibition of the sale within the State of Ohio of this product, concededly pure, wholesome and nutritious, is invalid as a deprivation of liberty and property, and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Adams* v. *Tanner*, 244 U. S. 590; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Price* v. *Illinois*, 238 U. S. 446; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *People* v. *Biesecker*, 169 N. Y. 53; *Toledo, Wabash & Western Ry. Co.* v. *Jacksonville*, 67 Illinois, 37; *State* v. *Hanson*, 118 Minnesota, 85; *Ex parte Hayden*, 147 California, 649; *Rigbers* v. *Atlanta*, 7 Ga. App. 411; *Dorsey* v. *Texas*, 38 Tex. Crim. Rep. 527; *People* v. *Excelsior Bottling Works*, 184 App. Div. 45; *Waite* v. *Macy*, 246 U. S. 606.

Mr. Louis D. Johnson and *Mr. Charles J. Pretzman*, with whom *Mr. Joseph McGhee*, Attorney General of the State of Ohio, was on the brief, for appellees:

The food product, whether pure and wholesome or not and whether plainly and fairly labeled or not, is within

the condemnation of the legislation of the State of Ohio and may not lawfully be sold in Ohio. Lewis' Sutherland Statutory Construction, pp. 967, 980; *Conrad* v. *State*, 75 Ohio St. 52; *United States* v. *Hartwell*, 6 Wall. 385; *State* v. *Brown*, 7 Oregon, 186; *Bissot* v. *State*, 53 Indiana, 408; *Barker* v. *State*, 69 Ohio St. 68; *State* v. *Vause*, 84 Ohio St. 210, 215, 216; *State* v. *Crescent Creamery Co.*, 83 Minnesota, 284; *Genesee Valley Milk Products Co.* v. *J. H. Jones Corporation*, 143 App. Div. 624, 626, 627; *Commonwealth* v. *Boston White Cross Milk Co.*, 209 Massachusetts, 30; *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153; *Ryder* v. *Maryland*, 109 Maryland, 235; General Code of Ohio, §§ 12725, 5774, 5778, 5785, and 12717.

The prohibition of the sale in Ohio is not an unconstitutional interference with interstate commerce. The appellants are not entitled to be protected against interference with sales in the original packages, and the prohibition of the statute is not repugnant to the Federal Food and Drugs Act. *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100, 124; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *County of Marshall*, 196 U. S. 261; *Price* v. *Illinois*, 238 U. S. 446; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *Sligh* v. *Kirkwood*, 237 U. S. 52; *Savage* v. *Jones*, 225 U. S. 501; *Plumley* v. *Massachusetts*, 155 U. S. 461.

The prohibition of sale in Ohio is a valid exercise of the police power of the State, and not invalid as a deprivation of liberty and property or as denial of the equal protection of the laws. *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280–288; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342–357; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Waite* v. *Macy*, 246 U. S. 606; *People*

v. *Biesecker*, 169 N. Y. 53; *In re Bresnahan, Jr.*, 18 Fed. Rep. 62; *Butler* v. *Chambers*, 36 Minnesota, 69; *Toledo, Wabash & Western Ry. Co.* v. *Jacksonville*, 67 Illinois 37, 40; *State* v. *Hanson*, 118 Minnesota, 85; *Ex parte Hayden*, 147 California, 649; *Rigbers* v. *Atlanta*, 7 Ga. App. 411; *Dorsey* v. *Texas*, 38 Tex. Crim. Rep. 527; *Commonwealth* v. *Waite*, 11 Allen, 264; *State* v. *Capital City Dairy Co.*, 62 Ohio St. 246; 183 U. S. 238; *State* v. *Rippeth*, 71 Ohio St. 85, 87; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *People* v. *Marx*, 99 N. Y. 377; *State* v. *Addington*, 77 Missouri, 110; *Powell* v. *Commonwealth*, 114 Pa. St. 265.

The bill of complaint should be dismissed for want of equity.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought to restrain prosecutions threatened against the plaintiffs and their customers for selling a food product of the plaintiffs called Hebe, the bill being based upon the destruction of the plaintiffs' business which it is alleged will ensue. The prosecutions are threatened mainly or wholly under certain statutes of Ohio which, the plaintiffs argue, do not bear the construction put upon them by the defendants, or, if they do, are bad under the Fourteenth Amendment to the Constitution of the United States and the Commerce Clause. Article I, § 8. A similar case was heard before three judges. By agreement the evidence in that case was made the evidence in this. The District Judge adopted the opinion of the three and dismissed the bill.

Hebe is skimmed milk condensed by evaporation to which six per cent. of cocoanut oil is added by a process that combines the two. It is sold in tin cans containing

one pound or six ounces of the product and labeled "Hebe A Compound of Evaporated Skimmed Milk and Vegetable Fat Contains 6% Vegetable Fat, 24% Total Solids," with the place of manufacture and address of the Hebe Company. On the side of the label are the words "For Coffee and Cereals For Baking and Cooking." By § 12725 of the General Code of Ohio "Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from . . . unadulterated . . . milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made," is subject to a fine, and for each subsequent offense to a fine and imprisonment. The first question is whether Hebe falls within these words.

It is argued that, as Hebe is a wholesome or not unwholesome product, the statutes should not be construed to prohibit it if such a construction can be avoided, and that it can be avoided by confining the prohibition to sales of condensed milk as such, under the name of condensed milk, as was held with regard to ice cream in *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153. But the statute could not direct itself to the product as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. *Savage* v. *Jones*, 225 U. S. 501, 524. By § 5778 a food is adulterated if a valuable ingredient has been wholly or in part abstracted from it, and the effect of this provision upon

skimmed milk is qualified only by § 12720, which states the stringent terms upon which alone that substance can be sold. It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so the statute cannot be avoided by adding a small amount of cocoanut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover, when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort.

We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204. If the character or effect of the article as intended to be used "be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury," or, we may add, by the personal opinion of judges, "upon the issue which the legislature has decided." *Price* v. *Illinois*, 238 U. S.

446, 452. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357. The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends. See further *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 288.

With regard to the other objection urged, the statute "was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food." *Savage* v. *Jones*, 225 U. S. 501, 524. The defendants disclaim any intention to interfere with the sale of the goods in the original packages by the consignee, and if the record is thought to raise a doubt with regard to that it may be met by a modification of the decree so as to leave it without prejudice in case prosecutions should be threatened or attempted for such sales. Some question was raised as to whether the individual can was not to be regarded as the original package. But it appears that the cans are brought from Wisconsin, where Hebe is manufactured, into Ohio in fibre cases containing forty-eight one-pound cans or ninety-six six-ounce cans. The cases are the original packages so far as the present question is concerned, *Austin* v. *Tennessee*, 179 U. S. 343, although no doubt, as shown by *McDermott* v. *Wisconsin*, 228 U. S. 115, 136, the power of Congress to regulate interstate commerce would extend for some purposes to the cans. The Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, dealt with in *McDermott* v. *Wisconsin*, does not prevent state regulation of domestic retail sales. *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 517. *Weigle* v. *Curtice Brothers Co.*, *ante*, 285. Indirect effects upon interstate commerce do not invalidate the act. *Sligh* v. *Kirkwood*, 237 U. S. 52, 61. *Savage* v. *Jones*, 225 U. S. 501, 525.

Decree affirmed.

297. DAY, VAN DEVANTER, and BRANDEIS, JJ., dissenting.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE VAN DEVANTER and MR. JUSTICE BRANDEIS, dissenting.

The right to prohibit the sale of plaintiffs' product in the State of Ohio is mainly rested upon § 12725 of the General Code of that State. In the absence of a construction by the Supreme Court of Ohio, we must interpret the statute ourselves. We have been unable to come to the conclusion, reached by the majority of the court, as to the meaning of the law. As the result of this decision is to exclude from sale in the State of Ohio a food product not of itself harmful, but shown to be wholesome, we shall briefly state the reasons which impel the dissent.

Section 12725 of the General Code of Ohio reads:

"Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

The statute defines a crime, and the question is not different than it would be if the plaintiffs were indicted for its violation. While all statutes are to receive a reasonable interpretation, those of a criminal nature are not to be extended by implication. Condensed milk, when this statute was passed, was well known to be milk from which a considerable portion of water had been evaporated.

Condensed milk to be what its name imports must be made from whole milk. If not so manufactured, the legislature has the right to provide that the public shall be advised of the treatment to which it has been subjected. Skimmed milk, conspicuously labeled as such, may be sold in the State of Ohio. (§ 12720, Gen. Code, Ohio.) The legislature has shown no intention to condemn it as an unwholesome article of food. It is not less so when condensed.

We are unable to find in these statutes anything which prohibits the sale of condensed, skimmed milk when it is a part of a wholesome compound sold for what it really is, and distinctly labeled as such. In the section under consideration, 12725, the Ohio legislature was not dealing with compounds. It was undertaking to assure the purity of a well-known article of food—condensed milk. The statute provides that such condensed milk so offered for sale shall be made of pure, clean, fresh, unadulterated and wholesome milk from which the cream has not been removed, and that the can containing it shall be distinctly labeled with its true name. With deference to the contrary view, it seems to us that reading the statute in the light of its purpose to require condensed milk to be made from whole milk and sold for what it is, the necessary result is to exclude the plaintiffs' compound from the words and meaning of the act. It is not evaporated milk, and makes no pretense of being such. It is a food compound consisting in part of condensed, skimmed milk. It is so labeled in unmistakable words in large print on the can containing it. The label states with all the emphasis which large type can give that it is a compound made of "evaporated skimmed milk and vegetable fat." The proportions of the ingredients are stated. The striking label does not describe condensed milk, and he who reads it cannot be misled to the belief that he is buying that article. It is shown to be wholesome and clean and free from impurities.

297. DAY, VAN DEVANTER, and BRANDEIS, JJ., dissenting.

It seems to us that the case is within the principle stated by this court in *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153, in which a statute forbidding the sale as ice cream of an article not containing a certain portion of butter fat was sustained as within the police power of the State. The statute was construed by the highest court of the State where it was produced to include articles sold as ice cream; thus interpreted, we held it to be a constitutional exercise of the police power of the State. So here, we think the legislature of Ohio intended to deal with condensed milk when sold as such, and to make it an offense to sell it when of less than the required purity.

It may be conceded that the statute would include such an article when not up to the standard, but sold for the real thing. The public is entitled to protection from deception as well as from impurity. This principle seems to have controlled the decision of the District Court. The record discloses that in one or more instances dealers had supplied this article as condensed milk. But an act or two of this sort by fraudulent dealers ought not to be the test of the plaintiffs' right, or control the meaning of this statute. If such were the case, very few food compounds would escape condemnation. The few instances of deception shown had not the sanction of plaintiffs' authority. Such acts did violence to the plain terms in which the plaintiffs' printed label disclosed that their product was a compound and defined its parts. The label so truly expresses just what the substance is, that it is difficult to believe that any purchaser could be deceived into buying the article for something other than it is.

The interdiction of the State Board is not against the sale of this article as condensed milk, but of all sales of this compound in the State of Ohio. In our view this criminal statute, rightly interpreted, does not embrace the plaintiffs' product, and that reason alone should be sufficient to warrant a reversal of the decree.

UNION FISH COMPANY *v.* ERICKSON.

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

No. 76. Submitted November 22, 1918.—Decided January 7, 1919.

By a contract made orally in California, respondent was engaged to go to Alaska and there for one year to serve as master of petitioner's vessel, mainly upon the sea. The respondent libeled the vessel in the District Court in California for breach of the contract. *Held*, that the contract was maritime, and that the California statute of frauds requiring a writing for agreements not to be performed within a year was therefore inapplicable in defense. P. 312.

235 Fed. Rep. 385, affirmed.

THE case is stated in the opinion.

Mr. G. S. Arnold and *Mr. William Denman* for petitioner:

The California statute, Civil Code, § 1624, made the contract invalid; it did not affect merely procedure, like the corresponding portion of 29 Charles II, c. 3, par. 4. The contract, therefore, was everywhere unenforceable, unless a State is powerless to make any maritime contract, though entered into within her limits, invalid. *Leroux* v. *Brown*, 12 C. B. 801; *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489; *Buhl* v. *Stephens*, 84 Fed. Rep. 922; *Allens* v. *Schuchardt*, Fed. Cas. No. 236; affd. 1 Wall. 359; *Scudder* v. *Union National Bank*, 91 U. S. 406, 413; Minor, Conflict of Laws, §§ 173, 210.

The decision in *Workman* v. *New York City*, 179 U. S. 552, (*cf. s. c.*, 63 Fed. Rep. 298; 67 Fed. Rep. 347,) was not revolutionary. It merely applied well-settled principles, holding that in admiralty, as in equity, the federal courts will not be bound by decisions of state courts.

It must primarily be carried in mind that that action involved a tort and not a contract, and that the state law overridden was simply the common-law principles laid down in the state courts. All the decisions relied on (save *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 443,) were cases of procedure or jurisdiction, not passing upon the validity of any contract enforced in admiralty but concerned only with the powers of the States to regulate the admiralty courts. Naturally the States have no such power or the federal jurisdiction in admiralty would be carried on subject to the approval of the States. Admittedly, no state statute can regulate the jurisdiction or practice of the United States courts in equity, *Payne* v. *Hook*, 7 Wall. 425, 430; or in admiralty, *The Lottawanna*, 21 Wall. 558. The federal courts in admiralty, (as in equity,) are not governed by the state statutes of limitation. *The Key City*, 14 Wall. 653, 660; *Sullivan* v. *Ellis*, 219 Fed. Rep. 694, 698. A State cannot affect the application of the Limited Liability Act in admiralty. *Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527, 557. Contributory negligence does not wholly bar recovery in admiralty. *The Max Morris*, 137 U. S. 1. And the admiralty court will determine the priority of maritime liens upon maritime principles. *The J. E. Rumbell*, 148 U. S. 1. (As pointed out in *The Lottawanna*, the constitutionality of the Limited Liability Act was sustained not under the admiralty clause but under the commerce clause. *Lord* v. *Steamship Co.*, 102 U. S. 541, 545. As a valid act under the commerce clause, no state legislation could limit its operation. This is equally true of any valid federal act which regulates commerce, such as the Federal Employers' Liability Act of 1910. *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492, 501; *Moss* v. *Gulf Compress Co.*, 202 Fed. Rep. 657, 661.)

The rule that the federal courts are not bound by decisions of state courts upon questions of general juris-

prudence or general commercial law has always been recognized. As stated in *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 443, this principle applies only to state court decisions and does not apply to statutes. But if a State legislates regarding a matter of general commercial law, the federal courts necessarily are bound by the statute enacted. *Smith* v. *Nelson Land & Cattle Co.*, 212 Fed. Rep. 56, 59.

The case of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, is not inconsistent with the power of the State to regulate, in the absence of legislation by Congress, maritime contracts, so far at least as to prescribe the formal requirements necessary to the validity of such contracts. The reasoning of both the majority and dissenting opinions confirms this power. That the admiralty courts are bound to respect state statutes of the character here involved had been clearly enunciated some time before in *The Hamilton*, 207 U. S. 398, 405. See also *The Harrisburg*, 119 U. S. 199; *The Lottawanna*, 21 Wall. 558.

Under the similar power expressed in the interstate commerce clause, the federal courts have always held that where state statutes are local in their nature and Congress has not acted, the statutes are valid and will be enforced in the federal courts. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368. But to sustain the present decision, the conclusion must be reached that the power of Congress is *exclusive*, and that all state statutes regulating maritime contracts are void in admiralty.

If the California statute, prescribing the formalities necessary to the validity of a contract executed within her borders, will not be enforced in admiralty, it follows that the State is without power effectually to legislate with regard to maritime contracts at all, since the statutory regulation of maritime contracts necessarily involves the

invalidity of contracts not executed in conformity with the statute. To take away the power of a State to regulate maritime contracts seems a clear denial of the principle stated by the Supreme Court in enforcing in admiralty a state pilotage statute. *Ex parte McNeil*, 13 Wall. 236, 243.

As has been pointed out the courts have gone no further in making clear the inviolability of admiralty than they have of federal equity jurisdiction. Yet courts of equity constantly enforce state statutes of frauds. See such cases as *Kennedy* v. *Bates*, 142 Fed. Rep. 51; *Horton* v. *Stegmeyer*, 175 Fed. Rep. 756; *Ducie* v. *Ford*, 138 U. S. 587. If the California statute, prescribing general rules for all contracts, and applying only incidentally to maritime contracts, executed within her borders, infringes upon the judicial section of the Constitution when it is applied to maritime affairs, then so much the more must state statutes directly affecting maritime matters—marine insurance contracts, materialmen's liens, pilotage and many other subjects—infringe upon federal powers.

Mr. Charles J. Heggerty for respondent. *Mr. F. R. Wall* was also on the brief.

Mr. Justice Day delivered the opinion of the court.

Erickson filed a libel in admiralty in the District Court of the United States for the Northern District of California, alleging that by an oral contract with the petitioner, owner of the vessel "Martha," he engaged to proceed to Pirate Cove, Alaska, and after arrival there to serve for a year as master of the vessel, and perform certain duties in connection therewith for an agreed compensation. The libel averred that he proceeded to Pirate Cove, and performed his duties under the contract until he was wrongfully discharged by the respondent. Libelant sought to

recover damages for breach of contract. An answer was filed denying the alleged contract, and averring that libelant was discharged because of his wrongful conduct.

A decree was rendered in favor of libelant in the District Court; upon appeal that decree was affirmed by the Circuit Court of Appeals. 235 Fed. Rep. 385.

The question presented and argued here concerns the application of the California Statute of Frauds, which it is alleged rendered the contract void because not to be performed within one year from the making thereof. The Civil Code of California provides: Section 1624. "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof."

The contract of the master was of a maritime character. This does not seem to be controverted by the petitioner. (See *The Boston*, 3 Fed. Cas. 921, Cas. No. 1669; *The William H. Hoag*, 168 U. S. 443.) We have, then, a maritime contract for services to be performed principally upon the sea, and the question is can such engagement be nullified by the local laws of a State, where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?

The Constitution (Article III, § 2) extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Admiralty jurisdiction under the Federal Constitution "embraces," says Mr. Justice Story in his treatise on the Constitution, "two great classes of cases,—one dependent upon locality, and the other upon the nature of the contract." In the latter class are embraced "contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Story on the Constitution, 4th ed., § 1666.

This court has had occasion to consider the nature and extent of admiralty jurisdiction as it was intended to be conferred by the Constitution. In *The Lottawanna*, 21 Wall. 558, the subject was much considered, and Mr. Justice Bradley, speaking for the court, said:

"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."

This principle was reiterated in *Workman* v. *New York City*, 179 U. S. 552. In that case it was declared that neither local law nor decisions could deprive of redress where a cause of action, maritime in its nature, was prosecuted in a court of admiralty of the United States. (179 U. S. 560.)

In the recent case of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, the subject was again considered and the cases in this court reviewed, and state legislation was declared invalid "if it . . . 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." (244 U. S. 216.)

In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts* v. *Camors*, 115 U. S. 353, 362.

In different countries the appointment of masters of

vessels has been the subject of maritime law which has directed the conduct of "those who pursue commerce and put to sea." Their duties and qualifications have been the subject of regulation by the recognized principles of admiralty law. Benedict's Admiralty, 4th ed., § 146. They are regulated by statutes enacted under federal authority. See U. S. Comp. Stats. of 1916, vol. 12, Index "Masters of Vessels."

If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States.

We think the Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner.

Affirmed.

FISHER *v.* RULE.

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

No. 78. Argued November 22, 1918.—Decided January 7, 1919.

To initiate a right under the homestead act a minor's application must show that he is the head of a family; and a general assertion that he is such, by reason of having adopted a minor child, but without stating the time, place or mode of adoption, or identifying the child, is insufficient for this purpose. P. 317.

When the Secretary of the Interior, after canceling a final homestead entry, has ordered a suspension of all action under the decision

pending a reconsideration of it, no adverse right may be initiated under the homestead law either by settlement and improvement or by filing a preliminary application, while the suspension remains in force. *Id.*

To fasten a trust on a patentee of public land, the plaintiff must show that the better right to the land is in himself; it is not enough to show that the patentee ought not to have received the patent. *Id.*

232 Fed. Rep. 861, affirmed.

THE case is stated in the opinion.

Mr. Homer Guerry, with whom *Mr. Allen G. Fisher*, *Mr. William P. Rooney* and *Mr. John B. Barnes* were on the briefs, for appellant.

Mr. Samuel Herrick, with whom *Mr. Edwin D. Crites* and *Mr. F. A. Crites* were on the brief, for appellee.

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

This is a suit by Fisher to have Rule declared a trustee for him of the title to certain land in Nebraska, for which Rule holds a patent under the homestead law of the United States. Fisher lost in the District Court and its decree was affirmed by the Circuit Court of Appeals. 232 Fed. Rep. 861.

The case presented by the record is as follows:

In 1904, when the land was public land, a son of Rule applied for and secured a preliminary homestead entry thereof at the local land office. Under the ruling then and for many years prevailing in the Land Department he had six months within which to establish residence on the land. During the early part of that period he died intestate without establishing such residence. The father was the only heir and as such, according to the ruling then and theretofore prevailing in the Land Department,

could acquire title under the son's entry without himself residing on the land. Shortly after the son's death he took possession under the entry, fenced the land, erected substantial buildings thereon, cultivated forty acres or more and pastured live stock on the remainder, but resided on an adjoining tract. In due course, after continuing his cultivation and improvements for five years, he submitted final proof at the local land office showing what he had done and made the payments required by law. In that connection his right to a patent was contested by one who, although making no claim to the land, insisted that the entry was extinguished *ipso facto* when the son died without establishing residence on the land, and that, if the entry was not thus extinguished, the father forfeited his rights thereunder by failing to make the land his own place of residence. The local officers held against the contestant and with the father, and that decision was affirmed by the Commissioner of the General Land Office. But when the matter came before the Secretary of the Interior that officer, conceiving that the settled rulings of the Land Department before noticed were not well grounded, sustained the insistence of the contestant, reversed the decisions of the local officers and the Commissioner and directed that the entry be canceled. 42 L. D. 62, 64. The father sought to have the matter reconsidered and, while at first his efforts were unavailing, a rehearing ultimately was granted. On the rehearing, of which the contestant had timely notice, the Secretary recalled his first decision, adhered to the prior settled rulings, dismissed the contest and directed that the entry be reinstated. 43 L. D. 217. It was under that decision that the patent was issued.

On receiving the usual notice of the Secretary's first decision the local officers complied therewith by canceling the entry on their records. Fisher, who knew of the entry and the contest, then presented an application to

enter the land as a homestead. The application, while disclosing that he was a minor and unmarried, asserted in a general way that he was the head of a family, and therefore a qualified applicant, by reason of having adopted a minor child.[1] The local officers called for a further showing respecting the asserted adoption and for the time being withheld action on the application. Before a further showing was made the Secretary of the Interior, who was being asked to reconsider his first decision, ordered a suspension of all action under that decision; [2] and of this Fisher was advised by the local officers. Subsequently Fisher produced a court order purporting to show his adoption of a younger brother eighteen days after his homestead application was presented, but, by reason of the Secretary's suspending order, no further action was had on the application until after the Secretary's last decision, when the application was rejected. During the continuance of the suspending order, and without the consent of Rule, Fisher went on the land, erected improvements and attempted to establish a residence there.

In no admissible view of these facts can this suit be sustained. Even if under a right construction of the homestead law Rule was not entitled to the patent—which we do not at all intimate—Fisher is not in a position to take advantage of the error. He cannot be heard to complain on behalf of the United States; and he has no such personal interest in the land as entitles him to complain on his own account. He acquired no right

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[1] There was no statement respecting the time, place or mode of adoption or the identity of the child. In Nebraska adoption seems to be controlled by statute, *Kofka* v. *Rosicky*, 41 Nebraska, 328, 342; and the statute apparently provides that only adults may adopt. Rev. Stats. 1913, § 1615.

[2] A second suspending order was made by the Secretary at a time when Rule was resorting to judicial proceedings in the District of Columbia.

by his homestead application. It never was allowed; nor could it reasonably have been allowed. As originally presented it did not sufficiently show that he was a qualified applicant, and his additional showing—whatever else might be thought of it—came after the suspending order had superseded the cancellation of the Rule entry and become an obstacle to the initiation of any adverse claim. Neither did he acquire any right by his attempted settlement after that order was made. The order was no less effective against that mode of initiating a claim than against the other. Its purpose was to preserve the *status quo* pending final action on the Rule entry. A settlement in opposition to such an order is nothing short of a trespass and confers no right under the public land laws. *Lyle* v. *Patterson*, 228 U. S. 211, 216.

It is a familiar rule that to succeed in such a suit the plaintiff "must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent." *Sparks* v. *Pierce*, 115 U. S. 408, 413; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647; *Bohall* v. *Dilla*, 114 U. S. 47, 50; *Lee* v. *Johnson*, 116 U. S. 48, 50; *Duluth & Iron Range R. R. Co.* v. *Roy*, 173 U. S. 587, 590; *Johnson* v. *Riddle*, 240 U. S. 467, 481; *Anicker* v. *Gunsburg*, 246 U. S. 110, 117.

Decree affirmed.

DANCIGER ET AL., DOING BUSINESS AS DANCIGER BROTHERS, *v.* COOLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 37. Submitted November 14, 1918.—Decided January 7, 1919.

Section 239 of the Criminal Code made it an offense for "any railroad company, express company, or other common carrier, or any other person . . . in connection with the transportation" of intoxicating liquor, from one State into another, to collect the purchase price, or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or in any manner to act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, save only in the actual transportation and delivery.

Held: (1) In view of the conditions giving rise to the act and the report of the Senate Committee, that the practice of collecting the price at destination, as a condition to delivery, was the evil aimed at. P. 327.

(2) That such collections when made by an agent of the seller constituted the offense no less than when made by a common carrier or its agent. *Id.*

The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is never applied when to do so will give to a statute an operation different from that intended by the body enacting it. P. 326.

Transportation is not completed until the shipment arrives at destination and is there delivered. P. 327.

Whether in a state court a principal may recover from an agent money collected by the latter in carrying out an arrangement between them which involved a violation of Criminal Code, § 239, *held* a matter of local law not reëxaminable by this court. P. 328.

98 Kansas, 38, 484, affirmed.

THE case is stated in the opinion.

Mr. Edwin A. Krauthoff for plaintiffs in error. *Mr. Harry L. Jacobs, Mr. I. J. Ringolsky* and *Mr. M. L. Friedman* were also on the brief:

Shippers' order shipments are legal. *Norfolk & Western Ry. Co.* v. *Simms*, 191 U. S. 441, 447; *American Express Co.* v. *Iowa*, 196 U. S. 133, 143.

Section 239 of the Criminal Code refers only to railroad carriers and their employees. The opinion of the Supreme Court of Kansas, holding otherwise, is in conflict with the decisions of the federal courts. *First National Bank* v. *United States*, 206 Fed. Rep. 374, 378; 29 Ops. Atty. Gen. 58, 62; *Danciger* v. *Stone*, 188 Fed. Rep. 510; *U. S. Express Co.* v. *Friedman*, 191 Fed. Rep. 673; *United States* v. *87 Barrels of Wine*, 180 Fed. Rep. 215, 216.

The shipments were within the protection of the commerce clause and the Wilson Act, notwithstanding they were consigned to the shipper's order instead of to the purchaser directly. And § 4398, Kans. Gen. Stats., 1909, forbidding a consignee to give an order on the carrier to enable some other person to obtain the liquor was violative of the commerce clause as here applied. *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203; *Southern Operating Co.* v. *Hays*, 236 U. S. 188; *Norfolk & Western Ry. Co.* v. *Simms*, 191 U. S. 441, 447; *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572; *American Express Co.* v. *Iowa*, 196 U. S. 144; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Adams Express Co.* v. *Kentucky*, 236 U. S. 129. Besides, by a later law, Congress had explicitly excepted deliveries "upon the written order in each instance of the bona fide consignee." Penal Code, § 238. The fact that Congress deemed it essential to enact this provision shows that the Wilson Law did not, or was not intended to, have the effect of permitting state legislation on the subject. But even if the Wilson Law did grant the State such right, this later enactment is exclusive. *Palmer* v. *Southern Express Co.*, 129 Tennessee, 116; *Blunk* v.

Waugh, 32 Oklahoma, 625; *McCord* v. *State*, 2 Okla. Crim. Rep. 214.

No brief filed for defendant in error.

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

Danciger Brothers, who conducted a mail-order liquor business in Kansas City, Missouri, brought this suit in a Kansas court to recover from Cooley certain moneys collected by him, under an arrangement with them, as the purchase price of intoxicating liquors sold by them in interstate commerce, and also to enforce a similar claim assigned to them by another liquor dealer. After issue and trial Cooley prevailed and the judgment was affirmed; the appellate court holding that the arrangement under which the moneys were collected involved a violation of § 239 of the Criminal Code of the United States, c. 321, 35 Stat. 1136, and that, applying the settled rule of the Kansas courts, a principal who employs an agent to make collections in violation of a criminal law cannot compel the agent to account for what he collects. 98 Kansas, 38 and 484. The case is here on writ of error sued out prior to the Act of September 6, 1916, c. 448, 39 Stat. 726.

These are the facts: During the year 1910 Danciger Brothers received through the mails several orders for whiskey from customers in Topeka, Kansas, and in each instance shipped the liquor from Kansas City, Missouri, to Topeka, as freight. Each package was consigned to the shipper's order and was to be delivered by the carrier only on the surrender of the bill of lading properly endorsed. A sight draft was drawn on the customer for the purchase price and this with the bill of lading attached was sent to Cooley under an arrangement whereby he was to collect the draft, was then to hand the bill of lad-

ing suitably endorsed to the customer to enable the latter to get the package from the carrier, and ultimately was to remit to Danciger Brothers the amount collected less a commission for the service rendered. Before this arrangement was made the banks had refused to make such collections.

The assigned claim need not be separately described, for it was essentially like the other.

As the transactions occurred before the passage of the Webb-Kenyon Act, c. 90, 37 Stat. 699, we are not concerned with it, but only with the situation theretofore existing.

Whether § 239 of the Criminal Code reaches and embraces acts done by an agent such as Cooley was in this instance, or is confined to acts of common carriers and their agents, is a question about which there has been some contrariety of opinion, and it is now before this court for the first time. Of course, the chief factor in its solution must be the words of the statute. Omitting what is irrelevant here, they are:

"Sec. 239. Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any . . . intoxicating liquor . . . from one State . . . into any other State, . . . shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined," etc.

A reference to the conditions existing when the section was enacted, in 1909, will, together with its words, conduce to a right understanding of the evil at which it is aimed and the relief it is intended to afford. The condi-

tions were these: In some of the States there were state-wide laws prohibiting the manufacture and sale of intoxicating liquor; in some there was a like prohibition operative only in particular districts, and in other States the business was lawful. But the prohibitory laws did not reach sales or transportation in interstate commerce, for under the Constitution of the United States that was a matter which only Congress could regulate. True, there was a regulation by Congress, known as the Wilson Act, c. 728, 26 Stat. 313, which subjected liquor transported into a State to the operation of the laws of the State enacted in the exercise of its police power, but the time when the liquor was thus to come within the operation of those laws was after the shipment arrived at the point of destination and was there delivered by the carrier. *Rhodes* v. *Iowa*, 170 U. S. 412, 426. Thus a State, although able effectively to prohibit the manufacture and sale of liquor within its own territory, was unable to prevent its introduction from other States through the channels of interstate commerce. Of course, the real purpose of the prohibitory laws was to prevent the use of liquor by cutting off the means of obtaining it. But with the channels of interstate commerce open those laws were failing in their purpose, for dealers in States where it was lawful to sell were supplying the wants of intending users in States where manufacture and sale were prohibited. This interstate business generally was carried on by means of orders transmitted through the mails and of shipments made according to some plan whereby ultimate delivery was dependent on payment of the purchase price. The plans varied in detail, but not in principle or result. All included the collection of the purchase price at the point of destination before or on delivery. One made the carrier having the shipment the collecting agent; another committed the collections to a separate carrier, the liquor being forwarded as railroad freight

and the bill of lading being sent to an express company with instructions to hand it to the buyer when the money was paid; and still another made use of an agent, such as Cooley was here, the bill of lading being sent to him with a sight draft on the buyer for the purchase price. In some instances the liquor was consigned to the buyer and in others to the shipper's order, the bill of lading then being suitably endorsed by the shipper.

Where the transactions were real and not merely colorable, the business so conducted was lawful interstate commerce and entitled to protection as such until the sale and transportation were consummated by the delivery of the liquor to the vendee at the point of destination. Such was the decision of this court in *American Express Co.* v. *Iowa*, 196 U. S. 133, a case which arose out of the transportation into the State of Iowa of a collect-on-delivery shipment of liquor ordered from a dealer in Illinois. The Supreme Court of Iowa had held that, as the sale was to be completed in that State by payment and delivery there, the laws of the State enacted to prevent sales of liquor therein applied. This court reversed that ruling and said in the opinion, pp. 143, 144:

"The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when [and] the condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce.

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"When it is considered that the necessary result of the ruling below was to hold that wherever merchandise shipped from one State to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment the movement of such merchandise is not interstate commerce, it becomes appar-

ent that the principle, if sustained, would operate materially to cripple if not destroy that freedom of commerce between the States which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. It would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers and valid by the laws of the State where made to the laws of another State, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

After that decision the matter of further regulating interstate commerce in liquor was much considered in Congress, and as a result of extended hearings conducted by the Committee on the Judiciary of the Senate that committee, speaking through Senator Knox, proposed the enactment of what afterwards became §§ 238–240 of the Criminal Code. The report of the committee shows that its attention was directed to the practice of shipping liquor from one State into another, to be paid for as a condition to delivery, and that the committee regarded it as an evil which should be met and corrected.

With the conditions just described in mind we come to examine § 239. It consists of two parts, both relating to liquor transported from one State into another. The first deals with the collection of the purchase price, and

the second with acts done "for the purpose of buying or selling or completing the sale" of "any such liquor." If the meaning of the first is affected by the second it is not in a restrictive way, but the reverse, so, if Cooley and his acts are within the first, the second need not be noticed further. The first, as before quoted, says:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any . . . intoxicating liquor . . . from one State . . . into any other State, . . . shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, . . . shall be fined," etc.

The words "any railroad company, express company, or other common carrier," comprehend all public carriers; and the words "or any other person" are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words "or any other person" have the same meaning as if they were "or any agent of a common carrier" would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this connection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it. *United States* v. *Mescall*, 215 U. S. 26.

Without question the practice of collecting the purchase price at the point of destination as a condition to delivery is the thing at which the statute is aimed. Through that practice the sale of liquor in interstate commerce was rapidly increasing. But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event. Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing. The volume of the business and the attending mischief would be unaffected. Doubtless all this was in mind when the statute was drafted and accounts for its comprehensive terms. That the words "or any other person" are intended to include all persons committing the acts described is, as we think, quite plain.

To be within the statute it is essential that the act of collecting the purchase price be done "in connection with the transportation of" the liquor. The statute does not say "in the transportation," but "in connection with" it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. *Rhodes* v. *Iowa*, 170 U. S. 412, 415, 420; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 451; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82; *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572; *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48, 50. What Cooley did, while not part of the transportation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment

followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transportation, it would seem to be equally present here.

We conclude that § 239 reaches and embraces acts done by an agent such as Cooley was. The ruling on the right of a principal to recover from an agent money received by the latter in carrying out an arrangement between them which involved the violation of a criminal statute turned on a question of local law and cannot be reëxamined here.

Judgment affirmed.

LEARY *v.* THE MAYOR AND ALDERMEN OF THE CITY OF JERSEY CITY, ET AL.

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

No. 3. Argued November 12, 13, 1918.—Decided January 7, 1919.

An instrument executed in the name and behalf of the State of New Jersey by the State Riparian Commission, after reciting an application and agreement for a lease of certain submerged land, the fixing of a specified rental and of a larger sum to be paid for a conveyance free from rent, proceeded to "bargain, sell, lease, and convey" the lands to the applicant corporation, its successors and assigns, and "the right, liberty, privilege and franchise to exclude the tide water" from such land "by filling in or otherwise improving the same and to appropriate the land . . . to their exclusive private use;" an habendum declared that the lands and all rights and privileges exercisable within and over or with reference to the same should be held by the company, its successors and assigns forever, subject to the payment of the specified rent in semi-annual instalments, and

there were covenants for payment of the rent and for right of re-entry by the State for non-payment, and for conveyance of the land or any part thereof to the company, its successors or assigns, free and discharged of the rent, upon payment of a sum specified, or an equitable portion of it.

Held, that, under the law of New Jersey, there was a grant of the fee, subject to a rent charge, and that the lands were taxable against the grantee and its assigns as owners. P. 331.

208 Fed. Rep. 854, affirmed.

THE case is stated in the opinion.

Mr. John M. Enright, with whom *Mr. Merritt Lane* was on the briefs, for appellant.

Mr. Edward P. Stout, with whom *Mr. John Bentley* and *Mr. John Milton* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity brought in the United States Circuit (afterwards District) Court for the District of New Jersey by Leary, the appellant, against the City of Jersey City and the City Collector, to remove a cloud upon the title held by Leary in certain lands lying beneath the waters of New York Bay adjacent to the New Jersey shore, arising from the lien asserted by the city to secure payment of certain taxes assessed against those lands and alleged by complainant to be invalid under the constitution and laws of the State and repugnant to the Constitution of the United States. The Circuit Court dismissed the bill (189 Fed. Rep. 419), the Circuit Court of Appeals for the Third Circuit affirmed its decree (208 Fed. Rep. 854), and an appeal to this court was allowed.

The lands in question were granted or leased April 30, 1881, by the State of New Jersey, acting by its Riparian Commissioners appointed under an Act of March 31, 1869 (P. L. p. 1017), supplementary to an Act of April 11,

1864 (P. L. p. 681). The recipient of the grant was the Morris & Cumings Dredging Company, a corporation of the State of New York, and this company on February 24, 1904, assigned its interest to appellant. The taxes in question were assessed annually for the years 1883 to 1905, inclusive, amounted in all to $163,392.24, and remain unpaid. The lands having been advertised for sale by the City Collector to pay them, the original bill was filed to restrain such sale. Afterwards the city, under an act of the legislature known as the Martin Act, approved March 30, 1886, (P. L. p. 149), and its supplements, caused an adjustment of the taxes to be made, which was confirmed by a circuit judge, pursuant to the act. The assessment resulted in a large reduction in the amount of the taxes, fixing the aggregate burden upon appellant's land at about $108,000, including the taxes for the years 1904, 1905, 1906, and 1907, which were included in the adjustment. The adjusted taxes were made the basis of a supplemental bill herein. At the same time they were reviewed by the Supreme Court of the State upon a writ of certiorari prosecuted by the city, and were sustained by that court and by the Court of Errors and Appeals. *Jersey City* v. *Speer*, 78 N. J. L. 34; 79 N. J. L. 598. That review, however, did not involve the questions now raised.

In the present suit the validity of the taxes was assailed principally upon four grounds: First, that the lands were not owned by the Morris & Cumings Dredging Company or by appellant in such a sense as to make them taxable in their hands under the state laws, but on the contrary remained the property of the State; Second, that the lands, although within the territorial limits of the State of New Jersey, were, by the compact made in the year 1833 between that State and the State of New York, approved by Act of Congress of June 28, 1834, c. 126, 4 Stat. 708, made subject to the governmental jurisdiction of the State of New York, and that the imposition of a tax upon

them under the authority of the State of New Jersey would deprive appellant of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States; Third, that the lands were not within the taxing district of Jersey City; and Fourth, that the lien of the taxes had expired.

Since the suit was commenced the second contention, which raised the only substantial federal question, has been decided adversely to appellant by this court in *Central R. R. Co.* v. *Jersey City*, 209 U. S. 473.

The third and fourth points are satisfactorily dealt with in the opinions of the Circuit Court and Circuit Court of Appeals.

The first point—whether the interest of appellant and of his predecessor in title were taxable under the laws of the State—is the one chiefly relied on in this court. It is insisted, and for the purposes of the decision we assume, that the state laws provide for taxing lands only against the owner, and not against a lessee. Hence, the crucial question on this branch of the case is whether the riparian grant under which appellant derives his title is a mere lease, as contended by him, or confers such an ownership as is taxable under the state laws; in short, whether the State or the grantee is the owner.

The legislation by which the powers of the riparian commissioners are defined is set forth in the opinion of the Circuit Court (189 Fed. Rep. 422–425), and need not be here repeated. Suffice it to say that it authorizes the making, in the name and behalf of the State, of such a grant or lease as that which was made to the Morris & Cumings Dredging Company, and which that company assigned to appellant. The instrument recites that the company, being the owner of lands fronting on New York Bay, and desirous of obtaining a lease for the lands under water lying in front of them, had applied to the riparian commissioners and the governor for such a lease, and in com-

pliance with the application the commissioners had agreed to lease the submerged lands in question, and had fixed the sum of $4,233.60 as the annual rental to be paid for them, and the sum of $60,480 as the price on payment of which a conveyance of the lands free from rent would be made; the instrument proceeds in the name of the State to "bargain, sell, lease, and convey unto the said The Morris and Cumings Dredging Company and to its successors and assigns forever" the submerged lands in question (describing them), "and also the right, liberty, privilege and franchise to exclude the tide water from so much of the lands above described as lie under tide water by filling in or otherwise improving the same and to appropriate the land above described to their exclusive private use." There follows an habendum clause to the effect that the lands granted and all rights and privileges exercisable within and over or with reference to the same in manner and form as granted are to be held by the company and its successors and assigns forever, subject to the payment of the rent specified in semi-annual instalments. There is an express covenant for the payment of the rent at the times appointed, with the right on the part of the State to reënter for nonpayment; and there is a covenant by the State to convey the lands or any part thereof to the company, its successors or assigns, free and discharged of the rent, upon payment to the State of the sum of $60,480, or an equitable portion thereof.

With respect to a similar grant, made under the same statutory authority and containing like provisions, the court of last resort of New Jersey has held that it transmitted the entire estate of the grantor to the grantee; that the interest remaining in the State was not an actual estate but a right of entry for nonpayment of rent, and the mere possibility of a reverter for condition broken did not amount to an estate in reversion; and that the lands covered by the grant were not lands belonging to the

State within the meaning of a section of the general railroad act which limited the power of corporations created thereunder to condemn lands for the uses contemplated by the act. *Hudson Tunnel Co.* v. *Attorney General,* 27 N. J. Eq. 573, 578. In *Cook* v. *Bayonne,* 80 N. J. L. 596, the Supreme Court of the State held that a riparian grant of the same character amounted to a conveyance in fee subject to a rent charge, and that the lands were taxable in the hands of the grantee. A similar view as to the nature of the estate which passes under a "riparian lease" was taken by Vice Chancellor Leaming in the recent case of *Ocean Front Improvement Co.* v. *Ocean City Gardens Co.,* 103 Atl. Rep. 419. The last two cases do not appear to have been reviewed by the court of last resort.

Appellant refers to that part of the lease which grants the right to exclude the tide water from the lands described by filling in or otherwise improving the same and to appropriate the lands described to private use, and upon the strength of this insists that the instrument, whether by way of lease or in fee, confers a mere license to reclaim, and does not constitute the licensee the owner of the land or extinguish public rights therein unless and until the license is executed by actual reclamation. *Polhemus* v. *Bateman,* 60 N. J. L. 163, a decision by the Court of Errors and Appeals, is relied upon to support this contention. But the authority of that case has been much restricted by the subsequent decision of the same court in *Burkhard* v. *Heinz Co.,* 71 N. J. L. 562, 564, where it was pointed out that the judgment in the *Polhemus Case* was not as far reaching as the opinion; that its legal effect was simply that such common rights as the right to fish in the sea were not annulled by a riparian grant until the grantee made some appropriation of the property inconsistent with them. We do not regard this as conclusive upon the present question.

The other cases particularly relied upon, *Long Dock Co.*

v. *Board of Equalization of Taxes*, 87 N. J. L. 22; *Long Dock Co.* v. *State Board of Assessors*, 89 N. J. L. 108; 90 N. J. L. 701, so far as they touch the point at all, are based upon the language of the charter of the Long Dock Company, P. L. 1856, p. 67, and are not inconsistent with *Hudson Tunnel Co.* v. *Attorney General; Cook* v. *Bayonne*, and *Ocean Front Improvement Co.* v. *Ocean City Gardens Co.*, *supra*. Under the doctrine of these cases, which we accept as well founded in reason, to say nothing of authority, appellant's estate is taxable under the New Jersey laws.

Other points are raised, but none that seems to require mention.

Decree affirmed.

GUERINI STONE COMPANY *v.* P. J. CARLIN CONSTRUCTION COMPANY.

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

No. 218. Argued November 7, 8, 1918.—Decided January 7, 1919.

C contracted to erect a federal building, and G subcontracted with C to build the superstructure in a specified time, to be extended to make up for delays caused by the owner, by C or by other causes specified, and C agreed to provide all labor and materials not included in G's contract in such manner as not to delay the material progress of G's work, and to reimburse G for any loss caused by failure to do so. G's work was stopped by the action of the Government in suspending the operations because of a defect in the foundation provided by C, and after more than two months there was still no prospect that G, though ready, could resume within a reasonable time. *Held*, that an agreement that C would furnish a suitable foundation so as not to delay G was imported, which was not dependent on C's fault or the rights of the Government under the main con-

tract, and that G was not confined to the remedy of time extension and reimbursement, but could treat the contract as broken and sue for the breach. P. 340.

When the complaint counts upon a special building contract, and defendant's breach in failing to provide a proper place for plaintiff's work under it, and also upon a *quantum meruit* for labor performed and materials furnished, evidence of materials, etc., left on the premises by the plaintiff at the termination of the contract and appropriated by the defendant, is admissible under the latter count, without regard to its bearing on the damages recoverable under the special contract. P. 342.

Error in admitting evidence cannot be imputed to the trial court upon the theory that a count of the complaint was waived at the trial, when the theory depends on a statement made by plaintiff's counsel in the Circuit Court of Appeals, which was inconsistent with the bill of exceptions. *Id.*

Upon the breach by the defendant of a building contract, certain tools and appliances, brought to the building and used by the plaintiff in performing the contract and susceptible of further use in completing the work, were left in place by the plaintiff and accepted and appropriated by the defendant, *held*, that their value should be considered as part of plaintiff's expenditure under the contract, in computing damages, within the rule laid down in *United States* v. *Behan*, 110 U. S. 338, 344, 346. *Id.*

Where a building contract contemplates that the contractor's ability to perform will depend upon his receiving stipulated payments on account as the work progresses, a substantial failure to pay as stipulated will justify him in declining to proceed with the work. P. 344.

A contractor agreed to do certain concrete work, furnishing the materials, for a stated sum, payable partly in instalments, and by a separate paragraph of the contract offered an option, which was afterwards accepted, to set at so much per square foot certain granite blocks, to be furnished by the other party. There was a general provision for monthly payments on account, not to exceed a certain per cent. of the cost of work erected in the building, to be made upon written requisition, and the parties subsequently agreed upon a mode of estimating concrete work for this purpose. *Held:* (1) That the acceptance of the option did not make a separate contract for the granite work and that the provision for monthly payments applied to that as well as to the concrete work, so that a requisition properly included both classes; (2) that in any event a requisition uniting demands for both classes was unobjectionable if the granite work had

been completed and the full compensation therefor had become payable. P. 345.

In an action for breach of a building contract, the complaint alleged defendant's failure to make payments upon demands made "in accordance with the contract," while the demands proved were based on a modification of the contract. *Held*, an unimportant variance not requiring an amendment, particularly in view of the relation of the matter to a former decision and mandate of this court. P. 346.

An exception to an instruction should be specific, directing the mind of the court to some single point of alleged error. P. 348.

When the grounds relied on by the Circuit Court of Appeals for reversal prove untenable, this court will consider what judgment should have been rendered in view of other assignments of error. P. 349.

241 Fed. Rep. 545, reversed.

THE case is stated in the opinion.

Mr. Edward S. Paine, with whom *Mr. Eugene Congleton* was on the briefs, for petitioner.

Mr. John C. Wait, with whom *Mr. Charles Hartzell* was on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is before us for the second time, our former decision being reported in 240 U. S. 264. It was an action for damages, brought by the present petitioner as plaintiff against the present respondent as defendant in the District Court of the United States for Porto Rico. Our first review was upon a direct writ of error sued out by plaintiff under § 244, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), prior to the amendment of January 28, 1915 (c. 22, 38 Stat. 804, §§ 3 & 6). Judgment was reversed and the cause remanded for further proceedings. Upon the going down of the mandate a new trial was had, resulting in a verdict in plaintiff's favor

for substantial damages. To review the judgment entered thereon, defendant, under the Act of 1915, prosecuted a writ of error from the Circuit Court of Appeals for the First Circuit, setting up assignments of error based upon rulings of the trial court in admitting and excluding evidence and in giving and refusing instructions to the jury. The Court of Appeals reversed the judgment and ordered the cause to be remanded for further proceedings, 241 Fed. Rep. 545; and to review this judgment the present writ of certiorari was allowed, 245 U. S. 643.

The controversy arose in the course of the construction of a federal post office and court building at San Juan, Porto Rico. Plaintiff had a sub-contract for a part of the work under defendant, which was the general contractor under the Government of the United States. Pertinent clauses of the contract and a general history of the case were set forth in our former opinion and need not be repeated at length.

The evidence at the second trial followed the general lines of the first. Defendant was to construct the foundation complete to the basement floor. Upon this, plaintiff was to construct the principal part of the building, including exterior and interior walls, floors, and roof, to be built of concrete. For this work and the necessary materials defendant agreed to pay to plaintiff the sum of $64,750 in certain monthly instalments on account and the balance on completion. The plans called for certain granite work, for which defendant was to send the cut blocks from the United States; and under an option set forth in paragraph 25, afterwards accepted by defendant, plaintiff was to set this granite for 40 cents per square foot of surface.

It appeared that after the work had been in progress for some time a disagreement arose between the parties about payments on account. Paragraph 12 of the contract provided that there should be "monthly payments on

account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the sub-contractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how such cost of the work, other than the granite setting, should be ascertained. In December, 1911, and January, 1912, plaintiff made written requisitions which were not complied with; and, according to plaintiff's evidence, it was agreed between the parties on or about February 2, 1912, that future applications and payments should be made upon the basis of a schedule which specified, *inter alia*, "Exterior and interior concrete walls, arches, and cement work $1.07 per cubic foot." On March 9, 1912, plaintiff made a requisition for payment computed on this basis, and showing a balance due of $11,735.95. This requisition was in effect refused, and no further payment was made except the sum of $674, which was paid a few days later.

In the month of February, 1912, the government superintendent of construction found a serious settlement in the foundation, as a result of which work upon the building was ordered to be stopped. This order was communicated verbally by defendant's representative to plaintiff's agent at San Juan on the 9th of March, and was confirmed two days later by letter, in which, however, a request made by plaintiff's agent for instructions as to what should be done with plaintiff's force of men pending the suspension of the work was evaded. Plaintiff stopped work pursuant to defendant's notice, and did nothing more upon the building.

Thus matters remained until May 22, 1912, plaintiff in the meantime having received no payment pursuant to its requisition of March 9 beyond the small sum mentioned above, nor any instructions or permission to pro-

ceed with the work upon the building; and, according to plaintiff's evidence, it was impossible to tell when the work could proceed. On May 22 plaintiff wrote to the defendant referring to the stoppage of the work and to "the very considerable cost and damage to us caused by your breach of contract," to the inability to get payments from defendant in accordance with the terms of the contract, and to defendant's refusal of an offer of arbitration and refusal of "an assurance that even now we would have an opportunity within any reasonable time to proceed with our work," and concluding with this notification: "Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

The principal ground of action was based upon the contention that in refusing to respond to plaintiff's requisitions for payments on account, and in the complete and indefinite stoppage of plaintiff's work under the circumstances mentioned, defendant had committed breaches of the contract so material as to amount to a total breach, justifying plaintiff in declining to proceed further and in suing at once for its damages. See *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 552. But as we pointed out in 240 U. S. 283, plaintiff counted also upon a *quantum meruit* for work and labor performed and materials furnished in and about the construction of the building.

The Circuit Court of Appeals attributed error to the trial court in the following respects:

(1) The trial court refused defendant's request to instruct the jury that plaintiff was not justified in terminating the contract because of delays, and in instructing them on the contrary, as the court did in substance, that if it was evident to the parties on May 22, 1912, that there would be a long delay or an indefinite delay, or if it was evidently impossible to tell when the work could be begun again, plaintiff had a right to terminate the contract and was not obliged to await indefinitely the pleasure of the Government as to the resumption of work. It should be noted that when plaintiff took action to terminate the contract, more than two months already had elapsed since the work was stopped. This was undisputed, and of course must be considered in dealing with the instruction referred to.

It is sufficiently obvious that a contract for the construction of a building, even in the absence of an express stipulation upon the subject, implies as an essential condition that a site shall be furnished upon which the structure may be erected. In this case the matter was not allowed to rest upon an implication, for, as we held in our former opinion, the 11th paragraph of the sub-contract, providing: "The general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss," as applied to the facts of the case, imported an agreement by defendant to furnish the foundation in such manner that plaintiff might build upon it without delay, and was inconsistent with an implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless; and defendant's obligation to furnish a suitable foundation was not dependent on whether it was at fault or whether the delay was attributable to a stoppage of work by the owner in the exercise of a right con-

ferred upon it by a provision of the principal contract which was not brought into the sub-contract.

The Circuit Court of Appeals, however, held (241 Fed. Rep. 549) that although under paragraph 11 defendant would be liable to respond in damages for such delays if plaintiff completed or stood ready to complete its contract, yet it did not follow that if plaintiff was delayed in completing its work within the 300 days specified in paragraph 6 it could decline to go on, since by paragraph 7 it was provided that should the sub-contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay, or default of the owner (among other causes), the time fixed for the completion of the work should be extended for a period equivalent to the time lost from such causes. The court held that this rendered it clear that delays occasioned to the plaintiff by the owner, the general contractor, etc., were not to excuse plaintiff from proceeding to complete the contract, but were to operate merely as an extension of the time within which by the terms of the contract plaintiff was required to perform its work. In our opinion there was error in holding that the provisions of the 6th and 7th paragraphs limited, thus, the provisions of the 11th. From the fact that by paragraph 6 plaintiff was obliged to finish the work in 300 days, and by paragraph 7 this time was extended for plaintiff's benefit in the case of delays caused by the owner, the general contractor, or otherwise as specified, it does not follow that plaintiff was not entitled to finish the work more speedily if it could do so; or that a breach of paragraph 11 by defendant, so serious as to result in a total suspension of the work, with no reasonable prospect that it could be resumed within any reasonable time, left plaintiff still under an obligation to hold itself in readiness to proceed, and without remedy except an action for damages under that paragraph.

(2) The court found error in the admission of evidence tending to show that at the time plaintiff ceased work it had on hand and left upon the premises certain materials, machinery and tools of the value of $3,500, which defendant took and appropriated to its own use. As pointed out above, the complaint contained a general claim in the nature of a *quantum meruit* for labor performed and materials furnished. The particular item in question was specified in the bill of particulars. This clearly justified the trial court in admitting the evidence over the only substantial objection made, which was that it was immaterial and not within the pleadings. There is nothing to show that it was admitted only for its bearing upon the question of damages for breach of the special contract. It is true that in answer to the objection of immateriality plaintiff's counsel said: "I will show you a case where it says that the rule is that the plaintiff's expenditure minus any materials which he may have on hand and plus any profits which he might have made"—evidently referring to *United States* v. *Behan*, 110 U. S. 338, 344, 346; but in responding to a further objection that the material could not be charged to defendant, plaintiff's counsel insisted: "I propose to show that the defendant took it and has it," and followed it up with proof to this effect.

The opinion of the Circuit Court of Appeals (241 Fed. Rep. 550) shows that counsel for plaintiff in that court stated that the *quantum meruit* had been disregarded, and that the trial proceeded solely upon the ground of a breach of the special contract; but the bill of exceptions fails to bear this out, and error can not be attributed to the trial court on that theory. There was no waiver of the general claim for materials, and the evidence referred to furnished a ground of recovery upon that claim, irrespective of plaintiff's right to recover damages for breach of the special contract.

But upon the latter question also it was admissible,

upon the assumption that the rule of damages laid down in *United States* v. *Behan, supra,* was applicable, which is not disputed. That rule would give the plaintiff a right to recover what it had expended toward performance of the contract, subject to a deduction for the value of the materials remaining on hand at the time performance was stopped. But of course the deduction is based upon the theory that those materials remained the property of plaintiff and subject to its disposal. If they were appropriated by defendant to its use—and this is what the evidence tended to show—it is plain that their value should not be deducted from, but should be treated as a part of, plaintiff's contribution to the performance of the contract, in addition to its other outlay in respect of work performed.

The Circuit Court of Appeals considered that the furnishing of the materials in question was a matter so entirely outside of the contract that it could not properly be considered as an element of damage for its breach, and that plaintiff's remedy to recover their value must be by action of tort for conversion. But the evidence showed no tortious conversion; it tended to show that the articles were appropriated by defendant with plaintiff's consent; and it hardly is necessary to say that, if tort there were, plaintiff could waive it and sue upon the implied assumpsit. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 598; *Hirsch* v. *Leatherbee Lumber Co.,* 69 N. J. L. 509, 513.

Nor was this a matter entirely outside of the contract. The materials in question consisted in the main of tools and appliances that had been brought to the building by plaintiff for use in the performance of the contract, were so used, presumably were fitted for further use on the building, and upon the interruption of the work were left in position in the control of defendant and ready to be employed by it whenever it should proceed with the

work that plaintiff had been prevented from doing. If they were accepted and retained by defendant, as the evidence tended to show was the fact, it was proper to take them into account as a part of plaintiff's expenditures upon which the damages caused by defendant's breach of the contract were to be computed.

(3) The next ground of error upon which the Circuit Court of Appeals based its decision was an instruction given to the jury, in substance, that if defendant failed to make payments on account as called for by the contract,—"a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment"—such failure constituted a breach on the part of defendant justifying plaintiff in stopping work and entitling it to recover damages from defendant; and the refusal of a requested instruction to the effect that "The delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for a rescission or termination of the contract by plaintiff," and that plaintiff's remedy was to recover interest on the deferred payments.

The Circuit Court of Appeals very properly held that in a building or construction contract like the one in question, calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. In addition to the provisions of paragraph 12, already referred to, the concluding paragraph of the contract was as follows: "And the said general contractors hereby promise and agree with the said sub-contractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms

and conditions herein contained and referred to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth." As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed. *Canal Co.* v. *Gordon,* 6 Wall. 561, 569; *Phillips Construction Co.* v. *Seymour,* 91 U. S. 646, 649.

But it was held that defendant's refusal to pay was justified because plaintiff's requisitions were not made out in accordance with the provisions of the contract. There were but two requisitions in evidence, one dated December 30, 1911, the other March 9, 1912. Both were held defective, in that they included not only 85 per cent. of the estimated amount of the concrete construction, which was the principal subject-matter of plaintiff's contract, but also a like percentage of the amount earned in setting granite under the accepted option in paragraph 25. The court held that the provision for monthly instalments related only to the former, and that as to the granite work plaintiff was not entitled to payments on account in advance of its completion. In our opinion, however, defendant's acceptance of the option to call upon plaintiff to set the granite blocks did not make a separate contract, but merely added something to the work that plaintiff was to do under the contract previously made; and by necessary inference it subjected the granite setting to the appropriate general provisions respecting the method of performance and the time when the work was to be paid for.

Were it otherwise, the requisition of March 9 could not be rejected merely on the ground that it called for a pay-

ment for granite work. We say this because there was clear evidence—apparently uncontradicted, and at least sufficient to go to the jury—tending to show that the granite setting was substantially completed by the early part of February, and that because the few blocks remaining to be set were arriving intermittently and could be set only at unreasonable cost, it was then at plaintiff's request agreed by defendant that plaintiff should set no more granite. This part of the work was thus brought to a close, or so the jury might find; in which event, if it constituted a separate contract, payable at completion, as the Circuit Court of Appeals held, plaintiff on March 9th was entitled to demand not only 85 per cent., but the entire amount due for granite setting.

(4) The court held the requisition of March 9 to be defective upon the further ground that it was based upon the unit price of $1.07 per cubic foot, pursuant to the understanding said to have been arrived at between the parties on February 2, instead of the actual cost of the work erected in the building as required by paragraph 12 of the contract. It was held that since the complaint alleged that plaintiff's demands for payment were made "in accordance with the terms of the contract," evidence to show the agreement made on February 2 about unit prices was not admissible without an amendment of the complaint setting up a modification of the contract.

This view cannot be upheld. The allegation quoted from the complaint did but touch upon the performance of a condition precedent, concerning which the former niceties of pleading no longer obtain. And besides, evidence of the agreement of February 2 about unit prices was introduced at the first trial and was particularly referred to in our opinion reviewing it (240 U. S. 273–274); and the requisition of March 9, then as now relied upon by plaintiff, was excluded from consideration by us only because such details as were then furnished did not appear

to bear out the estimate contained in it as to the amount of work that had been completed (240 U. S. 282), an omission that was supplied at the second trial. As the case went back for further proceedings in conformity with that opinion, the trial court doubtless considered that compliance with our mandate required the admission of the testimony as to the agreement of February 2, which furnished the basis of the requisition of March 9, and that no amendment of the pleadings was necessary. Were there doubt about this, we should deem it proper that the complaint be amended, or treated as if amended, even in the appellate court, rather than that the judgment should be reversed for so unimportant a variance, not in the least prejudicial to defendant.

(5) The final ground upon which the reversal was rested was an instruction given by the trial court to the jury upon the question of damages in the following terms: "If you find he [meaning plaintiff] was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account, are the outlays less the material on hand, the amount of work actually performed and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction." The appellate court held this instruction to be misleading because it embodied a duplication of elements. Respecting this a difficult question would be presented if defendant were

in a position to raise it. When the case was here before, we assumed (240 U. S. 282, 283) that an instruction similarly phrased ought to have been granted at plaintiff's request had it been confined in its application to a recovery based upon a finding that the contract was rightfully terminated by the notice of May 22, 1912; but, this was an assumption *arguendo*, and not a part of the matter decided.

At the second trial this part of the charge was given by the court of its own motion, not at plaintiff's request; nor was it excepted to by defendant. The statement of the Circuit Court of Appeals to the contrary (241 Fed. Rep. 555) is not borne out by the record. The proposition criticized is not contained in any of the instructions requested by plaintiff; and even had it been requested there is no exception touching it unless it be the following: "I will ask on behalf of the defendant an exception . . . to the action of his Honor . . . in giving all instructions requested by plaintiff." This is altogether too general to be regarded as directing the mind of the trial court to any single and precise point of alleged error so as to call for a reconsideration of the ruling, and hence could not furnish a basis for reversing the judgment. That an exception must be specific need not be emphasized. *McDermott* v. *Severe*, 202 U. S. 600, 610; *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529.

There was another exception, couched in these terms: "To that part of the charge to the effect that if the plaintiff had the right to terminate the contract under the authority of the *Behan case*, the measure of damages would be not only the expenses incurred by the plaintiff, but also reasonable profits." This, however, refers to another passage in which the trial court quoted from the headnote in 110 U. S. 338. This clause contained no reference to the amount of work performed or what plaintiff was entitled to by reason of this work at the contract

price; it mentioned only (a) plaintiff's outlay, and (b) the lost profits, embodied no duplication of elements, and was not erroneous.

Having found that none of the grounds relied upon by the Circuit Court of Appeals for reversal of the judgment of the trial court is tenable, it remains to consider what judgment ought to have been rendered upon the record and bill of exceptions, in view of the assignments of error other than those we have thus far considered. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 528. There were 101 assignments in all, and these have been examined with the aid of respondent's brief, which extends to 250 pages, in addition to the oral argument; but we have found no ground for reversing the judgment of the trial court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

UNITED STATES *v.* COMYNS ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 235. Argued November 4, 5, 1918.—Decided January 7, 1919.

A bill of particulars supplementing an indictment is no part of the record for the purpose of deciding a demurrer.

An indictment alleged a scheme to defraud divers persons, through use of the mails, by representing that certain land could be purchased by them under the Timber & Stone Act for less than its value, and that defendants would secure it for them in return for fees part payable in advance, and would refund such advance payments in case of non-success, whereas the defendants well knew they could not carry out the agreement, but intended to secure the advance payments and to appropriate them to their own use.

Held: (1) That a decision sustaining a demurrer was based upon a con-

struction of § 215 of the Criminal Code, and was reviewable under the Criminal Appeals Act.

(2) That the indictment charged a "scheme or artifice to defraud," etc., within the meaning of said § 215.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States.

Mr. Charles A. Keigwin, with whom *Mr. William R. Andrews* was on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a review under the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246), of a judgment of the District Court sustaining a demurrer to an indictment found under § 215 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1130).

That section provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter . . . in any post-office, or station thereof, . . . to be sent or delivered by the post-office establishment of the United States . . . shall be fined, . . . " etc.

The indictment contains four counts, but a recital of the first will suffice, since the others adopt by reference that part of its averments upon which is raised the question we have to determine. Omitting formal matters, that count recites that Comyns and Byron had devised a scheme and artifice to defraud nine persons named and

divers other persons to the grand jurors unknown, that is to say, to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations and to induce the victims to give to the defendants and each of them such moneys and property, with the intent on the part of the defendants and each of them to convert the same to their own use, which scheme was as follows: that defendants should represent that Comyns was a lawyer, admitted to practice before the United States Land Office, and that Byron was a locator, "and that they could locate said parties and secure for them the preference right to purchase from the United States of America under the Timber and Stone Act of June 3, 1878 [20 Stat. 89, c. 151], certain land within the Western District of Washington for the sum of $2.50 per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum"; and that they would agree with the parties to be defrauded that they would charge each of them a fee for locating them and securing for them the title to said land, a part of the fee, called the initial fee, to be paid at the time of making the agreement, and the balance when title to the land was secured, "and that if said parties to be defrauded failed to get title to said land, then the said defendants and each of them would refund to said parties to be defrauded the amount of the fee already so paid to said defendants"; whereas, as defendants and each of them knew, defendants could not locate said parties and could not secure for them the preference right to purchase the land mentioned for $2.50 per acre by filing said application; "and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said initial fee and for the purpose of preventing said

parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement." Then follows an averment that defendants made use of the mails for the purpose of executing the scheme by causing a letter inclosing a timber and stone application to be sent by mail to the Register of the Land Office.

At first the demurrer was overruled by the District Court, but at the same time it was ordered that the Government should furnish a bill of particulars "stating the reason why the land in question could not be secured by the applicants." A bill of particulars was filed setting up, in brief, that the lands could not be secured under the Timber and Stone Act (a) because they were covered by a list of selections made by the State of Washington in lieu of school sections 16 and 36; and (b) because the statements to be made in the application as to the character of the land were to be made on information and belief, and not from the applicant's personal knowledge after examination of the land as required by the rules of the General Land Office. The defendants moved to strike out the bill of particulars, and this was treated by the District Court as a petition for a rehearing of the demurrer to the indictment as amplified by the bill of particulars; and thereupon the demurrer was sustained.

Notwithstanding a contention to the contrary, it seems to us that the decision was based upon a construction of § 215 of the Criminal Code, and hence that we have jurisdiction under the Criminal Appeals Act. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Nixon*, 235 U. S. 231, 235.

In reviewing the judgment we shall disregard the bill of particulars, since this forms no part of the record for the purposes of the demurrer. *Dunlop* v. *United States*, 165 U. S. 486, 491.

In brief, the indictment avers that the scheme of defendants was to induce their intended victims to part with their money by representing to them that certain land (not described except generally as being located in the Western District of Washington) could be purchased from the United States under the Timber and Stone Act for less than its real value if the victims would employ defendants to secure such land and would pay a part of the proposed fee in advance; the defendants agreeing at the same time that in case of non-success the money thus prepaid would be refunded; whereas in truth, as defendants well knew, for some reason not specified they could not carry out the agreement, and the purpose of making it was to secure the payment of the initial fee by the intended victims, which defendants intended to appropriate to their own use and did not intend to refund in case of a failure to secure title in accordance with the agreement.

In our opinion such a scheme is a "scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises" within the meaning of § 215 of the Criminal Code. To use the mails in order to carry out a scheme for getting money by the making of promises or agreements which, whether known to be impossible of performance or not, there is no intention to perform, is a forbidden use of the facilities of the post office department. *Durland* v. *United States*, 161 U. S. 306, 313. The District Court erred in holding otherwise, and its judgment is

Reversed.

TURNER *v.* UNITED STATES AND CREEK NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 33. Argued November 13, 14, 1918.—Decided January 7, 1919.

While recognized by the United States as a distinct political community, the Creek Nation leased a pasture, the lessees undertaking to fence and pay rent. When nearly completed, the fence was destroyed by the action of a Creek mob, participated in by the Creek Treasurer; and thereafter one of the lessees, assignee of the rest, sued the Creek Nation for the cost of the fence and of the assignments and for the loss of the benefits of the lease. *Held*, that there was no cause of action; for a sovereignty, on general principles, is not liable for injuries resulting from mob violence or failure to keep the peace; and neither the wrong of the Treasurer nor any duty under the lease created such liability here. P. 357.

The special Act of May 29, 1908, c. 216, 35 Stat. 444, 457, authorized suit in the Court of Claims against the Creek Nation for the adjudication of this claim, but it did not validate the claim itself or permit that the United States be joined as a defendant. P. 358.

51 Ct. Clms. 125, affirmed.

THE case is stated in the opinion.

Mr. Chas. H. Merillat, with whom *Mr. Chas. J. Kappler* was on the brief, for appellant.

Mr. Assistant Attorney General Thompson and *Mr. George M. Anderson*, for the United States, submitted.

Mr. James C. Davis, for the Creek Nation of Indians, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of

Congress, they then exercised within a defined territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge.[1]

In 1889 the Creek Nation enacted a statute which conferred upon each citizen of the Nation, head of a family engaged in grazing livestock, the right to enclose for that purpose one square mile of the public domain without paying compensation. Enclosure of a greater area was prohibited; but provision was made for establishing, under certain conditions, more extensive pastures near the frontiers to protect against influx of stock from adjoining nations. The conditions prescribed were these: If the district judge should receive notice from citizens of a desire to establish such a pasture, he was required to call a meeting of citizens to consider and act upon the subject; and if it appeared that a majority of the persons of voting age in the neighborhood thus to be protected favored its establishment, the district judge was directed to let such pasture for three years (subject to renewal) to citizens who would by contract bind themselves to build a substantial fence around the pasture, and to pay at least five cents per acre per annum for the grazing privilege.

In 1890 Turner and a partner formed, under the name of Pussy, Tiger & Co., an organization consisting of themselves and one hundred Creeks, with a view to securing such a pasture in the Deep Fork district. They caused an election to be held and a contract to be entered into by the district judge with Pussy, Tiger & Co., which covered about 256,000 acres. The fence required to enclose it was

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[1] Treaty of June 14, 1866, Art. X, 14 Stat. 785, 788; Report of the Commissioner of Indian Affairs for 1888, p. 113; for 1889, p. 202; for 1890, pp. 89, 90; for 1891, vol. I, pp. 240–241.

about 80 miles in length. Before its construction was begun, dissatisfaction had already developed in the neighborhood; and from the time the fence was commenced, there were rumors of threats by Indians to destroy it if built. The work was, however, undertaken; the threats continued; and Turner and one of his assignees secured from the United States Court in the Indian Territory, First Judicial Division, an injunction restraining the Creek district judge for the Deep Fork district and L. C. Perryman, the Principal Chief of the Nation, from interfering with or damaging the fence. After it had been nearly completed, three bands of Creek Indians destroyed the fence, cutting the wire and posts and scattering the staples. It does not appear that either the Creek judge or the Chief or any other official of the Creek Government had any part in the destruction of the fence, except one Moore, the Treasurer, whose only official duties seem to have been "to receive and receipt for all national funds and to disburse the same, as should be provided for by law."

More than $10,000 net expended in constructing the fence, and $2500 paid by Turner to the 100 Creek Indians associated with him for the release of their grazing rights were lost; and large profits which it was expected would be made through assignment of pasturage rights to cattle raisers were prevented. Claims for compensation were repeatedly presented by Turner to the Creek Nation. Once its National Council voted to make compensation; but Chief Perryman vetoed the action and his veto was sustained. Later the Creek supreme court declared the fence a legal structure; but still the Nation failed to make any compensation. On March 4, 1906, the tribal organization was dissolved pursuant to Act of March 1, 1901, c. 676, § 46, 31 Stat. 861, 872. In 1908 Congress provided, by § 26 of the Act of May 29, 1908, c. 216, 35 Stat. 444, 457, as follows:

"That the Court of Claims is hereby authorized to

consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

In August, 1908, Turner, having acquired all the rights of his associates, filed a petition in the Court of Claims against the Creek Nation and the United States as trustee of Creek funds,[1] to recover the amount lost, which he alleged to be the sum of $105,698.03. The Court of Claims dismissed the petition (51 Ct. Clms. 125), and the case comes here by appeal.

The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property and prevented him from securing the benefits of the contract entered into between him as grantee and the Creek Nation; and that if the substantive right did not already exist, it was created by the act which conferred jurisdiction upon the Court of Claims to hear and adjudicate the controversy.

First. No such liability existed by the general law. The Creek Nation was recognized by the United States as a distinct political community, with which it made treaties and which within its own territory administered its internal affairs. Like other governments, municipal as well as state, the Creek Nation was free from liability

[1] On November 18, 1915, the sum of $1,325,167.16 was held by the United States in trust for the Creek Nation of Indians. In addition thereto approximately $1,110,000.00 of the tribal funds of the Nation were on deposit in the Oklahoma state and national banks, on April 10, 1916, under the provisions of the Act of March 3, 1911, c. 210, § 17, 36 Stat. 1058, 1070.

for injuries to persons or property due to mob violence or failure to keep the peace. Compare *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 287, 291; *South* v. *Maryland*, 18 How. 396; *Murdock Grate Co.* v. *Commonwealth*, 152 Massachusetts, 28, 31. Such liability is frequently imposed by statute upon cities and counties (see *City of Chicago* v. *Pennsylvania Co.*, 119 Fed. Rep. 497); but neither Congress nor the Creek Nation had dealt with the subject by any legislation prior to 1908. The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace. And the participation in the injuries of an officer acting, not *colore officii*, but in open and known violation of the law, cannot alter the case. The claimant's contention that the defendant owed to the claimant, as its own grantee, a greater duty than it owed to other persons in the territory, to protect him against mob violence, finds no support in reason or authority.

Second. The special Act of May 29, 1908, did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent. The Court of Claims is "authorized to consider and adjudicate and render judgment as law and equity may require." The words of the act which follow merely identify the claims which the court is authorized to consider. Authority to sue the Creek Nation is implied; but there is nothing in the act which even tends to indicate a purpose to create a new substantive right. Compare *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Green* v. *Menominee Tribe*, 233 U. S. 558, 568; *Thompson* v. *United States*, 246 U. S. 547. The act simply provides a forum for the adjudication of such rights as Turner may have against the Creek Nation.

Third. The United States objected also to the jurisdiction of the court over it. Neither the special act nor any general statute authorized suit against the United States. As it cannot be sued without its consent, the United States was improperly joined as a party defendant, although in the capacity of trustee for the Creek Nation. Compare *Green* v. *Menominee Tribe, supra.*

It is not necessary to consider the many other objections urged against the petition. The Court of Claims properly dismissed it; and the judgment is

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* MAUCHER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 85. Argued December 17, 18, 1918.—Decided January 7, 1919.

The freedom of the States to establish and apply their own laws and policies touching the validity of contracts exempting carriers from liability to passengers for injuries due to negligence, was not affected by the Carmack Amendment, which deals only with shipments of property. P. 363.

An employee of a circus was injured by the negligent operation of a passenger train of a railroad company while traveling upon a train owned by the circus, which was being hauled over the tracks of the railroad company by its locomotive and crew pursuant to a special contract declaring the company not a common carrier therein and not liable for negligence. *Held*, that the employee was not a passenger of the railroad company, and that his cause of action was based on the general right not to be injured by the negligence of another. *Id.*

Writ of error to review 100 Nebraska, 237, dismissed.

THE case is stated in the opinion.

Mr. William D. McHugh, with whom *Mr. William H. Herdman* and *Mr. John M. Kelley* were on the brief, for plaintiff in error:

Under these contracts, cars of the circus company loaded with paraphernalia, an extensive menagerie of wild animals, tents, equipment, horses, wagons, performers and employees, all comprising the circus outfit, were moved over the lines of the plaintiff in error in interstate commerce. The contracts fixed the rights and liabilities of the parties with respect to the shipment and transportation. This court has repeatedly held that the power of railroad companies to contract with respect to their liability in matters of interstate transportation was the subject dealt with by the Carmack Amendment, and that, therefore, the laws and policies of particular States respecting the validity of such contracts, were superseded.

The validity of the contracts is a matter to be determined by the common law as declared by this court, and enforced by the federal courts throughout the United States.

The right of a common carrier, when acting outside the performance of its legal duties, as such, to contract as a private carrier and to stipulate for freedom from liability for injury, due to its negligence, to persons or property carried under such contract, is broadly recognized by this court. *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 377; *Santa Fe, Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.,* 228 U. S. 177.

Under the common law, as applied by this court and federal courts generally, the plaintiff in error was under no obligation, as a common carrier, to move the circus outfit over its line as it was moving at the time of the injury. The rendition of such service, and the terms upon which the same will be rendered, is a matter for private bargain.

The defendant in error, at the time of his injury, was

an employee of the circus and was being transported as such by his employer, as a part of its circus outfit, in a car and train belonging to his employer which his employer was running over the tracks of the plaintiff in error under the special contract. He had paid no fare and his only right to be there was by virtue of his contract of employment with the circus company and the special contract between plaintiff in error and the circus company. *Baltimore & Ohio S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498, 512; *Railway Co.* v. *Mahoney*, 148 Indiana, 196; *Robertson* v. *Old Colony R. R. Co.*, 156 Massachusetts, 525; *Coup* v. *Railway Co.*, 56 Michigan, 111; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wallace*, 66 Fed. Rep. 506, 510; *Wilson* v. *Atlantic Coast Line R. R. Co.*, 129 Fed. Rep. 774; *Clough* v. *Grand Trunk Western Ry. Co.*, 155 Fed. Rep. 81; *Sager* v. *Northern Pacific Ry. Co.*, 166 Fed. Rep. 526, 527.

Mr. Philip E. Horan, with whom *Mr. J. A. C. Kennedy* and *Mr. Yale C. Holland* were on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

Barnum & Bailey, who owned rolling stock adapted to carrying their circus equipment and personnel, made, in 1913, a special contract with the Chicago, Rock Island & Pacific Railway Company concerning transportation on its lines. The railway agreed for a sum fixed, to give the right to use its tracks and locomotives fully manned and supplied, to haul the circus trains. Barnum & Bailey agreed, among other things, that the railway was not acting therein as a common carrier; that it should not be liable for any injury, though arising from negligence, either to their own person or property or to that of any of their

employees; and that they would indemnify the railway against any such injury.

While the circus train was being moved in Nebraska, from Lincoln to Atlantic, Iowa, it was crashed into by one of the railway's regular passenger trains; and Maucher, an employee of the circus, was injured. He had, by his contract of employment, agreed to release all railroad companies from any claim for injuries suffered while travelling with the circus on their lines; but he brought, in a state court of Nebraska, an action against the railway for damages, alleging that he had been injured by its negligence. The railway defended on the ground that its contract with Barnum & Bailey, and thus with the plaintiff, operated to release it from all liability; that since the contract related to a movement in interstate commerce, its validity was to be determined by the federal law; and that by the federal law the contracts were valid, although undertaking to release the railway from liability; since it was not acting as common carrier. *Santa Fe, Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177. The trial court held that the liability was to be determined by the law of Nebraska; and entered judgment for plaintiff which was affirmed by the Supreme Court of the State. 100 Nebraska, 237. The case came here on writ of error under § 237 of the Judicial Code.

The railway admits that prior to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the States were free to establish their own laws and policies and apply them to such contracts. *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477. But it contends that this power of the States was superseded by the Carmack Amendment, since that amendment dealt with the power of carriers to contract in respect to such liability;

Adams Express Co. v. *Croninger*, 226 U. S. 491; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; that it was the intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries is governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons. Furthermore, plaintiff was not even a passenger on the railway. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another. Compare *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 613. The case presents no substantial federal question. The writ of error is

Dismissed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* SEALY ET AL., PARTNERS AS HUTCHINGS, SEALY & COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 90. Argued December 18, 1918.—Decided January 7, 1919.

When a party neglects to present a federal question within the time allowed by the state procedure, and it is refused consideration by the state court for that reason, writ of error will not lie under Jud. Code, § 237.

A cause of action under an interstate bill of lading, which arose, if at all, before the date of the Carmack Amendment, depends upon the state law.

Writ of error to review 98 Kansas, 225, dismissed.

THE case is stated in the opinion.

Mr. Joseph M. Bryson, for plaintiff in error, submitted. *Mr. W. W. Brown* and *Mr. James W. Reid* were also on the brief.

Mr. Maurice H. Winger, with whom *Mr. F. M. Harris*, *Mr. Arthur Miller* and *Mr. Samuel J. McCulloch* were on the brief, for defendants in error.

Mr. Justice Brandeis delivered the opinion of the court.

In June, 1900, the Missouri, Kansas & Texas Railway Company issued bills of lading to shipper's order covering 27 carloads of grain to be shipped from Kansas City, Missouri, to Galveston, Texas. No grain was in fact delivered to it for shipment; but before the fraud was discovered, the alleged shipper transferred the bills of lading to Hutchings, Sealy & Co., who made advances thereon. The advances were not fully repaid; and in 1905 they brought suit against the railroad in a state district court of Kansas. The railroad defended on the ground that, since the bills of lading had been delivered in Missouri, the transaction was governed by the Missouri law, and that under the law of that State the railroad was not liable. For more than eight years the record contained no suggestion of a federal question, the case having meanwhile been passed upon twice by the Supreme Court of Kansas (*Railway Co.* v. *Hutchings*, 78 Kansas, 758; *Hutchings* v. *Railway Co.*, 84 Kansas, 479). Thereafter, in 1913, the railroad presented the claim that the transaction was governed by the federal law; and that, by it, the defendant was not liable. The Supreme Court of Kansas, apparently as a matter of state practice, declared that the contention came too late to be considered; and entered judgment for the plaintiff. 98 Kansas, 225. The case comes here on writ of error under § 237 of the Judicial Code.

The federal question was not seasonably raised. *Bonner* v. *Gorman*, 213 U. S. 86, 91; *Louisville & Nashville R. R. Co.* v. *Woodford*, 234 U. S. 46, 51. But it is also unsubstantial. Prior to the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595) the rights of the parties were governed by state law, *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, 109–110; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S. 133; and the Carmack Amendment does not apply, as the cause of action, if any, arose six years before the passage of that act. The writ of error is

Dismissed.

MERCHANTS EXCHANGE OF ST. LOUIS *v.* STATE OF MISSOURI AT THE RELATION OF BARKER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 116. Argued December 19, 1918.—Decided January 7, 1919.

A state law forbade, under penalties, any person, corporation, or association, other than a duly authorized and bonded state weigher, to issue any weight certificate for grain weighed at any warehouse or elevator where state weighers were stationed, or to charge for such weighing or certificates. *Held:* (1) consistent with the due process and equal protection clauses of the Fourteenth Amendment as applied to a local corporation, having the usual powers of a board of trade, which weighed grain and issued weight certificates, for a charge, at the request of its members; (2) not a burden on interstate commerce as applied to grain received from or shipped to points without the State; (3) not superseded by or in conflict with the Federal Grain Standards Act (August 11, 1916, c. 313, 39 Stat. 482, Part B). Pp. 367–369.

269 Missouri, 346, affirmed.

THE case is stated in the opinion.

Mr. Percy Werner, with whom *Mr. Everett W. Pattison* was on the briefs, for plaintiff in error.

Mr. John T. Gose, Assistant Attorney General of the State of Missouri, with whom *Mr. Frank W. McAllister*, Attorney General of the State of Missouri, was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

A statute of Missouri relating to the inspection and weighing of grain, approved March 20, 1913 (Laws, Missouri, 1913, pp. 354–373), and amended March 23, 1915 (Laws, Missouri, 1915, p. 302), declares that in cities of more than 75,000 inhabitants all buildings used for the storage or transferring of grain of different owners, for a compensation, shall be deemed public warehouses; and, by § 63 (p. 372) thereof, prohibits under severe penalties "any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate . . . [for any] grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed . . . , or to make any charge for such weighing, . . . or weight certificates . . ."

In June, 1915, an original proceeding in the nature of *quo warranto* was brought under this statute at the relation of the Attorney General in the Supreme Court of the State against the Merchants Exchange, a Missouri corporation with the usual powers of a board of trade. See *House* v. *Mayes*, 219 U. S. 270; *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236. The information stated that St. Louis is a city of more than 75,000 inhabitants; that

public weighers of grain are maintained there at all public warehouses and elevators in compliance with the act; and that the respondent in violation thereof and in abuse of its corporate franchise maintains a bureau for weighing grain, grants weight certificates, and makes charges therefor. The prayer is that respondent be adjudged guilty of these practices and that a fine be imposed. The return admitted substantially the facts stated in the information but alleged that the services were rendered only at the request of members; that the weighing by its bureau in addition to that of the public weighers added to the general security, thus benefiting farmer, dealer, and consumer; that similar weighing bureaus were maintained by the boards of trade at competing grain markets; and that the statute, in prohibiting the practice, deprived its members of liberty and property and of equal protection of the laws in violation of the Fourteenth Amendment. The return also set forth that the grain weighed by its bureau was in large part shipped into or out of the State; that it is commercially necessary as a part of interstate transit to pass grain through an elevator where it is weighed, and the issue of certificates of weight is essential; and that the provisions of the Missouri act therefore violated the commerce clause of the Federal Constitution. Upon a demurrer to the return, the full court found the respondent guilty and ordered that it be ousted of the usurped power of weighing grain received into or discharged from public warehouses and elevators and of making charges therefor, and of issuing weight certificates and making charges therefor; and that the respondent pay costs. 269 Missouri, 346. The case comes here on writ of error.

First. Section 63 of the act does not violate the Fourteenth Amendment. As the state court has pointed out, the statute does not prohibit owners of grain from weighing it before it is sent to a public warehouse or after it is removed therefrom. But the issue of a private weigher's

certificate in addition to the certificate of the public weigher might lead to embarrassment or confusion or prove a means of deception. The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To require that goods received in or discharged from public warehouses shall be weighed by public weighers and that no one else shall issue certificates of or make charges for weighing under those circumstances is not an unreasonable or arbitrary exercise of the discretion vested in the legislature. Compare *House* v. *Mayes, supra; Brodnax* v. *Missouri*, 219 U. S. 285. Nor can we say that to limit the application of the provision to grain and hay is an arbitrary discrimination against dealers in those articles. The fact that respondent is a corporation does not lessen the scope of the State's police power. We have no occasion to consider whether it is thereby enlarged.

Second. Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the State, burdens interstate commerce. It clearly does not. *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S. 590; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452. But the additional contention is made here that all state regulation of the weighing of grain was superseded by the United States Grain Standards Act, approved August 11, 1916 (39 Stat. 482). That act (which is Part B of chapter 313) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain. And Part B of chapter 313, by § 7 (p. 484), like Part C, the United States Warehouse Act (which does contain some reference to weighing), by § 29 (p. 490), makes manifest the purpose of Congress *not* to supersede

state laws for the inspection and weighing of grain, but to coöperate with state officials charged with the enforcement of such state laws. The Missouri act is not superseded by or in conflict with the federal legislation.

The judgment of the Supreme Court of Missouri is therefore

Affirmed.

ERIE RAILROAD COMPANY *v.* HAMILTON, COUNTY TREASURER OF THE COUNTY OF ROCKLAND, AS PUBLIC ADMINISTRATOR OF MISTSCHOOK.

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

No. 112. Argued December 19, 1918.—Decided January 7, 1919.

Under § 237 of the Judicial Code, as amended September 6, 1916, a judgment of a state court based on a construction, but not denying the validity, of a treaty, is not reviewable by writ of error from this court.

Writ of error to review 169 App. Div. 936; 219 N. Y. 343, dismissed.

THE case is stated in the opinion.

Mr. William C. Cannon, with whom *Mr. Frederic B. Jennings* and *Mr. Harold W. Bissell* were on the briefs, for plaintiff in error.

Mr. Herbert C. Smyth, with whom *Mr. Frederic C. Scofield*, *Mr. Charles Angulo* and *Mr. Charles C. Sanders* were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Erie Railroad Company was sued in the State of New York by the defendant in error to recover damages

for the claimed negligent causing of the death of Stephen Mistschook, who was a subject of the Emperor of Russia and who left surviving him a wife and three children resident in Russia.

After denying negligence and liability, the company averred that it had settled the claim with the Russian Consul resident at New York, who, acting under authority of the treaties between the United States and the Emperor of Russia, and in behalf of the widow and next of kin of the deceased, had executed in due form of law and, for the consideration of $400, had delivered a release of all claims and demands arising from the death complained of.

The claim at the trial was not, and it is not now, that the Russian Treaty of 1832 (8 Stat. 444, 448, Art. VIII,) in terms gave the consul the power to make the settlement relied upon, but that under the treaty of the United States with Spain, invoked through the "favored nation" paragraph of the Russian treaty, he had power to make it.

The trial court held that the Russian consul had no authority to make the settlement pleaded or to give a valid release, and the judgment recovered by the plaintiff (the defendant in error), affirmed by the proper Appellate Division of the Supreme Court and by the Court of Appeals, is argued as if properly before us for review on writ of error.

Since the judgment which the plaintiff in error seeks to review was entered on December 12, 1916, the record presents the question whether writ of error or writ of certiorari was the appropriate remedy for bringing the case into this court under § 237 of the Judicial Code, as amended by Act of Congress, approved September 6, 1916 (39 Stat. 726).

From the statement of the case which we have made it is clear that the railroad company has relied throughout the litigation upon the validity of the treaty of the United States with Russia and that it has claimed rights under a

construction of that treaty which were denied by the defendant in error and by the New York courts. What the proper construction of the treaty is, is the only question argued in this court.

The only provisions of the Act of September 6, 1916, applicable to the review of such a case as we have here are these:

"A final judgment . . . in the highest court of a State in which a decision in the suit could be had, where is drawn in question the *validity* of a treaty . . . of . . . the United States, and the decision is against their [its] validity . . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error . . .

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is claimed under . . . any treaty . . . and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such . . . treaty . . . "

Since, as we have seen, the plaintiff in error has not assailed the validity of the Russian treaty but on the contrary has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the railroad company asserted a right under the treaty which was denied to it by the state courts and this under the plain reading of the statute could give it a right to review here only by writ of certiorari.

The distinction between assailing the validity of a treaty or of a statute and relying upon a special construc-

tion of either is patent and has been the subject of such full discussion by this court that it should not now be considered either doubtful or obscure. *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210; *District of Columbia* v. *Gannon*, 130 U. S. 227; *Louisville & Nashville R. R. Co.* v. *Louisville*, 166 U. S. 709, 715; *United States* v. *Lynch*, 137 U. S. 280, 285; *South Carolina* v. *Seymour*, 153 U. S. 353, 358; *United States ex rel. Taylor* v. *Taft*, 203 U. S. 461, 464; *Stadelman* v. *Miner*, 246 U. S. 544.

For want of jurisdiction the writ of error is

Dismissed.

UNION DRY GOODS COMPANY *v.* GEORGIA PUBLIC SERVICE CORPORATION.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 87. Argued December 18, 1918.—Decided January 7, 1919.

A State fixed reasonable rates to be charged by a corporation for supplying electricity to the inhabitants of a city, which superseded lower rates agreed on in an existing time contract made previously between the company and a consumer. *Held*, a legitimate effect of a valid exercise of the police power, not impairing the obligation of the contract or depriving the consumer of property without due process.
145 Georgia, 658, affirmed.

THE case is stated in the opinion.

Mr. R. Douglas Feagin and *Mr. Rudolph S. Wimberly*, for plaintiff in error, submitted. *Mr Oliver C. Hancock* was also on the brief.

Mr. Roland Ellis, with whom *Mr. C. A. Glawson* and *Mr. Thomas W. Hardwick* were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Georgia Public Service Corporation and The Union Dry Goods Company, both corporations organized under Georgia law and doing business in Macon, on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years until in April, 1914, when the Dry Goods Company refused to pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The Service Corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the Dry Goods Company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the Service Corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the Supreme Court of Georgia both held against the claims of the Dry Goods Company and the case is here for review on writ of error.

The order of the Railroad Commission of Georgia, entered on February 24, 1914, reads:

"Ordered: That on and after March 1, 1914, and until the further order of this Commission, the following schedules of rates shall be the maximum schedules of rates to be charged by the Georgia Public Service Corporation."

Then follow the rates complained of.

No opinion was rendered in this case, but on the same date, in prescribing the same rates in a proceeding instituted by the Macon Railway & Light Company, also of Macon, the Commission said:

"The rates prescribed herein are in the opinion of the Commission at this time just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination." "All special rates, whether in the form of contracts for definite periods, or informal, in excess of these prescribed rates are illegal."

Of the several claims pressed in argument, we need notice only two: That the obligation of the contract of July 18, 1912, was impaired, and that the plaintiff in error was deprived of its property without due process of law, by the decision of the Supreme Court of Georgia, holding that the rates prescribed by the Railroad Commission were valid and superseded those of the contract between the parties.

Long prior to the contract of 1912 the Railroad Commission was given jurisdiction over, and power to regulate, the rates of electric light and power companies by statutes in form not greatly different from those of many other States, and, since no reason is assigned for assailing their validity, other than the result in this case, they must be accepted as valid laws.

As we have seen, the rates prescribed by the Commission were declared by it to be reasonable and the Service Company was given authority to charge them. The plaintiff in error did not assert in its pleadings, or offer evidence tending to prove, that these Commission rates were unreasonable, but complained only that they were higher than the contract rates and, for this reason, it argued that to give effect to the order, as the State Supreme Court did, violated the provisions of the Constitution referred to.

The presumption of law is in favor of the validity of the order and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants

of a city is devoted to a use in which the public has an interest which justifies rate regulation by a State in the exercise of its police power. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 407.

Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a State in an appropriate exercise of its police power, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault* v. *Springs*, 199 U. S. 473, 480, it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

This on authority of many cases which are cited.

In *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 357, it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

In *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482, this is quoted with approval from *Knox* v. *Lee*, 12 Wall. 457, 550, 551, viz:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority."

In the same report, in *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, at p. 567, it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, the court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And in *Rail & River Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 349, the state of the law upon the subject is thus aptly described:

"This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing."

372. Syllabus.

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State, and the judgment of the Supreme Court of Georgia must be

Affirmed.

ALLANWILDE TRANSPORT CORPORATION *v.* VACUUM OIL COMPANY.

SAME *v.* PIDWELL.

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

Nos. 449, 450. Argued December 12, 1918.—Decided January 13, 1919.

A charter of a sailing vessel and the bill of lading provided "Freight to be prepaid net on signing bills of lading," "Freight earned, retained and irrevocable, vessel lost or not lost." The vessel endeavored in good faith to make the voyage but was delayed by a storm requiring her return for repairs, and then indefinitely by the act of the Government in denying clearance to sailing vessels destined for the war zone. *Held*, that the carrier was relieved of the obligation to carry and need not secure transportation by other means or refund the prepaid freight. P. 385.

The bill of lading for other goods for the same voyage provided that the full freight should be due and payable on receipt of goods by the carrier, and that any payment in respect of them should be deemed fully earned and due and payable to the carrier at any stage before or after loading, without deduction, if unpaid, or refund in whole or in part, if paid, "goods or vessel lost or not lost, or if the voyage be broken up." It also exempted the carrier from liability "for any loss, damage, delay or default, . . . by arrest or restraint of governments, princes, rulers, or peoples." *Held, ut supra.* P. 386.

THE cases are stated in the opinion.

Mr. Oscar D. Duncan, with whom *Mr. Russell T. Mount* and *Mr. Courtland Palmer* were on the brief, for Allanwilde Transport Corporation.

Mr. John C. Prizer for Vacuum Oil Co. and Pidwell:

Freight is the compensation payable for the carriage and proper delivery at destination of the cargo. Scrutton, Charter Parties, Art. 136; 2 Parsons, Contracts, 9th ed., p. 422; *Kirchner* v. *Venus*, 12 Moo. P. C. 361; *Tirrell* v. *Gage*, 4 Allen, 245. If, for any reason, other than fault of the shipper, the cargo fails to arrive at destination in merchantable condition, no freight is earned. *Asfar & Co.* v. *Blundell*, [1896] 1 Q. B. 123; *The Harriman*, 9 Wall. 161; *The Kimball*, 3 Wall. 37, 44, 45; *Willett* v. *Phillips*, 8 Ben. 459; *Burn Line* v. *United States & Australasia S. S. Co.*, 162 Fed. Rep. 298. Where the voyage is interrupted by any cause, even by an excepted peril, the vessel may forward the cargo by another vessel to earn its freight; unless it does so, no freight is earned. *Hunter* v. *Prinsep*, 10 East, 378; *The Tornado*, 108 U. S. 342, 347; 1 Parsons, Admiralty and Shipping, p. 231.

Where a contract provides for prepayment of freight and delivery is prevented by some cause excepted in the charter-party, the American authorities, contrary to the English rule, require that the freight be refunded, since it has not in fact been earned. *The Kimball, supra; National Steam Nav. Co.* v. *International Paper Co.*, 241 Fed. Rep. 861, 862.

A stipulation that prepaid freight shall be irrevocable cannot lessen the obligation to perform the voyage or enlarge the exceptions by which the vessel has stipulated to excuse nonperformance. Even under the English rule prepaid freight can be recovered if the vessel has failed to perform the voyage in consequence of a cause against which it has not provided in its contract. *Great Indian Ry. Co.* v. *Turnbull*, 53 L. T. 325; *Dufourcet & Co.* v.

Bishop, 18 Q. B. D. 373; *Weir & Co.* v. *Girvin & Co.*, [1900] 1 Q. B. 45; Scrutton, Charter Parties, 7th ed., p. 304, note f.

The principle that impossibility of performance is no excuse is peculiarly applicable to maritime contracts; it is a frequent occurrence that performance becomes impossible, and it is important to know in advance which party has assumed the risk. It is therefore the universal practice to insert an enumeration of the perils for which the parties shall not be held responsible. Scrutton, Charter Parties, Art. 79; Carver, Carriage by Sea, 6th ed., § 74; Anson, Contracts, p. 325.

In the absence of an exception expressed in the contract, impossibility of performance is no excuse. *Spence* v. *Chodwick*, 10 Q. B. 517; *Hills* v. *Sughrue*, 15 M. & W. 253; *Kearon* v. *Pearson*, 7 H. & N. 386; *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D. 589; Carver, Carriage by Sea, § 74. Even an absolute obligation of the charterer to load or discharge within a given number of days is not excused by a circumstance beyond his control. *Budgett* v. *Binnington*, [1891] 1 Q. B. 35, 40, 41; *Thies* v. *Byers*, 1 Q. B. D. 244; *Empire Transp. Co.* v. *Philadelphia &c. Co.*, 77 Fed. Rep. 919, 921.

An embargo does not abrogate but simply suspends the performance of a charter-party. *Hadley* v. *Clark*, 8 Term Rep. 259, 265–268. That case has been followed in this country in every case involving embargo. *Odlin* v. *Insurance Co.*, 2 Wash. C. C. 312, 317, 318; *M'Bride* v. *Marine Ins. Co.*, 5 Johns. 299, 308; *Palmer* v. *Lorillard*, 16 Johns. 348; *Bayliss* v. *Fettyplace*, 7 Massachusetts, 324; *Tirrell* v. *Gage*, 4 Allen, 245; *Lorent & Steinmetz* v. *South Carolina Ins. Co.*, 1 Nott & McC. 505, 509; *Kelly* v. *Johnson*, 3 Wash. C. C. 45; *Braithwaite* v. *Power*, 1 N. Dak. 455. See also Carver, Carriage by Sea, § 242; Abbott, Merchant Ships and Seamen, 14th ed., p. 874; 2 Parsons, Contracts, p. 828. The recent English cases

relied on by the carrier, and which are cited in Scrutton, Charter Parties, 8th ed., p. 91, as discrediting the authority of *Hadley* v. *Clark*, were not embargo cases, but were cases in which the parties sought to rely upon the principles of that case by analogy.

An embargo is almost inevitably indefinite as to duration. *M'Bride* v. *Marine Ins. Co., supra.* It does not render performance illegal within the usual meaning of the term "illegality." *Lorent & Steinmetz* v. *South Carolina Ins. Co., supra;* 2 Parsons, Contracts, p. 828; *Bayliss* v. *Fettyplace, supra.*

That the shipper, upon giving security, may compel the surrender of his cargo is suggested in *Palmer* v. *Lorillard, supra.* In *Braithwaite* v. *Power, supra,* the vessel was held entitled to retain the cargo until resumption of navigation was possible, in order to earn freight.

The carrier, in repudiating its contracts and requiring the shippers to retake their cargoes without returning the prepaid freight and without giving security or promising to carry out the voyage upon the lifting of the embargo, committed a breach of contract. The measure of damages is not merely the amount of the prepaid freight, but the full damages sustained in consequence of the failure to transport the cargo or cause it to be transported to destination.

The doctrine of "frustration of venture" as urged by the carrier, is properly applicable only to contracts, or the severable portions thereof, remaining executory on both sides. With respect to a contract wholly executory on both sides, while it may well be said that the happening of an event not anticipated by either party dissolves the contract, it is idle to speak of dissolution where one party has paid in advance the full consideration for a service to be rendered by the other.

The carrier, by failing to insert any exceptions in its charter-party or bill of lading (other than the dangers

of the seas) assumed an absolute obligation to deliver the cargo at destination. In almost every maritime case cited by it the contract contained an exception of "restraint of princes, rulers, or peoples," which was expressly relied upon by the parties. The effect of the absence of exceptions is illustrated by *Hills* v. *Sughrue, supra; Budgett* v. *Binnington, supra; The Harriman, supra; Empire Transp. Co.* v. *Philadelphia &c. Co., supra.* The cases of *The Kronprinzessin Cecilie,* 244 U. S. 12, and *Watts, Watts & Co.* v. *Mitsui & Co.,* [1916] 2 K. B. 826; [1917] A. C. 227, are not authority for the proposition that the omission of such an exception is immaterial. In view of the emphasis laid upon the exception in both cases, and the fact that the cases, relied upon by this court in reaching its decision in the former case, contained a restraint of princes exception which was the principal reliance of the defense, they are authorities illustrating the practical importance of such an exception. See also *Nobel's Explosives Co.* v. *Jenkins,* [1896] 2 Q. B. 326; *Geipel* v. *Smith,* L. R. 7 Q. B. 404. That such an exception is necessary to excuse the vessel in the present cases is the view of the court in *The Gracie D. Chambers,* 253 Fed. Rep. 182.

The carrier not only inserted no restraint of princes clause to qualify its obligation, but expressly negatived such an exception by excepting "dangers of the seas *only.*" Certainly the court will not imply a restraint of princes exception for the exclusive benefit of the carrier while leaving it in possession of the prepaid compensation for which the service has not been rendered.

Mr. Justice McKenna delivered the opinion of the court.

The questions in the cases arise upon libels filed against the "Allanwilde" to recover prepaid freight for the trans-

portation of certain goods and merchandise to designated ports in Europe.

The solution of the questions turns upon (1) the asserted prevention of the adventure by a storm at sea which the vessel encountered, requiring her return to port for repairs, and (2) afterwards by the restraining power of the Government.

On November 1, 1917, the "Allanwilde," owned by the Allanwilde Transport Corporation, was seized upon libels filed by the Vacuum Oil Company and A. W. Pidwell, respectively, each of which had shipped certain goods to be carried from New York to Rochefort, France.

In May, 1917, the Oil Company chartered the vessel to carry a cargo of oil in barrels at the rate of $16.50 a barrel (changed afterwards to $15.25).

The charter party contained, *inter alia*, the following provisions:

". . . freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

On August 25, the oil having been loaded, the vessel issued a bill of lading containing, *inter alia*, the following provision: "All conditions and exceptions of charter-party are to be considered as embodied in this bill of lading."

Pidwell was permitted to ship certain kegs of nails on the vessel, and on August 15 a bill of lading was issued to him. *Inter alia*, it provided that the carrier should not be liable for loss, damage, delay or default "by causes beyond the carrier's reasonable control; . . . by arrest or restraint of governments, princes, rulers, or peoples; . . . by prolongation of the voyage: . . ."

It is provided in paragraph 5 of the bill of lading that "full freight to destination, whether intended to be pre-

paid or collect at destination, and all advance charges . . . are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; . . . and any payments made . . . in respect of the goods . . . shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; . . ."

In pursuance of the contracts thus attested the oil and the nails were shipped on the "Allanwilde" and the freight was paid in advance—$49,745.50 for the oil and $3,128.00 for the nails.

The vessel was seaworthy and properly manned and equipped, and set sail September 11. After she had been out about fourteen days and was about five hundred miles from New York, she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was three or four feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax was about five hundred miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account as well as for other good reasons be headed for New York, where he arrived on October 5, having been out twenty-four days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

"On September 28, while the vessel was at sea, the government decided to refuse clearance thereafter to any sailing vessel bound for the war zone. . . . The master did not know of this decision until the vessel returned to New York; he received no information from the shore after September 11. The repairs being finished, the vessel attempted to resume her voyage, but clearance

was refused, and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards, the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded, does not appear. The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight, but also damages for failure to carry. On each libel the District Court entered a decree for the prepaid freight alone, refusing recovery for the other damages."

Upon these facts the Circuit Court of Appeals have certified four questions, two in each libel, as follows:

"1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Co. dissolved, so as to relieve the carrier from further obligation to carry the oil?

"2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

"3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

"4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

A copy of the charter party and copies of the bills of lading are attached to the certificate and also the official bulletin refusing clearance to "sailing vessels destined to proceed through the war zone."

The argument of counsel upon the elements of the ques-

tions is quite extensive, ranging through all of the ways in which contracts can be dissolved or their performance excused by the agreement of the parties or prevented by some supervening cause independent of the parties and dominating their convention. We do not think it is necessary to follow the argument through that range. It may be brought to the narrower compass of the charter party and the bills of lading.

The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—"Freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost." The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation. It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting "restraint of princes, rulers and peoples" and that, therefore, the carrier was

not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie*, 244 U. S. 12.

There is no imputation of bad faith. The carrier demonstrated an appreciation of its obligations and undertook their discharge. It was stopped, first by storm, and then prevented by the interdiction of the Government. In neither situation was it inactive. It quickly repaired the effects of the former and protested against the latter, joining with the shipper in an earnest effort for its relaxation. It gave up only when the impediment was found to be insurmountable.

The answer to the other contention is that the contract regarded the "Allanwilde," a sailing ship, not some other kind of ship or means. *The Tornado*, 108 U. S. 342; *The Kronprinzessin Cecilie*, *supra*.

The bill of lading in No. 450 is even more circumstantial. It provided that "Full freight to destination, whether intended to be prepaid or collect at destination, . . . shall be deemed fully earned and due and payable to the *carrier* at any stage before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up." And there is exemption

from liability "for any loss, damage, delay or default, . . . by arrest or restraint of governments, princes, rulers, or peoples; . . ."

The questions certified are therefore answered in the affirmative.

So ordered.

INTERNATIONAL PAPER COMPANY *v.* THE SCHOONER "GRACIE D. CHAMBERS," &c., PAYNE, CLAIMANT.

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

No. 479. Argued December 12, 13, 1918.—Decided January 13, 1919.

The bill of lading contained the provisions "Restraints of princes and rulers excepted," "Freight for the said goods to be prepaid in full without discount, retained and irrevocably ship and/or cargo lost or not lost." Sailing was delayed indefinitely by the Government's refusal to clear sailing vessels destined for the war zone, which went into effect after the shipment commenced and before the freight was prepaid against delivery of the bill of lading. *Held*, that the carrier was relieved of the duty to transport the goods and need not refund the prepaid freight. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, *ante*, 377. P. 391.

253 Fed. Rep. 182, affirmed.

THE case is stated in the opinion.

Mr. William C. Cannon, with whom *Mr. R. L. von Bernuth* was on the brief, for petitioner:

Freight is not earned until the vessel "breaks ground" or starts upon her voyage. *The Tornado*, 108 U. S. 342; *Curling* v. *Long*, 1 Bos. & P. 634. A change of berth pending completion of necessary preliminaries to sailing is not a commencement of the voyage. *Gilchrist Transp.*

Co. v. *Boston Ins. Co.*, 223 Fed. Rep. 716; *Wood* v. *Hubbard*, 62 Fed. Rep. 753. Where the voyage has been begun but the cargo has not been delivered, the rule in this country is that, in the absence of an express stipulation, prepaid freight may be recovered. It became the practice to insert in both American and English bills of lading clauses providing that prepaid freight might be retained "ship lost or not lost," for the purpose of making the legal effect of such a stipulation conform with the English decisions. But the English cases hold that even where there is such a stipulation the recovery depends upon whether or not the voyage had commenced and the freight had begun to be earned. *Ex parte Nyholm; Re Child*, 29 L. T. 634; *Weir & Co.* v. *Girvin*, [1900] 1 Q. B. D. 45; *Great Indian Ry. Co.* v. *Turnbull*, 53 L. T. 325; *Allison* v. *Bristol Marine Ins. Co.*, 1 App. Cas. 209; Scrutton, Charter Parties, 8th ed., Art. 137. And, in the absence of a controlling agreement, prepaid freight is treated in the same manner as freight payable. *Allison* v. *Bristol Marine Ins. Co.*, *supra*. These cases do not construe the phrase "ship lost or not lost" to extend the already existing doctrine or to bar recovery of prepaid freight in any event; they confine the rule to losses caused by risks of the voyage, and hold that where freight had not commenced to be earned at the time it became due and payable it can be recovered back. *Coker & Co.* v. *Limerick S. S. Co.*, 34 T. L. Rep. 18; 118 L. T. 726, does not overrule them, and, if it did, should not be followed. *The Kimball*, 3 Wall. 37, 45. The only issue there litigated was, what portion of the charter hire became payable where part of the cargo had been loaded, and as to which some, but not all, of the bills of lading had been signed.

Under our law, the parties may stipulate to make prepaid freight an unconditional payment in consideration of loading the goods on board. *National Steam Nav. Co.* v. *International Paper Co.*, 241 Fed. Rep. 861, 863; *The*

Queensmore, 53 Fed. Rep. 1022. In both of these cases, however, the vessel had actually sailed and the earning of the freight had begun. The "ship lost or not lost" clause became operative. The presumption is that freight is payable only on so much of a cargo as is delivered, and to take the case out of the general rule language in the bill of lading which is unmistakable in its effect must be shown. *Christie* v. *Davis Coal & Coke Co.*, 95 Fed. Rep. 837. The burden is on the shipowners to show that the language employed was intended to have the effect claimed by them. With the exception of the *Coker Case*, no decision can be found, even in England, in which prepaid freight has been held not to be recoverable because of an express stipulation to that effect, where the ship has not actually started on her voyage. The bill of lading in the case at bar evinces no intention that the freight was to be paid as a consideration for receiving the goods on board. The courts have construed similar clauses as not preventing a recovery of prepaid freight. *Ocean S. S. Co.* v. *U. S. Steel Products Co.*, 239 Fed. Rep. 823; *The Allanwilde*, 247 Fed. Rep. 236, 238.

The restraint of princes clause only exempts the ship from liability for failure to carry and does not relate to freight moneys. *Jackson* v. *Union Marine Ins. Co.*, L. R. 10 C. P. 125, 145; *Kelly* v. *Johnson*, 3 Wash. C. C. 45. Furthermore, there was a frustration of the enterprise before the freight was paid or payable. The action of the Government was such an interference as to excuse performance and justify abandonment of the contract. *Geipel* v. *Smith*, L. R. 7 Q. B. 404; *The Kronprinzessin Cecilie*, 244 U. S. 12; *The Styria*, 186 U. S. 12; *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.*, 115 L. T. 814, 817, 819, 822; *Countess of Warwick S. S. Co.* v. *Nickel Societe Anonyme*, [1918] 1 K. B. 372; *Horlock* v. *Beal*, [1916] 1 A. C. 486; *Atlantic Fruit Co.* v. *Solari*, 238 Fed. Rep. 217; *Jackson* v. *Union Marine Ins. Co., supra;*

Embiricos v. *Sydney, Reid & Co.*, [1914] 3 K. B. 45. The freight moneys had not become due when the embargo was put into effect, and the petitioner was absolved from the obligation to pay them on the shipment. The consideration for the subsequent payment totally failed, and petitioner is entitled to the return of such moneys. *Card* v. *Hine*, 39 Fed. Rep. 818.

The signed bill of lading was delivered and the freight paid five days after the government order had been put into effect. The contract was wholly executory, and its performance having been prohibited by law, moneys paid on account thereof cannot be retained. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Taylor* v. *Bowers*, 1 Q. B. D. 291, 300; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 296; *Cleveland, C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. Rep. 849.

Mr. Robinson Leech, with whom *Mr. Charles Burlingham* was on the brief, for respondent.

Mr. Justice McKenna delivered the opinion of the court.

Libel in admiralty on the schooner "Gracie D. Chambers," her tackle, etc., to recover the sum of $5,845, prepaid freight on a cargo of paper loaded on the schooner for shipment from New York to Bordeaux, France, by the International Paper Company. Judgment went for libelant in the District Court. It was reversed by the Circuit Court of Appeals by a divided court. To this action this writ is directed.

The facts as found by the Circuit Court of Appeals are as follows:

"September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the Port of New York

to be delivered at Bordeaux. Between September 27 and 29 the libelant Paper Company shipped 120 tons of print paper.

"September 28 at 4:25 p. m. the Treasury Department at Washington telegraphed the Collector at the Port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within the danger zone. There was no official publication of this embargo, but it was put into effect beginning September 29 by the refusal of clearance to such vessels as they applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

"October 3 the schooner moved out to an anchorage at the Red Hook Flats to save wharfage charges and to await clearance.

"October 4 the freight was paid against delivery of the bill of lading.

"October 5 the master applied to the Collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo on the ground that it had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the freight paid.

"The bill of lading contained the following provisions:

"'Restraints of Princes and Rulers excepted.'

"'Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost.'"

The case was submitted with Nos. 449 and 450 [*Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, *ante*, 377], and its primary question is, as there, the sufficiency of the clauses in the bill of lading as a defense. In those cases we decided that the bill of lading expressed the contract of the parties and hence determined their rights and liabil-

ities. And it is the safer reliance, the accommodation of all the circumstances that induced it. It was for the parties to consider them, and to accept their estimate is not to do injustice but accord to each the due of the law determined by their own judgment and convention, which represented, we may suppose, what there was of advantage or disadvantage as well in the rates as in the risks.

It is asserted, however, that the vessel in this case did not break ground and that this fact distinguishes the case from Nos. 449 and 450. The fact does not deflect the principle of those cases. It was not made to depend upon the fact of breaking ground, but upon the bills of lading which provided for the payment of freight upon the shipment of the goods and the right to retain it though the goods were not carried, their carriage being prevented by causes beyond the control of the carrier.

Therefore, upon the authority of those cases, the judgment of the Circuit Court of Appeals in this case is

Affirmed.

STANDARD VARNISH WORKS *v.* STEAMSHIP "BRIS," REDERIAKTIEBOLAGET BORE, CLAIMANT.

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

No. 745. Argued December 13, 1918.—Decided January 13, 1919.

The bill of lading provided that prepaid freight should be considered earned on shipment of the goods and be retained by the vessel-owners, "vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere;" that in case the ship should be prevented from reaching destination by war or the hostile act of any power, the master might

await removal of the obstacle, discharge the goods at any depot or convenient port, or bring them back to the port of shipment, where the ship's responsibility should cease; and it exempted the carrier from loss "by arrest and restraint of princes, rulers or people." War measures taken by the Government respecting such goods soon after shipment made it impossible to carry them to destination and they were redelivered at the port of shipment without breaking ground. *Held*, that the carrier was not obliged to refund the freight. *Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, *ante*, 377; *International Paper Co.* v. *The Gracie D. Chambers*, *ante*, 387. P. 398.

THE case is stated in the opinion.

Mr. Julius J. Frank and *Mr. Everett P. Wheeler* for Standard Varnish Works:

The bill of lading should be construed as a whole, with reference to the main object—transportation to and delivery at destination. Reasonable effect should be given to it by holding that if the contract should not be performed by the shipowner he is not liable in damages to the shipper, but shall not retain the freight.

The action of the Government constituted "commercial frustration of the adventure," which dissolves the contract. *Horlock* v. *Beal*, 114 L. T. 193; *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.*, 114 L. T. 171; *Tamplin S. S. Co.* v. *Anglo-Mexican Co.*, 115 L. T. 315. It therefore dissolves the agreement that freight is earned on shipment of the goods. The word "irrevocable" in the contract in *The Gracie D. Chambers*, 253 Fed. Rep. 182 [ante, 387], is not used in this contract. The same rule which excuses failure to deliver, under the restraints of princes clause, also deprives of the right to retain prepaid freight. As there is a failure of consideration, advances made under the contract can be recovered. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *American Union Tel. Co.* v. *Union Pacific R. R. Co.*, 1 McCr. 188.

Clauses 6 and 7 of the bill of lading are to be strictly

construed in favor of the shipper. The stipulation that prepaid freight is to be retained applies only if the vessel sails and is lost. *Christie* v. *Davis Coal & Coke Co.*, 95 Fed. Rep. 837, 838; 110 Fed. Rep. 1006; *Great Indian Ry. Co.* v. *Turnbull*, 53 L. T. 325; *Ex parte Nyholm*, 29 L. T. 634; *The Tornado*, 108 U. S. 342; *Kelly* v. *Johnson*, 3 Wash. C. C. 45; Scrutton, Charter Parties, 8th ed., Art. 137. The final clause and clause 7 likewise apply only after the voyage has been begun. While they excuse failure to perform, they do not entitle the vessel to claim freight. *Kelly* v. *Johnson*, *supra*. This construction is in accord with *The Carib Prince*, 170 U. S. 655; *The Caledonia*, 157 U. S. 124.

Prepayment of freight was subject to the implied condition that performance would continue to be legal. The contract was one not for delivery of the goods to the ship, but for transportation to and delivery at destination. The reception was only an incident.

While the carrier may throw the risk of the loss of goods upon the shipper, it cannot throw upon him the risk of losing his advance freight through prevention of the voyage by act of the law. The shipper may insure against the former, but not the latter. The contention that there is no distinction in the construction of clauses against repayment of advance freight, whether the voyage has been begun or not, is untenable. When the voyage is begun it is subject to perils of the sea, and in case of war to breaking up; but while the vessel is in her home port there are no perils.

The carrier might have performed the contract if it had acted with due diligence. It received the cargo and issued its bill of lading a fortnight before the proclamation requiring a license was made. The shipper did not release the carrier from its obligation except on repayment of prepaid freight. The government regulations requiring licenses cannot be urged as a justification unless the carrier

tenders the prepaid freight. *Non constat* but that the shipper would have been willing to await a revocation of the regulations or that, sooner or later, an exception might have been made in favor of the shipment. The carrier must either perform, declare its readiness before breach to perform on removal of the obstacles arising without its fault, or ask cancellation of its obligation upon refund of what it had received as compensation for performance.

The carrier might have provided for the contingency which actually arose. But it did not attempt to exact an agreement that prepaid freight might be retained even though it should unload the cargo at the shipper's expense without the ship's having left her moorings, which would hardly have succeeded with any shipper. Such an agreement cannot be said to have been contemplated. The bill of lading does not authorize the carrier under any circumstances to unload and return any cargo before commencing the voyage, even upon tender of prepaid freight.

The case is to be decided on the merits of each clause as presented, leaving the parties to work out the problem of insurance for themselves. *The Prussia*, 93 Fed. Rep. 837; *The Montana*, 129 U. S. 397.

If the bill of lading be construed as contended for by the carrier, the clauses relied upon are against the policy of the law of this country and are invalid. *The Kensington*, 183 U. S. 263; *Chicago &c. Ry. Co.* v. *Solan*, 169 U. S. 133, 135; *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 279, 282; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509. The clauses in question also would be void under the Harter Act, §§ 1, 2, which prohibits the shipowner from limiting his liability for acts done before the inception of the voyage.

Mr. Clarence Bishop Smith, with whom *Mr. Charles S. Haight* was on the brief, for Steamship "Bris," etc.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with Nos. 449 and 450 [*Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, *ante*, 377], and No. 479, [*International Paper Co.* v. *The Gracie D. Chambers*, *ante*, 387], being a suit in admiralty, as they were, to recover prepaid freight upon a shipment of articles of merchandise which were not carried to destination, the carriage having been prevented by action of the Government. Judgment was rendered for libelant and the case taken to the Circuit Court of Appeals.

The case is here on certificate from that court, induced, as the court recites, by its decision in the case of *International Paper Co.* v. *The "Gracie D. Chambers," supra*, to review which a certiorari has been granted by this court.

The facts as certified are these:

"On August 17th, 1917, varnish belonging to libelant was shipped by it in the port of New York for Gothenburg, Sweden, upon the steamship Bris, consigned to the Allmanna Svenska Elektriska A. B. Westeras, and the agents for said ship thereupon delivered to libelant a bill of lading, of which a copy is annexed hereto, which formed a contract between libelant and claimant in reference to said goods. Particular reference is made to Clause 6, Clause 7 and the next to last clause of the bill of lading. The libelant paid in advance the freight mentioned in said bill of lading. At the time of said shipment, shippers were required to obtain export licenses from the British Government on cargo of this class, and were also required by the United States Statute to obtain export licenses from the United States Government in connection with such articles as the President should, by proclamation, designate. At the time that said shipment was made the President had designated certain articles as to which licenses

must be thus procured when destined for Gothenburg, Sweden, but varnish was not included among them. At the time of shipment, the libelant presented a license which it had procured from the British Government. On August 27th, 1917, the President made a further proclamation, effective August 30th, 1917, whereby shippers of varnish and all other cargo destined for Gothenburg, Sweden, were required to procure licenses before the same could be exported. The libelant thereupon made application for such a license, and the claimant held its vessel in port until October 8th, to see if such licenses could be procured, before beginning the discharge of the cargo. Unless shipments were accompanied by the aforesaid licenses they were not allowed by the men-of-war belonging to the Allies to proceed to destination. On or about October 8th the United States, acting through the Exports Administrative Board, refused the application for a license to transport the goods mentioned in the libel, and other cargo destined for Gothenburg, and claimant thereupon began to unload the cargo of the Bris and concluded the discharge on October 22d, 1917. The claimant continued ready and willing to carry said cargo forward if a license therefor were obtained by libelant. The libelant took redelivery of the cargo at the port of shipment and made a demand upon the claimant that the claimant should return the freight paid, which demand was refused. The question aforesaid is as follows:

"1. Did the bill of lading contract justify the carrier, under the facts stated, in refusing to refund the prepaid freight?"

Clause 6 of the bill of lading is as follows: ". . . Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; . . ." The material parts of clause

7 are as follows: "Also, in case the ship shall be prevented from reaching her destination by . . . war . . . or the hostile act of any power," the master may wait until the impeding obstacle be removed "or discharge the goods into any depot or at any convenient port or bring her cargo back to port of shipment where the ship's responsibility shall cease . . ."

Clause 2 should be considered. It exempts the carrier from loss by certain causes or "by arrest and restraint of princes, rulers or people."

We think the case is within the principle of the decision of the cases submitted with it. In this case, however, it is urged that the clause relied on by the ship to justify the retention of the advance of freight does not contain the word "irrevocable" and that upon that word stress was put by the Circuit Court of Appeals and presumably by this court. The word undoubtedly is one of intensity but its absence does not remove the meaning or intention of its associates. Their declaration is that "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost." The declaration is clear, and, in anxiety of purpose, uses some tautology. The words "prepaid freight is to be considered as earned" declare a completed right and carried the power of retention without the expression of the latter. And the expression of the right and the power cannot be put aside. Counsel, however, would make them purposeless and would consider the bill of lading as if they were not contained in it, and urges that the only effect of the refusal of clearance to the ship was the "commercial frustration of the adventure" working a dissolution of the contract, absolving from performance but requiring the restitution of the payments that were made as the consideration of performance.

We are not insensible to the appealing force of the contentions nor to the strength of the argument advanced

to support them, but the contract determines against them and the reasons for assigning to it that effect we have given in our opinions in the other cases.

We, therefore, answer the questions certified in the affirmative.

So ordered.

FINK ET AL., TRUSTEES &c., *v.* BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 43. Argued December 13, 16, 1918.—Decided January 13, 1919.

Through the Act of May 27, 1908, c. 199, 35 Stat. 312, restrictions on alienation were removed from a Creek Indian allotment which, under the Creek Supplemental Agreement of June 30, 1902, c. 1323, § 16, 32 Stat. 500, and the Oklahoma Enabling Act and Constitution, was exempt from taxation. The Act of 1908 provides "that all land from which restrictions have been or shall be removed shall be subject to taxation," etc. Upon conveyance by the allottee, *held*, that the tract was subject to state taxation in the hands of the grantees, for by taking their title under the Act of 1908 they took subject to its conditions and policy. P. 402.

The Act of May 27, 1908, *supra*, granting the right of alienation, invades no right of the Indian in making the exercise of that right a surrender of the exemption from taxation. P. 404.

Quære as to how far a grantee of an Indian may avail himself of the Indian's right to assert the unconstitutionality of an act of Congress. P. 405.

59 Oklahoma, —, affirmed.

THE case is stated in the opinion.

Mr. Charles B. Rogers, with whom *Mr. W. O. Cromwell* and *Mr. George W. Buckner* were on the briefs, for plaintiffs in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, with whom *Mr. R. E. Wood* and *Mr. Hunter L. Johnson*, Assistant Attorneys General of the State of Oklahoma, and *Mr. W. W. Cotton* were on the brief, for defendants in error.

Mr. Edmund Lashley, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice McKenna delivered the opinion of the court.

The question in the case is whether land allotted to an Indian of the Creek Tribe exempt from taxation in the hands of the Indian is exempt in the hands of a purchaser from the Indian.

Considering that the land was so exempt, in other words, that the exemption went with the land, in subsequent hands, the suit was commenced by plaintiffs in error, here called plaintiffs, to restrain the collection of taxes upon part of the land which had become lots in the town of Muskogee. There was a demurrer to the petition by defendant in error, here called defendant, which by stipulation of counsel was submitted solely on the question of exemption, other questions being reserved.

The stipulation recited that plaintiffs sought an injunction against the taxes assessed or hereafter assessed against the lots for the reason that they had been a part of the homestead of Eliza J. Murphy, a Creek Indian allottee and a citizen and member of the Creek Tribe or Nation, and for that reason the lots were exempt from taxation for the period of twenty-one years from the date of the deed or patent.

The District Court overruled the demurrer and enjoined the collection of the taxes. The judgment was reversed by the Supreme Court and the plaintiffs then

dismissed their petition as to all other grounds of relief than that the taxes "were illegal and void because prohibited by the contract, constitution, laws and treaties of the United States."

A petition for rehearing was denied and a judgment entered sustaining the demurrer and dismissing the petition.

The elements of decision are certain acts of Congress, the deed to Eliza J. Murphy, her deed to plaintiffs, and certain provisions in the constitution of the State of Oklahoma.

The lands of which the lots involved were a part were allotted to Eliza J. Murphy by virtue of the Act of Congress of March 1, 1901, and that of June 30, 1902 (31 Stat. 861; 32 Stat. 500). The latter act is known as the Creek Supplemental Agreement and provides (§ 16) that an allotment shall not be encumbered or subject to forced sale for five years, except with the approval of the Secretary of the Interior. And the section requires that each citizen of the Tribe "shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

A deed was made to Eliza J. Murphy on April 20, 1903, and, following the statute, expressed the non-taxability and inalienability and freedom from incumbrance for the designated period of exemption.

There were provisions in the Enabling Act of the State under which its constitution was drawn which preserved the rights of persons and property of the Indians so long as such rights should remain unextinguished and provided that nothing in the constitution should be construed to limit or affect the authority of the United States respect-

ing the Indians, their lands, their property or their rights. And the constitution exempted from taxation such property as might be exempt by reason of treaty stipulations existing between the Indians and the United States or by federal laws during the force and effect of such treaties and laws. Plaintiffs rely on these provisions and the deed to Eliza J. Murphy for their contentions, fortified, they assert, by decisions of this court.

To the contentions defendant opposes the Act of Congress of May 27, 1908, c. 199, 35 Stat. 312, which removed the existing restrictions on the homestead allotment, thereby enabling the allottee to sell the land, and which provides ". . . that all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other persons than allottees of the Five Civilized Tribes."

The contention based on this act is that by the Creek Supplemental Agreement, *supra*, the non-taxability and inalienability and freedom from incumbrance of the land were correlatives and to a certain extent, therefore, interdependent, a combination of limitations and rights, and as they existed together they disappeared together. And their co-existence depended upon the Indian and because it did there was no limitation or infringement of rights or impairment of contract. Plaintiffs, it is further contended, are in no better situation, as they only got title by virtue of the Act of May 27, 1908, removing the restriction upon alienation and they cannot avail themselves of it and repudiate it at the same time.

The Supreme Court of the State yielded to these contentions and gave special effect to the Act of 1908 which it considered "a comprehensive revision of the laws relating to the Five Civilized Tribes and their lands," that by it "the free right of alienation was granted," and as the plaintiffs "took their title to the lots they are

seeking to exempt from taxation by virtue of the terms of this act, they cannot go behind it. But for that act they could not have purchased the lands in question. They took subject to all the conditions of that act, and they cannot now claim the benefits of the exemption from taxation granted to the allottee by the Creek Supplemental Agreement. *Goudy* v. *Meath*, 203 U. S. 146."

In resistance to the contentions of the defendant and the conclusions of the court, plaintiffs adduce *Choate* v. *Trapp*, 224 U. S. 665, and certain cases decided upon its authority, that is, *Gleason* v. *Wood*, *id.* 679; *English* v. *Richardson*, *id.* 680.

Choate v. *Trapp* has not the extent assigned to it. In that case the State of Oklahoma undertook to tax lands which were yet in the hands of the Indians, asserting the right simply because of the removal of the restrictions upon alienation by the Act of May 27, 1908, *supra*. The reply of this court was that the law (Curtis Act of June 28, 1898, 30 Stat. 505) as modified by the Act of July 1, 1902, c. 1362, 32 Stat. 641, provided that all of the lands allotted should "be nontaxable while the title remains in the original allottee." There was no question in the case, and could not be, of the effect of alienation—an exercise of the right conferred by the Act of May 27, 1908, and the consequence of such exercise. It is true it was said that "exemption and non-alienability were two separate and distinct subjects" and that "one conferred a right and the other imposed a limitation." The distinction was apt for that case. The State contended that there was no tax exemption but that that provision was only directed against the absolute alienation of the land. This was, in effect, a contention that the power of alienation unexercised was the same as the power exercised, and to correct this confusion it was declared that the provision exempting from taxation was a property right. But it was a property right in the Indian, preserved to him not only

for his own interest but in the interest of the policy of the United States regarding him. *Kansas Indians*, 5 Wall. 737; *United States* v. *Rickert*, 188 U. S. 432; cases cited in *Choate* v. *Trapp*. At first his interest was put beyond his control; by the Act of May 27, 1908, it was committed to his control, this also satisfying the policy of the United States under the changed conditions. It invades no right of the Indian, therefore, to make the alienation of the land a surrender of the exemption from taxation, and we concur in the conclusion of the Supreme Court of the State that plaintiffs having taken title under the act cannot repudiate its conditions and its manifest policy. *New Jersey* v. *Wilson*, 7 Cranch, 164, is not in point. We are not dealing with rights in the abstract; we are dealing with rights under special conditions and as determined by acts of the parties under a law of Congress which was availed of by the Indian and a grantee of the Indian, and which, therefore, bound them by its conditions and subjected the land in the hands of the grantee to the usual burdens of government. It is an error to suppose that this takes anything of value from the Indian. We may here invoke the commonplace, for it is commonplace to say that we only know the value of a thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things —a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world. It may be that if exemption from taxation went with the land it might become an element in the price (worth in money) which the Indian might ask and receive, but that was not of concern to the purpose of the law, which was to give to the Indian all of the attributes of ownership, to give him a mastery of his property equal to that of other owners of property, and nothing more, and this consummated the new policy of Congress.

Further discussion we deem unnecessary, but we may observe that in *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310, and in *Williams* v. *Johnson*, 239 U. S. 414, 420, 421, a question was intimated whether a grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress. Opinion, however, was reserved, and we reserve it here, and rest the case on the grounds we have discussed.

Judgment affirmed.

COCHNOWER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued December 16, 1918.—Decided January 13, 1919.

Primarily, the creation of offices and the assignment of their compensation is a legislative function; and the fact and the extent of any delegation of it must clearly appear.

The Act of March 4, 1909, c. 314, 35 Stat. 1065, authorizing the Secretary of the Treasury "to increase and fix" the compensation of inspectors of customs, as he may think advisable, etc., did not empower him to decrease their salaries.

51 Ct. Clms. 461, reversed.

THE case is stated in the opinion.

Mr. William E. Russell, with whom *Mr. Seward G. Spoor*, *Mr. Louis T. Michener* and *Mr. Perry G. Michener* were on the brief, for appellant.

Mr. Assistant Attorney General Thompson and *Mr. Harvey D. Jacob*, for the United States, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from the Court of Claims involving the construction of an Act of Congress passed March 4, 1909, c. 314, 35 Stat. 1065, entitled "An Act Fixing the compensation of certain officials in the custom service, and for other purposes." This case is concerned particularly with § 2, which provides as follows: "That the Secretary of the Treasury be, and he is hereby, authorized to *increase* and *fix* [italics ours] the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours."

The Court of Claims construed the provision as authorizing the Secretary to decrease the salary of inspectors and dismissed Cochnower's petition that presented a claim for the difference between the salary at which he was serving and that from which he was reduced by the Secretary, in contest of the Secretary's power. From the judgment of the court this appeal was taken.

Cochnower's petition shows that he served in the customs service in various capacities and at various salaries, which he details, from 1879 to June 13, 1908, when he was appointed day inspector at $5.00 per diem, at which rate he served until July 1, 1910, when he was reduced to $4.00 per diem, at which rate he is now serving.

The case is one simply of statutory construction and depends primarily on the words "increase and fix" which we have italicized in our quotation of § 2. In opposition to the Court of Claims' view of them, counsel for Cochnower have indulged in a wide range and have been elaborate in citation and review of prior legislation and the decisions of the courts upon it. Counsel for the

Government have confined themselves to narrower limits and even urge that the argument based on "long-continued and contemporaneous construction . . . is irrelevant for the reason that section 8 of the said act of 1909 repealed all laws and parts of laws inconsistent" with it, and that its obvious purpose was to relieve the Secretary from whatever construction might have been put upon his acts or those of his predecessors under previous legislation. In other words, as we understand the Government, the Act of 1909 is to stand by itself and was intended to be and must be taken as the measure of the Secretary's power after its enactment; that it could not be limited or opposed by prior legislation, for that had been repealed; nor by prior practices, for they had been superseded, and a new rule of authority and practice pronounced. We may accept this as the gage of the Government and consider how far the act is a grant of authority to the Secretary.

Primarily we may say that the creation of offices and the assignment of their compensation is a legislative function. *Glavey* v. *United States*, 182 U. S. 595; *United States* v. *Andrews*, 240 U. S. 90. And we think the delegation of such function and the extent of its delegation must have clear expression or implication. The Act of 1909 does give a power to the Secretary, but the power is not absolute; it is expressed with qualification. The Government's contention makes it absolute, having no limit but the discretion of the Secretary. The contention gives the qualification no purpose, makes it simply a confusion or clumsiness of words. But why are they to be so regarded? Congress did not have to disguise its purpose or furtively accomplish it. And if Congress accidentally fell into the equivocal, the resulting uncertainty must be resolved by the application of the simple rule of considering all the words of a statute in their proper dependence. Reverting then to the statute, we discover that it was at pains to

express clearly the power to "increase." If it had been intended to give the power to "decrease"—an accurately opposite power—it would have been at equal pains to have explicitly declared it; and thus the unlimited discretion in the Secretary contended for by the Government would have been simply and directly conferred and not left to be guessed from a circumlocution of words or to be picked out of a questionable ambiguity. We say questionable ambiguity because its existence can be readily disputed. If it exists at all it exists in the word "fix" in the collocation "fix the compensation." But the instant signification of the word is the opposite of change—it declares stability and confirmation—and, giving it this sense, it is the natural complement of the power to increase, establishes the increase (fixes it) thereafter as the legal compensation. And this, we think, is the proper construction, direct, intelligible and adequate.

It is, however, urged that the act implies minimum and maximum salaries, especially of inspectors, and also the power of classification of inspectors. We are not called upon to dispute it. The fact or the power does not enlarge the authority to increase salaries into an authority to decrease them. The power given can otherwise be accommodated.

We think, therefore, that the Court of Claims erred in dismissing the petition, and its judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

So ordered.

FULLINWIDER *v.* SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA ET AL.

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

No. 121. Submitted December 20, 1918.—Decided January 13, 1919.

The Act of March 3, 1871, c. 122, 16 Stat. 573, granted public lands to the Texas Pacific Railroad, conditioned that those not sold or disposed of within three years from the completion of the road should be subject to settlement and preëmption at a maximum price, and other public lands to the Southern Pacific Railroad, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866." *Held*, that the condition of the Texas Pacific grant was inapplicable to the grant made by the same act to the Southern Pacific.
229 Fed. Rep. 717, affirmed.

THE case is stated in the opinion.

Mr. Fred Beall for appellant. *Mr. J. Mack Love* was also on the brief.

Mr. Charles R. Lewers and *Mr. Wm. F. Herrin* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a decree of the Circuit Court of Appeals affirming a decree of the District Court in and for the Southern District of California dismissing upon demurrer a bill brought by appellant (we shall refer to him as complainant) against the railroad company to compel the

company to convey to him a certain one-half section of land within the limits of the congressional grant to the company made by the Act of March 3, 1871, c. 122, 16 Stat. 573.

The bill alleged the incorporation of the company and that of various corporations impleaded with it, and the following facts: March 3, 1871, Congress made a grant to the Texas Pacific Railroad Company of certain sections of the public lands and provided that the lands which should not be sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and preëmption like other lands at a price to be fixed by and paid to the company at not exceeding an average of $2.50 per acre for all of the lands granted.

Section 23 of the act made a further grant of certain sections of the public lands in the State of California to the Southern Pacific Railroad and contained the provision that the company should construct a line of railroad from and to certain named points, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866." [c. 278, 14 Stat. 292.]

The road was completed between the designated points more than ten years prior to the 1st of December, 1913.

Among the lands which have not been sold or disposed of that are within the limits of the grant are those described in the bill, and on October 29, 1913, complainant (appellant) tendered the company $800 and demanded of it and the other defendants (appellees) a conveyance of the land, which demand was refused, to the injury and damage of complainant. The land is of the value of $3,000 and complainant has the qualifications entitling him to purchase the land.

Complainant offers to pay the $800 in court and alleges

that the suit was brought, among other things, for the purpose of having the court interpret and construe the acts of Congress referred to. The other defendants are alleged to have an interest in the land and a construction of the acts of Congress is prayed and of all other acts that have any relation to them; that defendants be decreed to convey to complainant the land and that he have general relief.

Sections 9 and 23 of the Act of March 3, 1871, are directly involved; the other sections of the act and other acts only as illustrating §§ 9 and 23.

By § 9 a land grant is made to the Texas Pacific Railroad of public land in California in the terms and qualifications which are quite familiar and contains the provision set out in the bill which subjects the land unsold within three years after the completion of the road to settlement and preëmption at a price not exceeding an average of $2.50 an acre.

By § 23 the Southern Pacific Railroad Company of California was authorized to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted" to the Southern Pacific Railroad Company by the Act of July 27, 1866, with reservations of rights to other railroad companies.

Based on this provision complainant puts three questions as involved in the case, but says it is only necessary for this court to answer the following one: "Was this grant of lands to the Southern Pacific Railroad Company under the Act of March 3, 1871, made subject to the rights, grants and privileges of said act, or under the rights, grants and privileges of the Act of July 27, 1866, and subject only to its terms?" Complainant's answer to the question is that the grant to the Southern Pacific was

made under the Act of 1871 and not under the Act of 1866, and deduces from that that the provision in § 9 requiring under certain circumstances a sale to preëmptors is applicable to the Southern Pacific.

Complainant's argument in support of the answer does not submit easily to succinct statement. Its postulate is that the policy of Congress in regard to the public lands came to have its chief solicitude in the disposition of them to actual settlers at reasonable prices and that this policy was not overlooked even in the grants to railroads. And the policy dictated, it is said, the provision of § 9 of the grants to the Texas Pacific Railroad Company, and determines the insertion of a like provision in § 23 which concerns the grant to the Southern Pacific Company, though it is not inserted therein. We may grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it cannot be a substitute for a law. However, we do not find the uncertainty in §§ 9 or 23 that complainant does, whether jointly or separately considered. Section 23 is complete in itself. The restrictions upon the grant it made that were deemed appropriate were expressed, and their expression excludes any other by a well known rule of construction.

Let us repeat: the Southern Pacific Company is authorized to construct a line of railroad in California with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the company by the Act of July 27, 1866. And there could not have been oversight, nor the inadvertence of expressing one thing when another was meant. Yet this is practically the contention of complainant. Not the conditions of the Act of 1866 are imposed on the grant, but the conditions imposed by § 9, conditions upon a different grant and a different company, is the contention, though complainant admits that "there is no question but that the language of Section 23 segregated from

the act, of which it is a part, and construed alone, supports the contention of the appellees." The language gains, we think, not loses in strength from its location. It makes evident that there was a conscious contrast of provision between the grants and the companies.

Decree affirmed.

CORDOVA *v.* GRANT, EXECUTOR OF COTTON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 104. Submitted December 18, 1918.—Decided January 13, 1919.

Plaintiff claimed, under the laws of Texas, land lying between the present and former beds of the Rio Grande. Defendant, claiming under Mexican grants, set up that, as plaintiff's title depended on whether the international boundary had shifted with the river, and as our government, though claiming and exercising *de facto* jurisdiction over the locus, conceded the true boundary to be unsettled, and by its treaties and acts with Mexico had agreed upon a commission with exclusive jurisdiction to settle it, the courts were thereby deprived of jurisdiction, and the case should be dismissed or the trial stayed until the boundary should be established. Our government had rejected the action of a commission which sat under the last of the treaties referred to, and had waived objection, based on comity, to the litigation. *Held*, that the District Court had jurisdiction and might properly proceed with the case, and that its holding to that effect did not involve the validity or construction of a treaty. P. 419.
Writ of error dismissed.

THE case is stated in the opinion.

Mr. Frank G. Morris for plaintiff in error:

It is manifest from the whole course of the pleadings and the evidence and the requested charges refused, and the

exception to the peremptory charge for plaintiff, that the sole question of title at issue drew in question a construction of the boundary treaty of 1889 and the arbitration treaty of 1910, and the action of the arbitrators thereunder and the status of the matters involved in the treaty after the award of June 15th, 1911. It was conceded by the plaintiff in error in his pleadings in the court below that, but for the qualification and limitations as to the effect of the *de facto* jurisdiction exercised in the territory in question by the United States, the exercise of jurisdiction by this government to the Rio Grande, as it at present runs, would express an unqualified determination and decision by the political department of the government that the international boundary followed the present channel of the river, which decision would in that case be binding on the courts.

But it was contended by plaintiff in error that the treaties mentioned gave character to the jurisdiction exercised by the United States, in that the two governments in said conventions treated the international boundary as an open question, to be thereafter determined amicably between them. They said substantially to each other that neither would undertake to decide for itself the true location of the boundary, and that the United States, in virtue of the treaty provisions, might police the territory in question pending a decision by the respective governments. These treaties, therefore, so qualified the jurisdiction exercised by the United States that it did not express a decision by this government that the channel of the present river, or any location south or west of the channel of the Rio Grande of 1852, constituted the true boundary. Hence the contentions arose on the treaty:

1. That as the treaties withdrew from the courts of the respective nations the power to decide the boundary question in cases wherein the title to lands would neces-

sarily depend upon the location of the international boundary, the courts could not decide the titles to lands depending on the boundary until the respective governments should decide the location of the boundary.

2. That if the courts of the United States might, for the purpose of trying titles to land in the territory in question, undertake to decide whether the Rio Grande had receded from its position in 1852 by gradual and slow erosion of the Mexican banks of the river and deposit of alluvium on the American side, the court could not, as it might have done in the absence of the treaty provisions mentioned, presume, from the exercise of *de facto* jurisdiction by this government up to the present channel of the river, that the political department of this government had decided that the change was such as to make the land on the north or east of the river American soil and therefore accretions to the plaintiff's abutting lands. The courts in the United States take notice of treaties and adjudicate rights accruing under them. If the court might try the case it should therefore try it as an ordinary boundary suit between individuals which would require the plaintiff to prove that he had acquired land by accretion. The treaties precluded him from relying on presumptions arising from actions of the political department of the government which were so qualified by the treaties as not to afford the presumption on which plaintiff below relied.

Furthermore, the defendant below relied upon the decision of the Arbitration Commission that the international boundary was the channel of the river of 1864, which was further south and west than the channel of 1852 but not so far south or west as the present channel of the Rio Grande. This contention necessarily involved a construction of the treaty of 1910 as to the powers of the commission and as to the effect of their award under the treaty. And this contention is not dispelled by re-

ferring to the acts of the executive department in refusing to enforce the award. It was not void on its face, and may be made certain by a survey. If so, the executive alone could not nullify the decision or take its effect from the courts when the award comes in question where private rights are involved. *Foster & Elam* v. *Neilson*, 2 Pet. 253.

The cases of *Warder* v. *Loomis*, 197 U. S. 619, and *Warder* v. *Cotton*, 207 U. S. 582, are memorandum decisions which give no statement as to what questions were properly raised in them.

Under § 238 of the Judicial Code there are no rules of pleading or requirement that the federal question be specially set up or pleaded as was required under some of the statutes. Whether a construction of a treaty is by appropriate procedure drawn in question in a trial at law in a district court of the United States or not, must depend on the application to the case of the state procedure and practice in which the court is located.

Mr. Walter B. Grant and *Mr. T. J. Beall* for defendant in error:

Although the answer of defendant and request for instruction in effect refer to the treaty of 1910, and to the action of the boundary commissioners thereunder, the facts show that no question as to its validity or construction is raised. The question being a political one, the case is not reviewable under clause 4 of § 238, Jud. Code. Mere allegations not based upon facts, showing wherein the construction and validity of the treaty are drawn in question, do not create a case under that clause. *Budzisz* v. *Illinois Steel Co.*, 170 U. S. 41.

Neither the trial court nor this court has jurisdiction to determine whether the changes in the river left the land territory of the United States or of Mexico. It was admitted that the United States and Texas have, since the land was formed, exercised government control and

political jurisdiction. It was also shown that the State Department, through an officer appointed for the purpose with the assent of Mexico, had determined that defendant had failed to exhibit such *prima facie* Mexican title as was contemplated by the agreement for protection of the *status quo*, and that there was no occasion to interfere with the action. The boundary question is purely a political one.

Warder v. *Loomis*, 197 U. S. 619, and *Warder* v. *Cotton*, 207 U. S. 582, involved the identical question concerning the land involved in this suit, or land adjacent thereto.

A question of international boundary is for the political departments, and their action binds the courts, leaving no constitutional or treaty question open for judicial determination.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of trespass to try title to land in Texas lying between the present and former bed of the Rio Grande. The plaintiff (the present defendant in error) alleged that his testator and those under whom the latter claimed had held the land under color of title from the State of Texas for the several statutory periods of limitation, and that the defendant unlawfully entered when the plaintiff had the legal title in possession as devisee. The jurisdiction of the District Court was based upon diversity of citizenship. The defendant pleaded that the plaintiff's title depended upon whether the land was within the United States, and that that depended upon whether the Rio Grande, established as the boundary in 1852, had changed its channel in such a way as to continue to be the boundary or not—the land in question having been upon the Mexican side of the river in 1852 and now being on the side of the United States. The defendant

went on to allege that while the United States now exercises a *de facto* jurisdiction over the territory where the land lies, it does so with the admission by treaty and diplomatic correspondence that the boundary is unsettled, and that "the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction," &c. On this ground it was prayed that the Court either dismiss the case or stay the trial until the boundary should be established. Subject to this the defendant pleaded not guilty and the ten years statute of limitation of Texas. The plaintiff demurred to the plea to the jurisdiction as showing on its face that the United States and Texas were exercising *de facto* jurisdiction over the land; set up that it was agreed between the United States and Mexico that Mr. Wilbur Keblinger should decide what lands in the disputed territory were proper subjects of litigation in the Courts of the United States and of Texas, that he had decided this land to be such, and that his finding had been acquiesced in by both governments. He further alleged that the Government of the United States always had claimed and now claims the land as belonging to the United States, and he denied all the defendant's allegations of fact.

It was agreed that the patents from the State of Texas under which the plaintiff claimed bounded the grants on the Rio Grande, and that if the additions now in controversy had been made by accretion, they belonged to the plaintiff. It also was admitted, and agreed that the Court in deciding upon the demurrer might notice, that the United States, the State of Texas and the County and City of El Paso were then and for many years before exercising government control and political jurisdiction over the property in question and that the United States and

State had enforced their laws over the whole of the same. It was agreed further that the Court might take notice of the correspondence between the Secretary of State, the Mexican Ambassador and Keblinger, the opinion of the Boundary Commission, and the action of the United States thereon. It appeared from the documents that the United States, while admitting that the boundary line was in question between the two countries, never had admitted any derogation of its *de facto* jurisdiction over the tract; that it had suggested to the federal courts that as a matter of comity they should not put into execution writs of ejectment, &c., against persons alleging Mexican titles, but that it found it necessary to limit this comity so as to exclude from it persons who had no *prima facie* Mexican titles in order to stop occupation by squatters who were taking advantage of the Government's forbearance. Keblinger was appointed to determine what persons showed a *prima facie* title. He decided against the defendant and with the sanction of the Government informed the plaintiff that the Government would not object if he should proceed.

The District Court sustained the demurrer to the plea to the jurisdiction and the only color of right to bring the case to this Court by direct appeal consists in a suggestion that the construction of a treaty is involved.

The decision of a Court that it has jurisdiction on the ground taken by the demurrer simply means that the Court finds the Government in fact asserting its authority over the territory and will follow its lead. It does not matter to such a decision that the Government recognizes that a foreign power is disputing its right and that it is making efforts to settle the dispute. The reference to Keblinger and his finding are important only as showing that there is no present requirement of comity to refrain from exercising the jurisdiction which in any event the Courts possess. Jurisdiction is power and matter of fact.

The United States has that power and the Courts may exercise their portion of it unless prohibited in some constitutional way.

If the passage quoted from the answer is sufficient to open the contention that treaties had contracted for the establishment of a boundary commission with exclusive jurisdiction and so had prohibited the Courts from dealing with the question, neither the validity nor the construction of any treaty was drawn in question; or if an attenuated question can be discovered it is no more than formal. A commission sat under the last of the treaties and its action was rejected by the Government as abortive. As the Government had withdrawn its suggestion of comity so far as the present case is concerned, there was no reason why the Court should not proceed to trial, and there is no reason why the present writ should not be dismissed as it was in *Warder* v. *Loomis*, 197 U. S. 619, and in *Warder* v. *Cotton*, 207 U. S. 582. It follows that some other questions argued cannot be discussed.

Writ of error dismissed.

UNITED STATES *v.* HILL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 357. Argued November 5, 6, 1918.—Decided January 13, 1919.

The transportation of liquor upon the person, and for the personal use, of an interstate passenger, is "interstate commerce." P. 424.

Under the power to regulate interstate commerce, Congress may forbid the interstate transportation of intoxicating liquor without regard to the policy or law of any State. P. 425.

The "Reed Amendment," § 5, Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069, provides: "Whoever shall order, purchase, or cause in-

toxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: *Provided*, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State." Respondent bought intoxicating liquor in Kentucky intending to take it to West Virginia for his personal use as a beverage, and for that purpose carried it upon his person on a trip by common carrier into the latter State, whose laws permitted such importation but forbade manufacture or sale for beverage purposes. *Held:* (1) That the Amendment applied, not being limited to cases of importation for commercial purposes; (2) that, as so construed, it is within the power of Congress under the commerce clause. P. 427.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom *Mr. Charles S. Coffey* was on the brief, for the United States.

No appearance for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error bringing in review under the Criminal Appeals Act the judgment of the District Court of the United States for the Southern District of West Virginia sustaining a demurrer and motion to quash an indictment against one Dan Hill. The indictment charged that Hill on the 20th of November, 1917, being in the State of Kentucky, there intended to go and be carried by means of a common carrier, engaged in interstate commerce, from the State of Kentucky into the State of West Virginia, and intended to carry upon his person, as a beverage, for his personal use, a quantity of intoxicating liquor, to-wit: one quart thereof, into the State of West

Virginia, and did in the State of Kentucky purchase and procure a quantity of intoxicating liquor, to-wit: one quart thereof, contained in bottles, and did then and there board a certain trolley car, being operated by a common carrier corporation engaged in interstate commerce, and by means thereof, did cause himself and the said intoxicating liquor, then upon his person, to be carried and transported in interstate commerce into the State of West Virginia. It is charged that Hill violated the Act of Congress approved March 3, 1917, commonly known as the Reed Amendment, by thus carrying in interstate commerce from Kentucky to West Virginia a quantity of intoxicating liquor as a beverage for his personal use, the manufacture and sale of intoxicating liquors for beverage purposes being then prohibited by the laws of the State of West Virginia. Further, that the intoxicating liquor was not ordered, purchased, or caused to be transported for scientific, sacramental, medicinal, or mechanical purposes.

The Reed Amendment is a part of § 5 of the Post-Office Appropriation Act, approved March 3, 1917, c. 162, 39 Stat. 1058, 1069, and reads as follows:

". . . Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: *Provided*, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State. . ."

The ground of decision, as appears by the opinion of the District Court, was that the phrase: "transported in interstate commerce," as used in the act, was intended to mean and apply only to liquor transported for commercial purposes. This conclusion was reached from a

construction of the act when read in the light of other legislation of Congress upon the subject of interstate transportation of liquor. Attention was called to the terms of the Wilson Act of 1890, c. 728, 26 Stat. 313, providing that intoxicating liquors transported into any State or Territory, or remaining therein for use, consumption, sale or storage, shall be subject on their arrival therein to the operation of the laws of the State or Territory enacted in the exercise of the police power. Reference was also made to the subsequent legislation known as the Webb-Kenyon Act, March 1, 1913, c. 90, 37 Stat. 699, prohibiting the shipment and transportation of intoxicating liquor from one State into another State when such liquor is intended to be received, possessed, sold or used in violation of the laws of such State. Advertence was made to the fact that the provisions of both the Wilson and Webb-Kenyon Acts apply broadly to the interstate transportation of liquors whether for commercial use or otherwise. It was concluded that Congress in the enactment of the Reed Amendment intended to aid the local law of the State by preventing shipment of intoxicating liquors in interstate commerce when intended for commercial purposes; and as the law of West Virginia permits any person to bring into the State not more than one quart of liquor, in any period of thirty days, for personal use, Congress did not intend to prohibit interstate transportation of such liquors not intended to be used for commercial purposes. We are of opinion that this is a too narrow construction of the Reed Amendment.

The Constitution confers upon Congress the power to regulate commerce among the States. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. *Gibbons* v. *Ogden,* 9 Wheat. 1, 188; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203. "Importation into one State from another

is the indispensable element, the test, of interstate commerce." *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107; *Lottery Case*, 188 U. S. 321, 345. The transportation of one's own goods from State to State is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases*, 234 U. S. 548, 560. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words "interstate commerce." *United States* v. *Chavez*, 228 U. S. 525, 532.

Congress in the passage of the Reed Amendment must be presumed to have had, and in our opinion undoubtedly did have, in mind this well-known and often declared meaning of interstate commerce. It had already provided in the Wilson Act for state control over liquor after its delivery to the consignee in interstate commerce. In the Webb-Kenyon Act it had prohibited the shipment of liquor in interstate commerce where the same was to be used in violation of the law of the State into which it was transported. In the passage of the Reed Amendment it was intended to take another step in legislation under the authority of the commerce clause. The meaning of the act must be found in the language in which it is expressed, when, as here, there is no ambiguity in the terms of the law. The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden. The exceptions are specific and are those for scientific, sacramental, medicinal, or mechanical purposes; and in the proviso it is set forth that nothing contained in the act shall authorize interstate commerce shipments into a State contrary to its laws.

West Virginia is a State in which the manufacture and sale of intoxicating liquors for beverage purposes is prohibited. If the act is within the constitutional authority of Congress, it follows that the indictment charged an offense within the terms of the law. That Congress posses-

ses supreme authority to regulate interstate commerce subject only to the limitations of the Constitution, is too well established to require the citation of the numerous cases in this court which have so held. Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not to be limited by state laws. Congress, and not the States, is given the authority to regulate interstate commerce. When Congress acts, keeping within the authority committed to it, its laws become by the terms of the Constitution itself the supreme laws of the land. "This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." *Minnesota Rate Cases*, 230 U. S. 352, 399, and previous decisions of this court therein cited.

The power of Congress, it is true, is to regulate commerce, which is ordinarily accomplished by prescribing rules for its conduct. That regulation may take the character of prohibition, in proper cases, is well established by the decisions of this court. *Lottery Case, supra; Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Hammer* v. *Dagenhart*, 247 U. S. 251, 270, 271.

That Congress has this authority over the transportation of liquor in interstate commerce, we entertain no doubt. In the recent case of *Clark Distilling Co.* v. *Western Maryland Ry. Co., supra,* this subject was given full consideration. That case involved the constitutionality of the Webb-Kenyon Law, prohibiting the shipment of liquors into States to be used therein in violation of the local law. While such was the particular case before the court, the authority of Congress to make regulations of its own was directly involved, and its authority over interstate commerce in intoxicating liquors was clearly stated and definitely recognized. After discussing the power of Congress over such shipment in interstate commerce, and affirming the ample power possessed by Congress over the subject-matter in view of its characteristics, this court said:

". . . we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation be-

tween the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

In view of the authority of Congress over the subject-matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon Laws, we have no question that Congress enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State saw fit to permit the introduction of liquor for personal use in limited quantity in nowise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy.

When Congress exerts its authority in a matter within its control, state laws must give way in view of the regulation of the subject-matter by the superior power conferred by the Constitution. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156; *Minnesota Rate Cases*, 230 U. S. 352.

It follows that the District Court erred in sustaining the demurrer and motion to quash, and its judgment is

Reversed.

Mr. Justice McReynolds dissenting.

When Hill carried liquor from Kentucky into West Virginia for his personal use he did only what the latter State permitted. Construed as forbidding this action because West Virginia had undertaken to forbid manufacture and sale of intoxicants, the Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the State's internal affairs. Whether regarded as reward or punishment for wisdom or folly in enacting limited prohibition, the amendment so construed, I think, goes beyond federal power; and to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the several States.

If Congress may deny liquor to those who live in a State simply because its manufacture is not permitted there, why may not this be done for any suggested reason, *e. g.*, because the roads are bad or men are hanged for murder or coals are dug. Where is the limit?

The Webb-Kenyon Law, upheld in *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, is wholly different from the act here involved. It suspends as to intoxicants moving in interstate commerce the rule of freedom from control by state action which the courts infer from congressional silence or failure specifically to regulate. "The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 508; *Leisy* v. *Hardin*, 135 U. S. 100, 119. In plain terms, it permits state statutes to operate and thereby negatives any inference drawn from silence. The Reed Amendment as now construed is a congressional fiat imposing more complete prohibition wherever the State has assumed to prevent manufacture *or* sale of intoxicants.

Mr. Justice Clarke concurs in this dissent.

DETROIT UNITED RAILWAY *v.* CITY OF DETROIT.

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

No. 666. Argued December 9, 10, 1918.—Decided January 13, 1919.

Where the District Court, in denying a preliminary injunction, of its own motion dismisses the bill, its action is equivalent to sustaining a demurrer, and, upon appeal, the allegations of the bill must be taken as true. P. 431.

A city, instead of exercising its power to compel the removal of tracks operated by a street car company without franchise, passed an ordinance looking to their continued operation by the company and prescribing fares and transfer privileges and penalties for violations. *Held*, equivalent to a grant of a right to operate during the life of the ordinance, entitling the company to a fair return on its investment. *Denver* v. *Denver Union Water Company*, 246 U. S. 178. P. 435.

A company operated a system of city street car lines, for some of which it had franchises entitling it to charge a certain fare and for others no franchises. An ordinance, regulating the entire system, purported explicitly to fix the fares for trips over two or more lines, whether franchise or not, and forbade extra charge for transfers, defining a continuous trip as a journey from one point to another in the city, whether made on one car or line, or by transferring from car to car or from line to line; declaring, however, that it should not be construed as an attempt to impair the obligation of any valid contract, but should apply to and govern all such street railway passenger traffic in the city except where governed by the provisions of such contract.

Held: (1) That the latter declaration must be construed as referring only to trips wholly on the franchise lines (p. 435); (2) that if its enforcement would result in a deficit to the company, as alleged, the ordinance violated the due process clause. P. 436.

An ordinance compelling a street car company to carry passengers on continuous trips over franchise lines to and over non-franchise lines, and vice versa, for a fare no greater than its franchises entitle it to charge upon the former alone, impairs the obligation of the franchise contracts. *Detroit United Railway* v. *Michigan*, 242 U. S. 238. P. 437.

Reversed.

THE case is stated in the opinion.

Mr. Elliott G. Stevenson, with whom *Mr. John C. Donnelly, Mr. William L. Carpenter, Mr. P. J. M. Hally* and *Mr. Bernard F. Weadock* were on the briefs, for appellant.

Mr. Allan H. Frazer and *Mr. Richard I. Lawson* for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The Detroit United Railway Company brought this action in the United States District Court for the Eastern District of Michigan to enjoin the City of Detroit from enforcing the provisions of an ordinance regulating street railway fares in that city. The ordinance was passed August 9, 1918. It is printed in the margin.[1]

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[1] *An Ordinance* to fix and establish maximum rates of fares and charges which may be exacted and received by persons, corporations or partnerships operating street railways for the carriage of passengers within the City of Detroit, and to fix a penalty for the violation thereof.

It is Hereby Ordained by the People of the City of Detroit:

Section 1. No person, partnership or corporation operating a street railway on the streets of the City of Detroit, for the carriage of passengers for hire, shall charge more than five cents for a single ride, or six tickets for 25 cents, per person for one continuous trip within the city over any line which is now operated or shall hereafter be operated without a franchise fixing the rate of fare.

Section 2. No such person, partnership or corporation shall charge a higher rate of fare upon any line now or hereafter operated under a franchise contract than is fixed by such franchise.

Section 3. Between the hours of five and six-thirty a. m. and four forty-five and five forty-five p. m. tickets in strips of eight for twenty-five cents shall be sold on all cars on all lines except where such sale would be contrary to the terms of a franchise contract, which tickets shall entitle the holder to the same rights between said hours as the payment of a five cent fare would.

Section 4. Where a trip is over two or more lines, whether franchise lines or not, the maximum fare shall be five cents, and no transfer fee

The bill attacks the ordinance upon two constitutional grounds: 1st, That it impairs the obligation of the company's existing contracts; 2nd, That it is confiscatory and hence deprives the company of its property without due process of law. The suit came on for hearing before the district judge upon an application for a temporary injunction, the judge denied the application and upon his own motion dismissed the bill.

The question upon this appeal is: Did the bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court was equivalent to sustaining a demurrer to the bill.

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shall be exacted which raises the total charge to more than five cents or six for 25 cents.

Section. 5 A continuous trip means one journey from point to point within the city, whether the same is made upon one car or one line or by means of transferring from car to car or from line to line. Each such person, partnership or corporation, and the officers, agents, servants and employés thereof, shall, upon demand, furnish proper transfers to carry into effect the provisions of this section. The provisions of this Ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where the same is governed by the provisions of such contract.

Section 6. Any such person, partnership or corporation which shall violate the provisions of this Ordinance, or shall attempt to do so, and any officer, agent, servant or employé who shall order or direct any such violation or attempted violation of the provisions of this Ordinance, shall be guilty of an offense, and upon conviction shall be fined not to exceed five hundred dollars, or imprisoned in the Detroit House of Correction for not to exceed ninety days, or shall be both fined and imprisoned in the discretion of the court, for each violation.

Section 7. This Ordinance is passed for the public welfare in the case of an emergency involving the peace, health and safety of the people of the city, and it is ordered to take immediate effect. It may be amended or repealed at any time by the Common Council of the City of Detroit. Unless so amended or repealed it shall remain in force for one year from August 9, 1918.

The bill alleges that the complainant company is the owner of all the street railways in the City of Detroit, constituting a system of tracks of upwards of two hundred and seventy miles. The sources of title of the company are set forth in the bill, and shown by many exhibits. It is sufficient for the present purpose to say that the system consists of a considerable mileage of tracks upon which the franchises have expired; upon other portions of the system there are unexpired franchises, some of them derived from villages in which the roads were constructed, which villages were subsequently incorporated into the city. That from December 1, 1917, its system was operated, except the so-called 3-cent lines, upon terms as follows: 5-cent cash fares for each passenger carried on or over its lines, including so-called universal transfers, with workingmen's tickets, 8 for 25 cents, between certain hours, and on the so-called 3-cent lines a cash fare of 5 cents, with 8 tickets for 25 cents between certain hours; good only on such 3-cent lines with the privilege of a transfer on payment of a 5-cent cash fare, and also with the privilege of purchase of 6 tickets for 25 cents, also good between certain hours. It is averred that afterwards it became necessary to increase rates of fare. The bill recites the demand of the employees of the company for increased wages, which was refused; that a submission of the controversy was made to the War Labor Board; that the Board after a hearing awarded a substantial increase of wages, and recommended an increase in passenger fares to enable the company to meet this cost. The bill alleges that the increase made by the War Labor Board amounted to about $2,000,000 per annum. The company petitioned the city for an increase of rates of fare, and this petition was denied.

On August 7, 1918, the company put in force a schedule of its own, making single fares 6 cents, with 10 tickets for 55 cents, cash fare or tickets good on connecting or inter-

secting lines within the city. It is contended that this action of the company was without legal authority. Whether this was authorized or not, is not an issue involved in this case, and we express no opinion concerning it. The matters involved in this bill concern the validity of the ordinance passed August 9, 1918.

It is further alleged that Detroit is a city of a population exceeding 750,000; that it is an industrial city with much the larger part of its male population employed in industrial plants within and adjacent to the city; that the operation of the company's railway system was the only means of transportation of such employees from their homes to their places of employment, and that the interruption of the operation of the company's system, or the separation in operation of the franchise from the non-franchise lines, would paralyze the industrial and business life of the city, throw thousands of its residents out of employment, and result in shutting down its industrial plants and factories. Allegations follow setting forth the value of the company's property, and stating that the effect of the ordinance, if enforced, will be to require the operation of the company's system at a deficit, and, consequently, with no return on the investment.

The learned district judge answered the contention of the company by holding, in substance, that as to the non-franchise lines the remedy of the company was to abandon the service and take its property from the city streets, and that as to the franchise lines the exception of the fifth section of the ordinance saved the company's contract rights from impairment. There can be no question that it was within the city's power to compel the company as to its non-franchise lines to remove its tracks from the streets of the city. This was settled in *Detroit United Railway* v. *Detroit*, 229 U. S. 39. The city did not do so. Instead of taking such action it passed the ordinance in controversy, providing for the continued operation of

the company's system. This ordinance has application to the entire street railway system. In section one it provides that no more than 5 cents shall be charged for a single ride, or 6 tickets for 25 cents, for one continuous trip through the city over any line operated without a franchise. Section two purports to preserve the right to charge franchise rates when fixed by contract. Section three provides for fares, 8 tickets for 25 cents, except when such fares are contrary to contract rights. Section four provides that where a trip is over two or more lines, whether franchise or not, the maximum fare shall be 5 cents, or 6 tickets for 25 cents, and no transfers shall be exacted which raise these rates of fare. Section five defines a continuous trip to mean a journey from one point in the city to another, whether on one car line or by means of transfers, and the company is required to furnish transfers to carry the provisions of the ordinance into effect. It is further provided that the ordinance is not to be construed as an attempt to impair the obligation of any valid contract, but shall apply to all street railway passenger traffic in the city except when the same is governed by the provisions of a contract. Section six provides for fines or imprisonment for violations of the provisions of the ordinance. Section seven provides that the ordinance shall be in effect for the term of one year from August 9, 1918, unless sooner amended or repealed.

The allegations of the bill, which for the present purposes must be taken as true, are ample to the effect that the enforcement of this ordinance will result in a deficit to the company. We cannot construe the exception of section five, having reference to existing franchise contracts, in such way as to modify the requirements of section four which in explicit terms fixes the fares for trips over two or more lines whether franchise lines or not, and limits the maximum fare without charge for transfers. This must be read in view of the definition of a continuous

trip in section five, as meaning a journey from one point to another point in the city whether the same is made on one car line or by means of transfers from car to car or from line to line. The exception in section five can have no further effect consistently with the other provisions of the ordinance, particularly those of section four, than to regulate fares where trips are wholly upon franchise lines. A principal ground upon which the bill was dismissed by the District Court was the view of the learned judge that the power to compel the company to remove its tracks from the streets involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not. We cannot agree with this view. In our opinion the case in this respect is ruled in principle by *Denver* v. *Denver Union Water Co.*, 246 U. S. 178. In that case the franchise of a water company had expired, and the city might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the city might have required the company to cease its service and remove its tracks from the non-franchise lines within the city. Instead of taking this course the city enacted an ordinance for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violations of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the city repealed the ordinance the public service should continue, with the use of the streets essential to carry on further service. Within the principles of the

Denver Case this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment. In the *Denver Case* we said: "The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual."

In the present case the service upon the terms fixed in the ordinance is continued for a year, the city reserving the right to repeal the ordinance at any time.

It is clear that the city might have taken a different course by requiring the company to remove its tracks from the non-franchise lines; it elected to require continued maintenance of the public service, doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the railway company to operate its lines. This amounted to a grant to the company for further operation of the system, during the life of the ordinance. For this public service it was entitled to a fair return upon its investment. Elements to be taken into consideration in valuing the property of the company in estimating a fair return are not involved in this case. If the allegations of the bill are true, and for present purposes they must be so regarded, the continued operation of the railroad system of the company upon the fares fixed in the ordinance will result in a deficit, and deny to the company due process of law within the meaning of the Federal Constitution.

As rates of fare are fixed on some of the existing franchise lines at 5 cents without transfers, it would follow as to continuous trips over such franchise and non-franchise lines, such trips comprehending much of the trans-

portation required, the latter lines would be without compensation for the service rendered. Furthermore, when a continuous trip begins on a non-franchise line and is over a franchise line and a non-franchise line, the former having the right to charge 5 cents for a trip over it, the effect would be to impair the obligation of the franchise contract. *Detroit United Railway* v. *Michigan*, 242 U. S. 238.

In our view the allegations of this bill for the purposes of the demurrer sufficiently alleged violations of the Constitution of the United States in the action of the city in passing and enforcing the ordinance in controversy. The District Court should have entertained the bill, heard the application for a temporary injunction, and proceeded to a hearing and determination of the case in due course.

Reversed.

MR. JUSTICE CLARKE dissenting.

The relation between the city and the railway company, when the ordinance which the court holds unconstitutional was passed, was this:

The company owned three classes of tracks, viz:

(a) Those in the business and residence streets most productive of traffic, constituting the greater part of the lines of the company. Its authority to maintain these tracks expired in 1909–1910, and they are designated in the record as "Non-franchise lines." It will be convenient to refer to the streets in which these lines are located as "Non-franchise streets."

(b) Tracks designated as "Three-cent franchise lines," (Exhibit "T"), also largely in business and important residence streets. The company had franchises for these lines under which it was obliged to sell eight tickets for twenty-five cents good from 5.45 a. m. to 8 o'clock p. m. and six tickets for twenty-five cents good during the

remainder of the twenty-four hours. Such tickets entitled the holders to transfer privileges only on all three-cent lines.

(c) Disconnected sections of track, of small mileage, in streets remote from the business parts of the city. For these lines the company had unexpired franchises granted by villages and townships before the extension of the city limits included them, which allowed a fare of five cents, in some places, in others five cents with transportation to the City Hall. The mileage of these grants varied from five miles to "six blocks" in length, they are described in the bill as lying, some to the north, others to the south, others to the east and others to the west of the city, as it was when the grants were made and, thus widely separated, they had no connection one with the other, except over non-franchise or three-cent franchise tracks. These are designated as "Five-cent franchise lines."

It was stated at the bar by counsel for the city, and not questioned, that there were about one hundred and fifty miles of non-franchise lines, about sixty-five miles of the three-cent franchise lines, and only fifty-five miles of five-cent franchise lines.

In their brief counsel for the company say that the larger part of the company's lines had been operated for several years prior to December, 1917, on what was known as the "Day-to-day agreement," (and see *Detroit United Railway* v. *Detroit*, 229 U. S. 39, 42), under which a rental was paid to the city for the use of the streets and the company was allowed to charge a cash fare of five cents or seven tickets for twenty-five cents, except during an hour and a half in the morning and one hour in the evening, when tickets sold eight for twenty-five cents were accepted. For these fares transfers were given over the entire lines of the company. Either party could withdraw from this arrangement at any time, and in December,

1917, the company did withdraw from it and thereafter was allowed to charge, on other than its three-cent franchise lines, a cash fare of five cents, but with eight tickets for twenty-five cents, good for one and a half hours in the morning and for one hour in the evening. Universal transfers were allowed for these fares.

This arrangement continued until August 2, 1918, when, not satisfied, the company proposed to the city a five-cent fare with a charge of one cent for a transfer over all lines in the city one-fare zone, or, in the alternative, a six-cent fare with ten tickets for fifty-five cents and universal transfers, the franchise rates on the three-cent lines to continue, except that for the fares last named universal transfers would be given.

This proposal the city rejected and thereupon the company, without any authority from the city, put into operation the second proposal above stated, allowing transfers over any connecting or intersecting line within the city limits. In response to this action of the railway company the city passed the ordinance which, for two reasons, the court has held invalid, viz:

(1) Over certain of the franchise lines a five-cent rate of fare without transfers was provided for in the grants, and because section four of the ordinance required transportation "where a trip is over two or more lines, whether franchise lines or not," without transfer charge, it is held that, if this provision were enforced, the effect would be to impair such five-cent franchise contracts and that the ordinance is therefore void.

(2) Interpreting the ordinance as a grant to the company of the right to operate its lines, franchise and non-franchise, at rates which the bill alleges to be non-compensatory, the court holds it invalid because it would deprive the company of its property without due process of law.

The case must be considered on the allegations of the

bill as if on demurrer and my reasons for dissenting from both of these conclusions of the court are as follows:

As to the first. It is not anywhere alleged in the bill that the "Five-cent franchise lines" (no complaint is made as to the 3-cent lines) can be operated separately and profitably or that less income would be realized from them if operated under the terms of section four in conjunction with the non-franchise lines than if they were operated as separate properties, if such thing be possible, charging the five-cent franchise rate without transfers. Without such an allegation it is pure conjecture to say that the company would suffer loss and that its contract would be impaired by giving effect to section four. He who would strike down a law must show that the alleged unconstitutional feature injures him and operates to deprive him of rights protected by the Federal Constitution. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 534.

But the bill not only fails to allege that the railway company would suffer loss from giving effect to section four, but it states facts which render it highly probable, if not entirely clear, that it would benefit by it.

All five-cent franchise lines appear from the bill to be, as we have said, outlying, of limited mileage, and so wholly disconnected one from the other that it would not be practicable to operate them profitably, if at all, except in connection with non-franchise lines. The record shows that in the past they have been so operated, with mutual transfers, and both of the proposals of the company made to the city on August 2, 1918, contemplated such operation. In the absence of allegation to the contrary, the reasonable inference from this description of the five-cent franchise lines and this practice with respect to them is, that it is not practicable to operate them profitably as separate properties and that whatever value there is in them must be realized by operating them jointly with the non-franchise lines, with mutual transfers, and that the

company would be benefited, and not injured, by being permitted to so operate them under section four.

But, should this section four be construed to prescribe a rate for transfer over franchise lines?

The first section, as printed in the margin of the court's opinion, prescribes a charge "for one continuous trip within the city over any line *which is now operated* or shall hereafter be operated, *without a franchise fixing the rate of fare.*"

Clearly this is intended not to apply to the franchise lines.

The second section declares that the charge over franchise lines shall not be greater than is fixed in the franchise.

This plainly contemplates allowing the full franchise rate where one exists.

Section three provides for the special or "workingmen's" tickets but carefully excepts from its application "all lines . . . where such sale would be contrary to the terms of a franchise contract."

Section five in terms declares "the provisions of this Ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where the same is governed by the provisions of such contract."

Thus we have in the ordinance a declaration that the rate prescribed shall apply only to non-franchise lines, that the franchise rate shall apply on all franchise lines, that special ticket rates shall not apply where they conflict with franchise rates, and in addition there is the general declaration that the city council is intending to deal with non-franchise lines only, and that the ordinance shall not be so construed as to impair franchise contracts.

To this we must add that, it is clear that, excluding the five-cent franchise lines, this section four would still have

a large and indisputably valid application to both non-franchise and franchise lines. The ordinance was designed to apply to 150 miles of non-franchise lines, extending in all directions throughout the city, and to regulate transfers between various parts of these lines. In addition to this, the three-cent franchise lines are greater in extent and much more important than the five-cent franchise lines. From December, 1917, to August 2, 1918, transfers were allowed over all of the non-franchise lines and between the five-cent and three-cent franchise lines and the non-franchise lines upon payment of the fare prescribed in section four—five-cent fare, or six tickets for twenty-five cents—and it was plainly the primary purpose of the section to continue this rate and practice and not to permit the charge to be increased to six cents, as contemplated in the proposal of the company to the city of August 2, 1918. No complaint is made of the application of the section to the three-cent franchise lines.

All of this is overlooked by the court, and laying hold of the possible loss to the company (wholly improbable as we have seen) through the application of the section to the five-cent lines, the entire ordinance is struck down as unconstitutional.

This judicial power of declaring laws unconstitutional is of so high and delicate a character that it has been often declared by this court that it would exercise it only in clear cases, *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Fairbank* v. *United States*, 181 U. S. 283. Every possible presumption is in favor of a statute and this continues until the contrary is shown beyond a rational doubt, *Sinking-Fund Cases*, 99 U. S. 700, 718. The violation of the Constitution must be "proved beyond all reasonable doubt," *Odgen* v. *Saunders*, 12 Wheat. 213, 270; *Nicol* v. *Ames*, 173 U. S. 509, 515.

But if it be assumed that the application of section four would result in loss to the company and would impair

its five-cent franchise contracts, even then it would seem that the section should be annulled only in so far as it might be applied to such grants and that the remainder, which is not assailed, should be permitted to stand, under the rule of this court applied from *Bank of Hamilton* v. *Dudley*, 2 Pet. 492, 526, to *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, that if only part of an act be unconstitutional the provisions of that part may be disregarded and full effect given to the remainder, if severable from the unconstitutional part of the act, as it clearly is in this case.

Coming now to the second and more fundamental ground, on which the court proceeds to its conclusion. It is held that the ordinance contemplates the continued operation of the non-franchise lines, and therefore, applying the novel doctrine of the *Denver Union Water Company Case*, 246 U. S. 178, that it is a grant which, if given effect, would necessarily deprive the company of its property without due process of law, since the allegations of the bill are that it would be non-compensatory.

We are now dealing, not with an alleged attempt on the part of the city to require the company to operate its five-cent and its three-cent franchise lines at a loss, but with an offer to it of a right to operate the lines in the non-franchise streets, in which it has no rights, in conjunction with its other lines at what is alleged to be a non-compensatory rate for the entire system. The right of the company to operate the five-cent and three-cent lines was complete without the ordinance and the operation of them, as separate properties, was quite unaffected by it.

In defining the relation between the city and the company as it was before the ordinance, which is declared invalid, was passed, the court holds, as it must (229 U. S. 39), that the company had no rights in the non-franchise streets, and that the city had the right to order its tracks taken out of them.

This being the legal relation between the two parties, the company, on August 2, 1918, made its proposal for increased fares, which was rejected by the city. This proposal, when followed by rejection, obviously did not change the relation of the parties from what they were before it was made.

Thereupon the city made its counter-proposal by tendering the ordinance rates to the company, which promptly rejected them. It seems equally clear that this proposal and the rejection of it did not change the relations of the parties and that they continued precisely as they were before and as they were defined in the opinion of the court—the railway company without any rights whatever in the non-franchise streets. But, not so says the court, for the reason that the ordinance implies that the lines are to be operated and, under the *Denver Case*, it must therefore be interpreted as a grant, (contrary it would seem to *Blair* v. *Chicago*, 201 U. S. 400, 463), and, since it is alleged that the rates prescribed are non-compensatory, it is an invalid grant.

If it be conceded that the ordinance is in terms a grant, yet since every grant implies and requires a grantee, when the company refused to accept it the grant necessarily failed. It is obvious and elementary that no person or corporation can be made a grantee against his or its will. Kent Com., 13th ed., vol. 4, p. 455, note b. Thus, again, even on the assumption of the court, it would seem that the ordinance failed to change the relations of the parties from what they were before.

The conclusion of the District Court that this case can be distinguished from the *Denver Union Water Company Case*, and therefore is not to be ruled by it, seems sound, but the distinction need not be discussed.

The application of the principle of that case to this one must result in depriving the city of the power to treat with the company for terms for the operation of the tracks

which it owns in the streets in which its franchises have expired and in which this court has decided it has no rights whatever, except upon terms as favorable to the company as it would be entitled to if it had a valid and continuing grant to operate in them. The utmost that can be claimed for the ordinance is that it suffers the company to use streets which it could not use at all without it,—for the company to use them in any other way than as thus permitted would be unlawful. Yet this mere offer of this naked privilege, in terms revocable at will, and rejected by the company, is held to give a constitutional right and at the same time to so violate that right as to render the ordinance invalid. I cannot bring myself to understand how, except by sheer assertion of power, even the apparent justice of the result which it is hoped thus to obtain can be made the basis for creating a constitutional right where no right whatever existed before the passing of this rejected ordinance.

If the management of the company was misinformed as to the effect of the expiring of its franchises, as seems probable (229 U. S. 39), or if it underestimated the difficulties in the way of securing an extension of them, the result, as declared by this court in the case just cited, was to deprive the company of all legal rights in the non-franchise streets, and while its misfortune may be regretted, the apparent hardship of the situation is no valid ground for raising a constitutional right in favor of one of the parties, which will result in depriving the other party of an advantage which has lawfully come to it. Substantial justice is more likely to result from trusting to the sense of fairness of a community in dealing with such cases than from imposing upon a city a contract which a court shall make for them. The language used by Mr. Justice Holmes, when dissenting in the *Denver Case*, 246 U. S. 196, is sharply applicable to this case, *mutatis mutandis:* "We must assume that the Water Company

may be required, within a reasonable time, to remove its pipes from the streets. *Detroit United Railway* v. *Detroit*, 229 U. S. 39, 46. . . . In view of that right of the City, which, if exercised, would make the Company's whole plant valueless as such, the question recurs whether the fixing of any rate by the City could be said to confiscate property on the ground that the return was too low. . . . The ordinance of the City could mean no more than that the Company must accept the City's rates or stop—and as it could be stopped by the City out and out, the general principle is that it could be stopped unless a certain price should be paid."

For the reasons thus stated, I think that the ordinance is valid, and that the judgment of the District Court should be affirmed, and therefore I am compelled to dissent from the opinion and judgment of the court.

I am authorized to say that MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

SOUTHERN PACIFIC COMPANY *v.* STEWART.

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

No. 89. Submitted December 20, 1918.—Decided January 13, 1919.

As to the jurisdiction in this case, see *s. c.* 245 U. S. 359; *id.* 562.

A stipulation in a contract governed by the Carmack Amendment for the interstate transportation of live stock released the carrier from all loss or damage unless a written claim therefor were made on the carrier's freight claim agent within ten days after unloading of the live stock. *Held* valid, under *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, and *Erie R. R. Co.* v. *Stone*, 244

U. S. 332; and observance not excused by the fact that the amount of the loss could not be ascertained within the period specified; nor waived by the fact that the carrier, with knowledge of the situation, negotiated for a compromise before and after the period had expired. 233 Fed. Rep. 956, reversed.

THE case is stated in the opinion.

Mr. Henley C. Booth, Mr. William R. Harr, Mr. Charles H. Bates, Mr. C. F. R. Ogilby and *Mr. William F. Herrin* for plaintiff in error. *Mr. Guy V. Shoup* was also on the brief.

Mr. P. H. Hayes for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Stewart sued for damages sustained in transit by dairy cows delivered July 1, 1913, to plaintiff in error for shipment over its railroad from California to Phœnix, Arizona, under a "live stock shipping order contract and bill of lading" signed both by himself and it, which, among other things, provided:

"Second party [the shipper] hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party, in writing, within ten days after unloading of the live stock; and that in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which

declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatsoever cause arising in excess of the declared value hereinbefore set forth."

As one ground of defense the company relied upon noncompliance with the above-quoted provision. In reply the shipper alleged and at the trial introduced evidence tending to establish facts and circumstances as follows:

He admitted that the cattle were unloaded and received by him July 5, 1913, at Phœnix and that he made no written claim for loss or damage upon any agent of the carrier within ten days thereafter. But he denied that he could have given notice of his claim within such time or that he had waived or released it.

He alleged that on July 4, 1913, and subsequently the carrier had full knowledge of injuries sustained by the cattle; that they were unloaded into its stock-pens at Yuma July 4, 1913, and prior to reloading five died; that they remained in the stock-pens there without shelter or protection nine hours, under care of carrier's agents; that upon reloading it provided an additional car for sick and crippled cows; that at various points en route the train officials received inquiries from other railroad officials as to conditions and after arrival at Phœnix one of the crippled animals remained several days in a car; that immediately after unloading at Phœnix and daily until October 21, shipper and the railroad agents were in communication relative to damages sustained; that the nature and extent of injuries to cows which arrived at destination alive made it impossible to determine within ten days the extent of damage sustained; and that a number of cattle died many days after their arrival at Phœnix.

He further alleged that about October 21, 1913, after repeated efforts to determine the damages, shipper made

demand in writing for $1,570, and on December 15th, as soon as he was able to ascertain nature and extent of the injuries, made written demand for $2,695; that the carrier had repeatedly waived requirement for demand within ten days by recognizing the shipper's right to recover something and attempting to settle and compromise; and that subsequent to October 21st carrier through its claim agents had twice attempted to adjust with the shipper the loss and damage sustained.

The trial court refused to direct a verdict in defendant's favor. Among other things, it said to the jury: "I charge you as a matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts." The Circuit Court of Appeals affirmed a judgment entered upon verdict for the shipper July 3, 1916, 233 Fed. Rep. 956, and, in the course of its opinion, said: "There was proof tending to sustain all the facts so alleged in the [plaintiff's] reply. We think, therefore, that the court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from giving notice within the ten days."

We have jurisdiction and the motion to dismiss based upon another view is denied. See *Southern Pacific Co.* v. *Stewart*, 245 U. S. 359 and 562.

Considering the principles and conclusions approved by our opinions in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, and *Erie R. R. Co.* v. *Stone*, 244 U. S. 332 (announced since the judgment below) and the cases therein cited, no extended discussion is necessary

to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract.

The trial court erred in giving to the jury the instruction quoted above; and it should have granted the carrier's request for a directed verdict.

The judgment of the court is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE MCKENNA and MR. JUSTICE CLARKE dissent.

COHN *v.* MALONE, TRUSTEE OF COHN, BANKRUPT.

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

No. 96. Argued December 18, 1918.—Decided January 13, 1919.

The cash surrender value of a life insurance policy which is payable to the executors, administrators or assigns of the insured, or payable to specified persons with a right in the insured to change the beneficiaries, is assets subject to distribution under the Bankruptcy Act. *Cohen* v. *Samuels*, 245 U. S. 50.

Section 2498 of the Georgia Code, 1910, providing that an insured may assign his life insurance by directing payment to his personal representative, or to his widow, or to his children, or to his assignee, and that no other person can defeat such direction when assented to

by the insurer, does not operate to withdraw the cash surrender value from his estate in bankruptcy when the assignment was made to his wife expressly subject to his right to change beneficiaries or surrender the policy at any time.

236 Fed. Rep. 882, affirmed.

THE case is stated in the opinion.

Mr. J. R. Pottle, for petitioner, submitted. *Mr. I. J. Hofmayer* and *Mr. J. W. Kieve* were also on the brief.

Mr. Sam S. Bennet, with whom *Mr. John D. Pope*, *Mr. H. A. Peacock* and *Mr. Charles Akerman* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1902 and 1905 the bankrupt took out two policies on his life in the Penn Mutual Life Insurance Company, loss under one payable to his "executors, administrators or assigns," under the other to his sister and brother with full power in the assured "while this policy is in force and not previously assigned, to change the present beneficiary or beneficiaries." By formal written instruments dated July 15, 1910, he assigned both policies to his wife "if she outlives me, otherwise to my estate, with full power to the insured to change the beneficiary or surrender this policy to said company at any time, this to be done by instrument in writing under his hand and seal to be recorded at the home office of the company."

While both policies were in the bankrupt's possession, the trustee demanded them in order that their cash surrender value might be secured and distributed under the Bankruptcy Act. The bankrupt defended upon two grounds: First, that the cash surrender value was not property which could have been transferred by him prior

to bankruptcy; and second, that the assignment to his wife could not be defeated by the trustee because protected by § 2498, Georgia Code, 1910, which provides—"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

The Circuit Court of Appeals held both grounds of defense bad. 236 Fed. Rep. 882. As to the first, its ruling accords with the doctrine recently announced in *Cohen* v. *Samuels*, 245 U. S. 50. In respect of the second that court declared:

"Nothing in the terms of the statute, especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to anyone other than the assured himself the power to defeat a direction by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him. The provision does not purport to make every such direction by the assured irrevocable by him, or to invalidate a stipulation in a life policy giving the assured the right to change the beneficiary at any time during the continuance of the policy. The statute puts a direction by the assured to pay to his widow on the same footing as one to pay to his assignee. If a policy is assigned as security for a debt which the assured pays during his life, certainly the statute is not to be given the effect of putting it out of the power of the assured to change the beneficiary upon the reassignment of the policy to him by the satisfied creditor. Nothing in its terms justifies giving it a different operation or effect in the case of a direction to pay to the widow. We are not of opinion that the provision quoted had the effect of conferring on the

bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in policies by the terms of which the beneficiaries could be changed by the bankrupt at any time." And we approve its conclusion.

Petitioner has not complained here of the action below concerning a third policy, issued by the New York Life Insurance Company.

The judgment of the Circuit Court of Appeals is

Affirmed.

CAVANAUGH ET AL. *v.* LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.

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

No. 107. Argued December 19, 1918.—Decided January 13, 1919.

The jurisdiction of the federal courts to enjoin the execution of a state law upon the ground of unconstitutionality should be exercised only in clear cases and where intervention is essential to protect rights effectually against injuries otherwise irremediable. P. 456.

Appellants sought to enjoin condemnation proceedings under a Texas act, alleging it unconstitutional and that the filing of the petition would cause them irreparable damage by impounding their land, clouding the title and preventing sale pending the proceeding. *Held*, properly refused, since the apprehension of irreparable loss appeared fanciful and all objections against the act could be raised in the condemnation proceedings. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Joseph Manson McCormick, with whom *Mr. Francis Marion Etheridge* was on the brief, for appellants.

Mr. B. F. Looney, Attorney General of the State of Texas, and *Mr. C. M. Cureton*, Assistant Attorney General of the State of Texas, for appellees, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The University of Texas is a state institution under immediate control of officers known as Regents, appointed by the Governor, with its principal educational departments in Travis and Galveston counties. An act of the legislature, approved August 30, 1911 (S. B. No. 20, c. 6, General Laws, Texas), undertook to authorize the Regents to purchase or condemn through proceedings in the district courts such lands within those counties as they might deem expedient for extension of campus or other university purposes. Appellants have long owned and used as a residence homestead twenty-six acres in Travis County desirable as an addition to the university grounds. Having failed in their efforts to purchase, the Regents were about to meet and ask the Attorney General to institute proceedings to condemn this entire tract. Thereupon appellants instituted this proceeding against them and the Attorney General in the United States District Court seeking to restrain their threatened action "on the ground [among others] that said law conflicts with the Constitution of the United States, in that the defendants are thereby pretendedly authorized to take plaintiffs' property without due process of law, and plaintiffs are thereby deprived of the equal protection of the laws." They alleged invalidity of the act because in conflict with both state and Federal Constitutions and averred "that unless restrained by a writ from this Honorable Court, the said defendants constituting the Board of Regents of the University of Texas will, at their next meeting aforesaid, request the Attorney General to file a petition in the Dis-

trict Court of Travis County for the condemnation of their property or a part thereof under said pretended Act, and that the said Attorney General, unless so restrained, will comply with said request of the Board of Regents, acting under said purported Act, and that the filing of such petition will cause irreparable loss and damage to your petitioners by impounding their property in court pending the disposition of said proceeding and will cloud the title thereto and prevent the vending of same or any part thereof."

The challenged act provides: That if the Regents cannot agree with the owners for purchase they shall request the Attorney General to file petition in the district court of the county, describing the land, stating purpose for which desired, and praying that its value be ascertained and decree be entered vesting title thereto in the State. That upon filing such petition the owner shall be cited as in other civil causes; that at the first term thereafter the cause shall be tried by a jury upon a single issue as to the value of the land and the decision of such jury shall be final—provided there shall be a right of appeal as in other civil cases. That when the value has been ascertained and the court satisfied therewith it shall enter a decree vesting title but not until such amount together with all reasonable costs and expenses including reasonable attorney's fees shall be paid to the owner or into court for his benefit.

It is alleged that the Act of 1911 especially offends the constitution of Texas because a local law passed without the required notice; and that it is bad under both federal and state constitutions because (1) it delegates to the Board of Regents power to determine what property is reasonably necessary for the purposes mentioned and forbids inquiry concerning this by the court, (2) it forbids inquiry into the damages to the remainder of a tract where a part only is taken, and (3) it permits the State

to acquire fee simple title to property which thereafter may be sold. It is further alleged that appellants' property is so situated that to take a part would necessarily cause serious damage to the remainder.

A special court assembled as provided by § 266, Judicial Code, denied application for preliminary injunction without opinion and allowed this direct appeal.

It is now settled doctrine "that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex parte Young*, 209 U. S. 123, 155, 156; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, 166, 167; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Truax* v. *Raich*, 239 U. S. 33, 37; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506. But no such injunction "ought to be granted unless in a case reasonably free from doubt," and when necessary to prevent great and irreparable injury. *Ex parte Young*, *supra*, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened "irreparable loss and damage" appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the

appropriate and adequate remedy by review here is obvious. Exercising a wise discretion we think the court below properly denied an injunction. Upon the record it was not called upon to inquire narrowly into the disputable points urged against the statute. No more are we.

The judgment of the court below is

Affirmed.

COON *v.* KENNEDY.

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

No. 398. Argued December 11, 1918.—Decided January 13, 1919.

Under Jud. Code, § 237, as amended September 6, 1916, a writ of error does not lie to a judgment of a state court holding the state Workmen's Compensation Law inapplicable to a case of personal injuries governed by the maritime law and holding the Act of October 6, 1917, which changes the rule in that regard, inapplicable retrospectively.

Writ of error to review 91 N. J. L. 598, dismissed.

THE case is stated in the opinion.

Mr. James D. Carpenter, Jr., for plaintiff in error.

Mr. Isidor Kalisch for defendant in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

This writ of error runs to a judgment of the Court of Errors and Appeals of New Jersey filed March 11, 1918, 91 N. J. L. 598, denying relief to Rebecca Coon who

sued to recover under the New Jersey Workmen's Compensation Act on account of her husband's death by drowning in the navigable waters of that State while employed as a fireman on a tug boat.

The court held that as the accident occurred August 4, 1915, the Act of Congress approved October 6, 1917, c. 97, 40 Stat. 395, "saving . . . to claimants the rights and remedies under the workmen's compensation law of any State" was inapplicable, and that under the doctrine announced in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, the rights of the parties depended upon the maritime law of the United States.

There was no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a State challenged because of repugnance to the Constitution, treaties or laws of the United States. Consequently, under the Act of September 6, 1916, c. 448, 39 Stat. 726, the writ of error was improperly sued out and must be

Dismissed.

J. HOMER FRITCH, INCORPORATED, ET AL. *v.* UNITED STATES.

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

No. 64. Argued November 19, 1918.—Decided January 20, 1919.

Judgments of the District Courts in suits against the United States under the Tucker Act are reviewable directly and exclusively by this court; the Judiciary Act of 1891, and the Judicial Code, did not disturb the exclusive jurisdiction as it previously existed. *Ogden* v. *United States*, 148 U. S. 390, declared overruled. P. 459.

An inadvertent assumption of jurisdiction is not equivalent to a decision that jurisdiction exists. P. 463.
234 Fed. Rep. 608; 236 Fed. Rep. 133, reversed.

THE case is stated in the opinion.

Mr. Edward J. McCutchen and *Mr. Ira A. Campbell,* for plaintiffs in error, submitted.

Mr. Assistant Attorney General Frierson, with whom *Mr. Charles S. Coffey* was on the brief, for the United States.

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

Liability of the United States for the hire of a ship for two charter periods was asserted. The trial court allowed recovery for one period and rejected it for the other and the court below affirmed its action. The case is here because of alleged error committed in not allowing for both. The Government insists that we have no jurisdiction because the judgment of the trial court was exclusively susceptible of being reviewed directly by this court; hence, that the court below had no jurisdiction and we must reverse and remand with directions to dismiss for want of jurisdiction. The contention is well founded, and we might content ourselves with referring to the authorities by which its correctness is conclusively established. As, however, some contrariety of opinion on the question is manifested in the decisions of the lower federal courts resulting either from a misconception of the governing principle upon which the right of direct review rests, or, it may be, caused by previous decisions of this court which if unexplained may continue to be the source of misconception, we briefly review and dispose of the subject from an original point of view.

When the United States made claims against it justiciable by conferring authority upon the Court of Claims to entertain and decide them, the grant was accompanied by a provision giving this court direct and exclusive jurisdiction to review the judgments of the Court of Claims rendered in the exercise of the new power given. When by the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505) authority was conferred upon the circuit and district courts of the United States to exert, concurrently with the Court of Claims, the power to decide claims against the United States, the question arose whether the judgments of those courts rendered in the exercise of such jurisdiction were reviewable exclusively and directly by this court.

Determining the principle by which the question was to be solved, it was decided that in the absence of express provision or necessary implication to the contrary, the judgments of courts of the United States rendered as the result of the new power would be subject to be reviewed only by the exclusive method theretofore provided for the Court of Claims. Applying the principle of interpretation thus announced to the Tucker Act, it was held that judgments of the courts of the United States in suits against the United States under that act were reviewable only directly by this court. *United States* v. *Davis*, 131 U. S. 36.

Early after the adoption of the Judiciary Act of 1891 (Act of March 3, 1891, c. 517, 26 Stat. 826) it was settled that the purpose of that act was to generally provide for and distribute the appellate power of the courts of the United States. *McLish* v. *Roff*, 141 U. S. 661; *Lau Ow Bew* v. *United States*, 144 U. S. 47; *National Exchange Bank* v. *Peters*, 144 U. S. 570; *Hubbard* v. *Soby*, 146 U. S. 56. Subsequent to such decisions there was pending in this court a case brought by the plaintiff below by direct appellate proceedings to review the judgment of a circuit court of

the United States, rejecting a claim against the United States sued upon in that court as a court of claims. On submission of a motion to dismiss or affirm, made by the United States without brief or argument by the appellant, the case was dismissed for want of jurisdiction, based upon authorities which were cited, establishing that the purpose of the Act of 1891 was to distribute the appellate power of the courts of the United States,—a ruling which implied that direct review by this court of judgments in suits against the United States rendered by the courts of the United States as courts of claims was taken away by the Act of 1891. *Ogden* v. *United States*, 148 U. S. 390.

In the next year the case of *Chase* v. *United States*, 155 U. S. 489, was decided. It came to this court on a direct writ of error to a circuit court of the United States, acting as a court of claims, to review a judgment rendered against the United States. Jurisdiction was disputed, not upon the ground that the power to review such a judgment by direct appeal no longer existed because of the Act of 1891, but upon the sole ground that procedure by writ of error instead of appeal had been mistakenly restored to. The contention was held unsound, jurisdiction was taken, and the case was decided.

It is to be conceded that, either because of the implication resulting from the ruling in *Ogden* v. *United States*, *supra*, or because of what was deemed to be the controlling force of the accepted doctrine of the distribution of appellate power made by the Act of 1891, the opinion obtained in some of the lower federal courts that the direct review by this court of judgments of courts of the United States acting as courts of claims, which prevailed under the Tucker Act, no longer existed, and that possibly these impressions continued to make themselves manifest until the error upon which they rested was demonstrated by the decision of this court in *Reid* v. *United States*, 211 U. S. 529.

In that case, acting upon the theory that the effect of the distribution of appellate power made by the Act of 1891 controlled the previously existing right to review judgments of the courts of the United States acting as courts of claims, a case was brought directly to this court under the assumed authority of the Act of 1891, which case, because of its amount, would not have been susceptible of being brought here under the right to review as existing prior to the Act of 1891. The case therefore rendered it necessary to decide whether the general distribution of appellate power made by the Act of 1891 had replaced the right to review previously existing as to judgments of the courts of the United States rendered under the power to dispose of claims against the United States. It was decided that it had not, and that the exceptional remedy by direct and exclusive review as to the exceptional jurisdiction to entertain claims against the United States remained unaffected by the general distribution of appellate power made by the Act of 1891.

It is true, indeed, that in the *Reid Case*, as it was also true in the *Chase Case*, no reference was made to the previous ruling in *Ogden* v. *United States*, virtually holding to the contrary; but, as we have previously pointed out, there was nothing on the face of the opinion in that case to direct attention to the fact that it concerned the continued existence of the exceptional jurisdiction to review judgments resulting from the exercise of the exceptional power to entertain claims against the United States, since, on the face of the opinion and the authorities which were referred to, that case dealt only with the operation of the Act of 1891 upon the general distribution of appellate power. And when the subject is scrutinized, there can be no room whatever for difference of opinion that the effect of the ruling in *Reid* v. *United States* was to overrule the *Ogden Case*. That result is made, if possible, more clearly manifest by the application of the ruling in

the *Reid Case* made by this court in subsequent cases. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640; *United States* v. *Hvoslef*, 237 U. S. 1; *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Kelly*, 243 U. S. 316; *Tweedie Trading Co.* v. *United States*, 245 U. S. 645.

But it is true to say that in the case of *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, decided subsequent to the decision of the *Reid Case*, the jurisdiction of the Circuit Court of Appeals to review the action of a district court when sitting as a court of claims was recognized by entertaining and deciding appellate proceedings to review the action of the Circuit Court of Appeals in such case. It is to be observed, however, that in that case no question whatever was raised as to the jurisdiction, and in view of the ruling in the *Reid Case*, to which no reference was made, the action of this court in the *Buffalo Pitts Case* must be regarded as a mere inadvertent assumption of jurisdiction rather than as a decision that such jurisdiction existed.

It is now insisted however that, granting the conclusive effect of the *Reid Case*, it is here inapplicable because decided before the adoption of the Judicial Code by which, it is contended, a change was made taking away the exceptional power to directly review which is here in question. The contention disregards the necessary result of the rulings in the cases just referred to, decided since the *Reid Case*, some of which disposed of controversies governed by the Judicial Code, and where the proposition now relied upon as to the assumed operation of that act was directly pressed in argument.

Aside from this view, however, the proposition disregards the plain context of §§ 294 and 295 of the Judicial Code, which were clearly intended to prevent implica-

tions of repeal, or change of legislative intent, like the one here relied upon. *United States* v. *Cress*, 243 U. S. 316, 331. But it is said that the contention as to the change made by the Code is not based upon implication but upon the fact that § 9 of the Tucker Act was expressly repealed by the Judicial Code, thus removing the very groundwork upon which the continued right in this court to exclusively review judgments of the courts of the United States when sitting as courts of claims was held to continue after the Tucker Act. The assumption however is fallacious, since it overlooks the fact that § 4 of the Tucker Act was excepted from the repealing clause and that its provisions are wholly incompatible with the proposition now relied upon. And this again brings the proposition back to the mere assertion that the ruling as to the Tucker Act made in *United States* v. *Davis*, and that as to the Act of 1891 made in the *Reid Case*, must now be disregarded.

As it results that the contention of the United States as to the want of jurisdiction in the court below was well founded, the judgment of the Circuit Court of Appeals must be and it is

Reversed and the cause remanded to that court with directions to dismiss for want of jurisdiction.

LA TOURETTE *v.* McMASTER, INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 114. Submitted December 19, 1918.—Decided January 20, 1919.

The power of a State over the subject of insurance extends to the regulation of those who may carry on the business as brokers representing both insurer and insured. P. 467.

A law of South Carolina provides that only such persons shall be licensed to act as brokers to represent citizens for the placing of insurance with insurers in that State or elsewhere as are residents of the State and have been licensed insurance agents of the State for at least two years. Construed as requiring local residence, as distinguished from citizenship, *held*, within the police power; and that it does not deprive a citizen and resident of another State, desiring to act as such broker in South Carolina, of liberty or property, in violation of the Fourteenth Amendment, or discriminate against him, in violation of § 2 of Article IV of the Constitution. Pp. 467–8.

104 S. Car. 501, affirmed.

THE case is stated in the opinion.

Mr. John L. McLaurin and *Mr. Wendell P. Barker* for plaintiff in error. *Mr. R. H. Welch* was also on the brief.

They contended that under the provisions guaranteeing the privileges and immunities of citizens, contained in § 2, Art. IV, of the Constitution, the Fourteenth Amendment, and § 5, Art. I, of the constitution of South Carolina, the statute in question was void. The following authorities were cited. *Commonwealth* v. *Milton*, 51 Kentucky, 212, 219; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Slaughter-House Cases*, 16 Wall. 36, 97; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757; *Ward* v. *Maryland*,

12 Wall. 418, 424, 425, 430, 432; *In re Watson*, 15 Fed. Rep. 511, 512; *Cole* v. *Cunningham*, 133 U. S. 107, 114; *Blake* v. *McClung*, 172 U. S. 239, 254, 256; *Sayre Borough* v. *Phillips*, 148 Pa. St. 482, 488, 489; *State* v. *Montgomery*, 94 Maine, 192; *Simrall & Co.* v. *Covington*, 90 Kentucky, 444; *Booth* v. *Lloyd*, 33 Fed. Rep. 593; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Laurens* v. *Anderson*, 75 S. Car. 62; *Hoadley* v. *Board of Insurance Commrs.*, 37 Florida, 564; Cooley, Const. Lim., 7th ed., p. 567.

Mr. Thomas H. Peeples, Attorney General of the State of South Carolina, *Mr. C. N. Sapp*, Assistant Attorney General of the State of South Carolina, and *Mr. Fred H. Dominick* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

An act of South Carolina approved March 2, 1916, entitled "An act to provide for the licensing of insurance brokers," defines in its first section an insurance broker "to be such person as shall be licensed by the Insurance Commissioner to represent citizens" of the State "for the placing of insurance in insurers" in the "State or in any other State or country." And it is provided in § 2 of the act, among other conditions, that only such persons may be licensed as are residents of the State and have been licensed insurance agents of the State for at least two years.

La Tourette offered to comply with all of the provisions of the act, but could not comply with the requirement of § 2, he being, as he alleged, a resident and citizen of New York; and he attacked the requirement by a petition in the Supreme Court of the State by which he charged it to be a violation of the constitution of the State and of § 2 of Article IV and the Fourteenth Amendment of

the Constitution of the United States, in that he, a citizen of New York, was denied the privileges and immunities granted to citizens of the State of South Carolina and deprived of liberty and property without due process of law. He further alleged that the Commissioner had refused to issue a license to him and prayed that he be required to do so.

The Insurance Commissioner, by the Attorney General of the State and other counsel, demurred to the petition, asserting as the ground thereof that the requirement of the act was a legal exercise of the police power of the State and that La Tourette was not deprived of any privilege or immunity secured to citizens of other States by the Constitution of the United States. The court sustained the demurrer and dismissed the petition and to that action this writ of error is directed.

The pleadings and the action of the court indicate the question in the case and, it would seem, the elements of it, but they are not clearly segregated in the argument of counsel. They seem to be: (1) That La Tourette is deprived of his liberty and a property right by the act of the State in violation of the due process clause of the Fourteenth Amendment. (2) That the act discriminates against citizens of other States in favor of citizens of the State of South Carolina in violation of § 2, Article IV, of the Constitution of the United States.

(1) This contention depends upon the character of the business of insurance, and it was decided in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, to be clothed with a public interest and subject, therefore, to the regulating power of the State. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representa-

tive of the insured. He is also the representative of the insurer (*Hooper* v. *California*, 155 U. S. 648, 657), and his fidelity to both may be the concern of the State to secure. As said by the Supreme Court of the State: "It is important for the protection of the interests of the people of the State that the business should be in the hands of competent and trustworthy persons." And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the Commissioner of Insurance.[1] The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate.

"But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise." It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 365, 366, and cases cited; also *Bunting* v. *Oregon*, 243 U. S. 426, 437.

(2) This contention, that is, that the act discriminates against citizens of other States and thereby offends the

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[1] Sec. 3. Such insurance broker shall exercise due care in the placing of insurance and shall procure from the supervising official in the State or county in which the home office of the insurer is located a certificate to the effect that the insurer is safe and solvent and is authorized to do business. He shall furnish the insured a statement showing the financial condition of the insurer and such other information as the insured may require. He shall report to the Insurance Commissioner in detail the amount of insurance placed and the premiums paid therefor, and shall pay to the Insurance Commissioner the additional license fee herein provided. He shall submit to the Insurance Commissioner within thirty days after December 31 of each year an annual report of his transactions, and his books, papers and accounts shall at all times be open to the inspection of the Insurance Commissioner or a deputy appointed by him.

Constitution of the United States, is La Tourette's ultimate reliance, and to it his counsel devote their entire argument. The State replies its power over insurance and that the legislation it justifies extends to its agents and is best executed when they are residents of the State. This view we have sustained, and manifestly to declare the legislation illegal is to put a restraint upon a power that has practical justifications.

The illegality of the act is, however, earnestly urged and that it is a "trade regulation" and recognizes "the business, trade or occupation of an insurance broker as proper and legitimate," and yet denies to La Tourette, a citizen of New York, the right to engage in it and thereby abridges the privileges and immunities that he has as a citizen. The contention is expressed and illustrated in a number of ways, and the privilege of a citizen is defined to be "the right to pursue and obtain happiness and safety" and "to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others," and that whatever rights a State grants to its own citizens are the measure within its jurisdiction of the rights of the citizens of other States, and for these propositions *Slaughter-House Cases*, 16 Wall. 36, and *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, are cited. Other cases are also cited in illustration. We do not dispute the propositions, and to see if they determine against the act under review we must turn to its words, as did the Supreme Court of the State, whose interpretation of them we must accept. It said, speaking by Mr. Justice Hydrick: "A citizen of any State of the Union who is a resident of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license; on the other hand, a citizen of this State, who is not a resident of the State and has not been a licensed insurance agent of this State for two years, may not be licensed. No discrimination is made

on account of citizenship. It rests alone on residence in the State and experience in the business." And the court further said: "Citizenship and residence are not the same thing, nor does one include the other. *Cummings* v. *Wingo*, 31 S. C. 427, 435, 10 S. E. 107, and authorities cited. But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage. But there is nothing in the act to suggest any such intention. On the contrary, the words 'residents' and 'citizens' are both used, each apparently in its ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority."

The court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so and, by doing so, it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other States, residence and citizenship being different things.

Judgment affirmed.

Counsel for Plaintiff in Error.

POSTAL TELEGRAPH-CABLE COMPANY *v.* TONOPAH & TIDEWATER RAILROAD COMPANY..

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK.

WESTERN UNION TELEGRAPH COMPANY *v.* BALTIMORE & OHIO RAILROAD COMPANY.

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

POSTAL TELEGRAPH-CABLE COMPANY *v.* CHICAGO GREAT WESTERN RAILROAD.

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

Nos. 130, 217, 404. Argued January 7, 9, 1919.—Decided January 20, 1919.

The amendment of June 18, 1910, which brought telephone, telegraph, and cable companies within the Act to Regulate Commerce, contains a proviso (§ 7) that nothing in the act shall be construed to prevent such companies "from entering into contracts with common carriers, for the exchange of services." *Held*, that the exchange of services may extend to those rendered by a telegraph company for a railway company beyond the line of the railway and those rendered by the railway company for the telegraph company beyond the line of the telegraph; and may be arranged upon the basis of reciprocal advantage, without regard to the rates chargeable for similar services to the public. P. 474.

176 App. Div. 910; 242 Fed. Rep. 914; 249 Fed. Rep. 664, affirmed.

THE cases are stated in the opinion.

Mr. Jacob E. Dittus and *Mr. Ode L. Rankin*, with whom *Mr. William W. Cook* and *Mr. Bynum E. Hinton*

were on the briefs, for plaintiff in error and appellant in Nos. 130 and 404.

No appearance for defendant in error in No. 130.

Mr. Ralph M. Shaw, with whom *Mr. George A. Kelly* was on the brief, for appellee in No. 404.

Mr. Rush Taggart for appellant in No. 217.

Mr. J. DuPratt White, with whom *Mr. George F. Brownell* and *Mr. Vermont Hatch* were on the brief, for appellee in No. 217.

Mr. Charles W. Needham, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission, as *amicus curiæ*, by special leave.

Mr. Justice Holmes delivered the opinion of the court.

The first of these cases, *Postal Telegraph-Cable Co.* v. *Tonopah & Tidewater R. R. Co.*, was a suit in the Municipal Court of the City of New York for services rendered to the Railroad Company. The defendant set up that the services consisted of the sending of telegrams relating to the defendant's business and were covered by a contract such as usually is made between railroads and telegraphs, under which such telegrams were to be sent free of specific charge. The question raised was the validity of the agreement. The Court decided that it was valid and judgment for the defendant was affirmed on appeal. The next case in number, *Western Union Telegraph Co.* v. *Baltimore & Ohio R. R. Co.*, was brought by the Railroad Company in the District Court of the United States for the Southern District of New York and sets up a similar contract, which the Telegraph Company

now refuses to perform in consequence of a ruling of the Interstate Commerce Commission. It prays a declaration of the validity of the contract and specific performance. The plaintiff obtained a decree in the District Court, 241 Fed. Rep. 162, which was affirmed by the Circuit Court of Appeals, 242 Fed. Rep. 914. The last of the three cases, *Postal Telegraph-Cable Co.* v. *Chicago Great Western Railroad*, was another bill in equity, brought by the Railroad Company in the District Court of the United States for the Northern District of Illinois upon a similar contract, to prevent a multiplicity of suits by the Telegraph Company like that first above mentioned, to have the validity of the contract declared, and to obtain a decree that it be performed. The defendant prevailed in the District Court, 245 Fed. Rep. 592, but the decision was reversed by the Circuit Court of Appeals, and there the plaintiff obtained a decree. 249 Fed. Rep. 664. The only question upon which our decision is sought is the validity of the agreements, which are so far alike as to present a single issue here.

The contracts elaborately provide for the reciprocal rights of the companies, for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employees of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while

valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. The Commission construes in this way a proviso added to § 1 of the Act to Regulate Commerce by an amendment of June 18, 1910, c. 309, § 7. [36 Stat. 539, 544.] This amendment brought telegraph, telephone and cable companies within the act but also inserted a proviso "that nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services." The question more specifically stated is whether the construction adopted by the Commission is right.

We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. But "exchange" is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way. We cannot follow the argument from *Santa Fe, Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, that the exchange properly

so called should be confined to cases where the common carrier is not acting as such. That seems to us a perverse conclusion from a proviso permitting "common carriers" to exchange.

Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other. The railroad and the telegraph have grown together in mutual dependence and we are told that contracts of this sort for long terms have been nearly universal for fifty years. The contracts had been called to the attention of Congress repeatedly by the Commission, which, in December, 1906, stated that, so far as it could see, the full performance of them by the carriers would not affect any public or private interest adversely. It held however that under the law as it then stood contracts for services off the line were unlawful. 12 I. C. C. 10, 12. Then the amendment of 1910 was passed, and passed, we must suppose, having the opinion of the Commission and the notorious long-standing form of existing contracts in view. The contracts are complex, as we have said, and entire. We cannot believe that an act which purported to allow them meant to break them up. The Commission seems not to have believed it in its first ruling upon the amended act.

Our opinion is confirmed by a consideration of the further additions to §1, in 1910, allowing free passes to

be given to the employees of telegraph, telephone and cable lines, and by some further matters of detail referred to in the judgments of the Courts below of which we have cited the reports. The interdependence of the companies is very intimate, and the trouble that would be caused by a narrow construction of the act we believe would be great, with no advantage so far as we can see to any other users of the lines or roads. We do not go into more minute discussion because the result reached must stand on the plain words of the act, the meaning of which is confirmed rather than made doubtful by the circumstances in which the proviso was enacted and the events that had gone before.

Judgment and decrees affirmed.

BANK OF CALIFORNIA, NATIONAL ASSOCIATION, *v.* RICHARDSON, TREASURER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 262. Submitted October 14, 1918.—Decided January 27, 1919.

The extent to which the States may tax the property or the shares of national banks is determined exclusively by § 5219 of the Revised Statutes. P. 482.

The object of the section is to avoid withdrawing the financial resources of national banks from the reach of state taxation, and at the same time to protect the banks as federal agencies from state interference. It therefore, with certain restrictions, permits the shares of the bank to be taxed to the shareholders, and, in that aspect treats the ultimate beneficial interest of the bank and the shareholders as one, subject to but one taxation and by that method only. P. 483.

It follows, (1) that the interest represented by shares of a state bank,

when held by a national bank, can be reached only by a tax upon the shares of the latter, and is not taxable to the national bank itself, and (2) that shares of a national bank, when held by another national bank, are taxable only to the latter as shareholder, and are not to be included in valuing the shares of the latter when taxing its shareholders. Pp. 484, 486.

175 California, 813, reversed.

THE case is stated in the opinion.

Mr. E. S. Pillsbury, Mr. F. D. Madison, Mr. Alfred Sutro and *Mr. Oscar Sutro* for plaintiff in error. *Mr. A. D. Plaw* was also on the brief.

The right to tax to the Bank of California the Mission State Bank shares is implied by the California Supreme Court solely upon the ground that its existence is essential to an exertion of the power to tax the Mills National Bank shares. The court does not deny that the shares of the state bank are personal property; nor does it find any express authority in the federal statute permitting the State to tax them to the Bank of California. But because shares in one national bank in the hands of another national bank may be taxed to the latter, *Bank of Redemption* v. *Boston*, 125 U. S. 60, the court below concludes that no different rule could be applied to the taxation of shares in a state bank owned by a national bank without violating the provision of § 5219 requiring other moneyed capital to be assessed at a rate equal to that imposed upon shares in national banks. But such an implication cannot be indulged, because the effect of § 5219, in limiting the power of the States to the right to tax the real property of national banks and their shares, is to prohibit the taxation of the property of those banks in any other manner. *Raleigh & Gaston R. R. Co.* v. *Reid*, 13 Wall. 269, 270. The statute being unambiguous in its limitation, *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 669, a power to tax the Bank of California for the state bank shares could only be implied if abso-

lutely essential to the exercise of the right to tax it upon the shares of the Mills National Bank. *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287, 292; *Austin* v. *The Aldermen*, 7 Wall. 694, 699; *Newton* v. *Commissioners*, 100 U. S. 548, 561. But such an implied power is unnecessary. The value represented by the state bank shares might be taxed by the State, under the power conferred by § 5219, either by taxing the capital of the Mission Bank directly to the latter, (*Crocker* v. *Scott*, 149 California, 575,) which the present state constitution expressly forbids; or by including the value of those shares in the assessment of the assets of the Bank of California, and taxing the value of those assets to the latter's shareholders, as is provided by the terms of the state constitution and statute, and as was done in the present case. But the State is without the power, under the federal statute, to tax their value directly to the Bank of California.

As the attempt to do this must fail, and as the state law does not permit any other taxation of their value except by including that value in the assets of the Bank of California, which is assessed to the latter's shareholders, the effect of that law is to tax the value of the shares of the Mission Bank, owned by the Bank of California, but once, while taxing the value of the Mills National Bank shares twice, once directly to the Bank of California, as a shareholder, and again by including their value in the assets of the Bank of California, upon which a tax is assessed against the latter's shareholders.

This method of taxation is in violation of the express provision of § 5219, forbidding discrimination against national bank shares. *Mercantile Bank* v. *New York*, 121 U. S. 138, 157.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Raymond Benjamin*, Chief Deputy

Attorney General of the State of California, for defendant in error:

It being conceded that the stock of all of these banks is primarily taxable to the shareholders, there can be no question of double taxation in the case. The plaintiff in its capacity as a stockholder is liable for the tax upon the Mills and Mission shares, which are held in its treasury in lieu of a certain amount of its capital, surplus or undivided profit. The stockholders of plaintiff, as such, have no right or title to any portion of this stock, their status being entirely distinct from the status of the corporation itself as stockholder. The tax paid by the plaintiff as a stockholder in no way concerns or affects the tax upon the value of the stock held by the plaintiff's stockholders.

The tax on the Mission Bank shares did not violate Rev. Stats., § 5219. In *Bank of Redemption* v. *Boston*, 125 U. S. 60, the decision did not turn solely upon the ground that the shares taxed were shares of a national bank. The statute intends not only to permit a State to tax all the shares of a national bank, but also to compel it to tax all shares of its own banks, without regard to ownership, for this is one of the mandates of the law which must be first obeyed to enable the State to tax the shares of national banks at all. The fundamental purpose was the protection of national banks in the matter of state taxation, and to compel the administration of even-handed justice. *People* v. *Weaver*, 100 U. S. 539–543; *Mercantile Bank* v. *New York*, 121 U. S. 154. The State must tax the moneyed capital in its state banks to the same extent as it taxes the shares of stock in national associations, and, in the enactment of the constitutional provision of California, a specific and uniform rule, applicable to both state and national bank stock, has been enacted.

If the shares of the Mission Bank owned by plaintiff

are exempt from taxation, because they are personal property owned by a national bank, then, inasmuch as the moneyed capital of the Mission Bank cannot be taxed at the same rate as the tax levied upon the moneyed capital in national banks, it follows that the taxation of the shares of national banks, under the constitution of California, will be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, in violation of the federal act.

Whether a State has or has not complied with the requirement of Congress in this particular is not to be determined from the face of the statute, but from its practical application and the results thereof. *Davenport Bank* v. *Davenport*, 123 U. S. 23.

Crocker v. *Scott*, 149 California, 575, cited by opposing counsel, dealt with a scheme of taxation which was superseded by the present state constitution.

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

Except as to real estate, which is taxed directly in the name of the owner, all the available resources of banks for the purposes of taxation are reached under the law of California, not by an immediate levy on the banks as the owner, but by annual assessment and tax thereon made by the State Board of Equalization against the stockholders of banks. The state law places the duty upon the banks to pay the tax assessed against their stockholders, with the obligation on the stockholders to repay, sanctioned by a right conferred upon the banks to sell the stock of any stockholder failing to refund.

The Bank of California, organized under the National Banking Law and established in San Francisco, commenced this suit to recover the amount of a tax, levied against its stockholders in 1915 under the law previously

stated, which it had paid under protest claiming that the tax was not only unlawful under the state law but illegal under the law of the United States governing the right of a State to tax national banks and their stockholders. The case is here to review a judgment denying the right to recover, on the ground that the tax had been lawfully exacted under both the law of the State and that of the United States.

The decision below, in so far as it rested upon the state law, is binding and we put that subject out of view. To understand the contentions as to the law of the United States requires a brief statement of the tax levied and the particulars in which it is complained of. The capital of the bank was $8,500,000, evidenced by 85,000 shares of the par value of $100 each. D. O. Mills & Company was a national bank established at Sacramento and the California Bank was a stockholder in that bank to the extent of 2,501 shares. The California Bank was also the owner of 1,001 shares of stock in the Mission Bank, a banking corporation organized under the state law and doing business in San Francisco. The Board of Equalization in 1915 fixed the value of all the assets of the California Bank at the sum of $15,775,252.67. The Board included in the assets making up this amount the stock standing in the name of the California Bank, both in the D. O. Mills National Bank and in the Mission State Bank; the first, the Mills National Bank stock, being computed as worth $625,546.30, and the second, the Mission State Bank stock, as worth $121,916.52.

Upon these valuations, the Board assessed the California Bank as a stockholder in the D. O. Mills National Bank and as a stockholder in the Mission State Bank for the shares of stock which it held in those banks, valuing each at the sum previously stated. Besides, the stockholders of the California National were assessed for the value of the assets of that bank, including in the amount

the full value of the shares of stock owned by the bank in the Mills National and Mission State Banks.

The controversy grows out of the asserted illegality of the two-fold tax levied on the assessments of the California Bank as a stockholder in the Mills National Bank and in the Mission State Bank. Its solution depends upon the effect of Rev. Stats., § 5219, the text of which is in the margin.[1]

Without considering some modifications made by the Act of February 10, 1868, c. 7, 15 Stat. 34, which are negligible for the purposes of the questions before us, the section is but the reproduction of a provision of § 41 of the Act of June 3, 1864, dealing with the organization of national banks. (13 Stat. 99, 112.) The forms of expression used in the section make it certain that in adopting it the legislative mind had in view the subject of how far the banking associations created were or should be made subject to state taxation, which presumably it was deemed necessary to deal with in view of the controversies growing out of the creation of the Bank of the United States and dealt with by decisions of this court. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Osborn* v. *United States Bank,* 9 Wheat. 738, 867; *Weston* v. *Charleston,* 2 Pet. 449.

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[1] "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court. *People* v. *Weaver*, 100 U. S. 539; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Covington* v. *First National Bank*, 198 U. S. 100.

Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the States to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several States so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation.

The first aim was attained by the non-recognition of any power whatever in the States to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. Full and express power on that subject was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again

from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question.

Let us come to consider whether the taxation in question was sanctioned by the act of Congress as thus understood. We do so, first, from the point of view of the twofold tax which was based on the ownership by the California Bank of stock in the D. O. Mills National Bank, and, second, as to the taxes which resulted from the ownership by the California Bank of stock in the Mission State Bank.

In *Bank of Redemption* v. *Boston*, 125 U. S. 60, it was determined that the stock held by one national bank in another is governed by the power to tax stockholders given by the statute. Hence, the circumstance of the ownership of the stock by the California Bank in the D. O. Mills National Bank in no way deflects the operation of the statute. This being the case, as the taxation of the California Bank as a stockholder in the Mills Bank conformed to the grant of power to tax stockholders of national banks, it results that the assessment for taxation made upon that basis was within the state authority and was rightly decided so to be.

But the principle upon which this rests inevitably leads to the further conclusion, that the inclusion of the stock ownership of the California Bank in the Mills Bank as an asset of the California Bank for the purpose of taxing the stockholders of the latter bank was a disregard of the provision as to taxing stockholders fixed by the statute.

Indeed, it is apparent that the use of the power conferred by the statute to tax the California Bank as a stockholder in the Mills National Bank, and in addition to avail of such stock ownership for the purpose of taxing

the shareholders of the California Bank, was but to accept the statute on the one hand, and to exert on the other a power which could have no existence consistently with the statute. To say that the two taxes, the one levied on the bank as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank on the one hand and the stockholders of the California Bank on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question.

It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided.

Again, when the purposes of the statute are taken into view, the conclusion cannot be escaped that the transmutation of the stock interest of the California in the Mills Bank, into an asset of the California Bank subject to be taxed for the purpose of reaching its stockholders, is to overthrow the very fundamental ground upon which the taxation of stockholders must rest.

We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority.

Coming to consider the tax on the California National Bank as a stockholder in the Mission State Bank, different considerations are controlling, since the provisions of the statute and the ruling in the *Bank of Redemption Case, supra,* both in letter and spirit apply only to stock ownership by a national bank in another national bank. It therefore follows that as the California National Bank was subject to state taxation as a federal agency only to the extent authorized by the statute, the taxation of that bank as a stockholder in the Mission State Bank was without the scope of the statute and beyond the power which it conferred.

But while this is true, it also follows that as the stock in the Mission Bank belonged to the California Bank and was part of its general assets embraced by the comprehensive power conferred to tax such assets in the absence of some provision of the statute to the contrary, which, as we have seen, was the case with regard to the stock held in the D. O. Mills National Bank, the assessment of the stock in the Mission Bank as an asset of the California Bank against its stockholders was within the scope of the grant given by the statute and was, therefore, valid.

From what we have said, it follows that the court below erred in refusing to order the refunding of the sum paid for the taxes levied on the assessment made against the stockholders of the California Bank for the value of the stock held by that bank in the D. O. Mills National Bank, and which had been assessed against the California Bank as a stockholder in the Mills Bank; and further erred in so far as it refused to decree a refund of the amount paid for the tax levied on the California Bank as the result of the assessment on that bank as a stockholder in the Mission State Bank. In these particulars, therefore, its decree must be, and is reversed. Our order, therefore, is

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

MR. JUSTICE PITNEY, dissenting.

Pursuant to the constitution and laws of California, the plaintiff in error, a national banking association located in that State, was required to pay the following three taxes for the year 1915:

(a) A tax upon the valuation of the shares of its own stock, assessed against the bank at its own request instead of being assessed in the names of its individual stockholders. Its shares are 85,000 in number, of the par value of $100 each ($8,500,000 in all), and were valued for taxation at the sum of $15,775,252.67; a valuation which took into account all the assets of plaintiff in error except the assessed value of its real estate (excluded pursuant to the provisions of the state constitution). Included in the estimate were the sum of $625,546.30, the valuation of 2,501 shares of stock of the Mills National Bank held by plaintiff in error, and the sum of $121,916.52, for the value of 1,001 shares of the Mission Bank (a state bank), likewise held by plaintiff in error. It appears that the Bank of California prior to February 5, 1910, was a state bank, and on that date was converted into a national association; and, being at that time a stockholder of the two other banks, was permitted, under § 5154, Rev. Stats., as it then stood, to continue to be such stockholder after becoming a national bank.

(b) A tax assessed directly against plaintiff in error as a stockholder of the Mills National, based upon the valuation already mentioned of 2,501 shares.

(c) A tax assessed directly against plaintiff in error as a stockholder in the Mission (state) Bank, based upon the above mentioned valuation of its 1,001 shares in that bank.

In an action brought by the California National against Richardson as state treasurer to recover a part of the taxes thus paid, the Supreme Court of the State, following its previous decision in *Bank of California* v. *Roberts*, 173

California, 398, denied recovery, and the case is brought here upon the ground that the state constitution and laws, in conformity to which the taxes were assessed, are repugnant to § 5219 of the Revised Statutes of the United States.[1]

This court now holds that while the California National was taxable as a stockholder in the Mills National Bank (*Bank of Redemption* v. *Boston*, 125 U. S. 60), the other taxes imposed against plaintiff in error were repugnant to § 5219 in two respects: (1) In that the valuation of the Mills National shares ought to have been deducted from the estimate of the valuation of the California National shares in making an assessment against the stockholders of the latter bank; and (2) in that plaintiff in error, as a national bank, was not taxable at all as a stockholder in the state bank, and that the tax last mentioned above was altogether erroneous.

Upon the last point I understand the case to be controlled by the decision of this court in *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, where it was held that § 5219 had the effect of exempting not only the operations and franchises but the property of the national banks from

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[1] Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

state taxation, except as to their real estate. There are weighty considerations to the contrary, which seem not to have been called to the attention of the court in that case—certainly are not adverted to in the opinion—but it would serve no useful purpose to bring them into the present discussion. Therefore I take it to be settled that under § 5219 a national bank may not be taxed by a State with respect to its ownership of shares in another corporation except shares in another national bank.

The Supreme Court of California, in the *Roberts Case*, 173 California, 398, 405, held that since it was decided by this court in the case of *Bank of Redemption* v. *Boston* that § 5219 permits the taxation of the shares of a national bank in the hands of another national bank, a different rule could not be applied to the taxation of shares in a state bank owned by a national bank without violating that provision of § 5219 which prohibits the taxation of national bank shares at a greater rate than is assessed upon other moneyed capital. But this view seems to me untenable; it mistakes an exemption accorded to a particular holder of other moneyed capital for a restriction upon the rate of taxation that may be assessed upon other moneyed capital as a class of property. As we held in *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, 393, the language of § 5219 "prohibits discrimination against shareholders in national banks and in favor of the shareholders of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual." The nontaxability of state bank shares in the hands of a national bank is attributable to the character of the national bank as a taxpayer, not to the quality of the state bank shares as an object of taxation.

And of course I agree that the California National was

taxable as a stockholder in the Mills National; it having been determined in *Bank of Redemption* v. *Boston*, 125 U. S. 60, 70, that § 5219 permits the taxation of a national bank owning shares of the capital stock of another national bank, by reason of that ownership, on the same footing with all other shareholders.

This brings us to the point of divergence.

I dissent from the conclusion that the taxation imposed directly upon the California National by reason of its ownership of Mills National shares entitled the stockholders of the former bank to have the estimated value of the Mills shares deducted from the estimate of their California shares.

I find no suggestion of a right to such deduction in the language of § 5219. It permits the inclusion of "all the shares . . . in the valuation of the personal property of the owner or holder of such shares," and leaves it to the legislature of each State to determine the manner and place of taxing them, "subject only to the two restrictions" which are particularly mentioned; and therefore, by necessary implication, free from all other restrictions.

The opinion seems to adopt the view that to treat the Mills National shares as assets of the California National Bank amounts to imposing a "twofold tax," a "double burden" or "two taxes" upon a single property interest. But if there are two taxes it is only because there are two banks, the stock in each of which is valued separately because the ownership is separate and distinct.

It is said that § 5219 regards the ultimate beneficial interest and treats the interest of the stockholder and that of the bank as one. I cannot accept this view, for several reasons in addition to the implied exclusion of restrictions other than those expressly mentioned in the section.

In the first place, the stockholder and the bank are entirely different entities, not merely in form but in sub-

stance; and this ought to be sufficient to rebut any inference that would rest upon an assumed identity in order to raise a limitation upon the already moderate scope of the scheme of taxation expressly prescribed.

In the second place, the property interest of the stockholder is, in a most substantial sense, different from that of the bank. The bank, if taxable with respect to its property, would be taxable upon all of its assets, saving any that might be expressly exempted. But the stockholders are in no proper sense the owners of the entire assets of the bank. Their interest, so far as they have any interest in the assets as such, is only in the residue that remains after payment of all outstanding liabilities. This is capable of enjoyment in possession only in the rare event of a winding-up and liquidation of the bank's affairs. Short of this, and as is true in the particular case of the California Bank, the interest of the stockholders is almost the opposite of a property interest in the assets themselves; it being confined to a right to have those assets employed in the current operations of a going concern of which they are only part proprietors, with the right to participate at proper intervals in the gains derived therefrom. Hence, while "book-value"—that is, the excess of assets over outstanding liabilities—may be laid hold of, as it appears to have been laid hold of in this case, as a convenient mode of estimating the value of the stock interest, not only is it a matter of familiar knowledge that such an estimate is a mere approximation, but it is entirely clear that both in law and in the common experience of mankind the beneficial interest of the stockholder in the concerns of the bank is very substantially different from the beneficial interest of the bank in its assets.

Thirdly, the distinction has been constantly recognized in the decisions of this court ever since the earliest establishment of the national banks. The court having in

the year 1862 decided that a state tax, imposed upon a bank according to the valuation of its capital and surplus as upon the property of individual citizens, was invalid in so far as it was based upon an investment in the stocks, bonds, and securities of the United States themselves exempt from taxation by the State (*Bank of Commerce* v. *New York City*, 2 Black, 620); and having held two years later that the same rule must be applied to a state tax imposed against a bank under another statute which made banks liable to "taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings," etc., (*Bank Tax Case*, 2 Wall. 200); the question was raised in the year 1865, in *Van Allen* v. *The Assessors*, 3 Wall. 573, 584, etc., whether under § 41 of the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99, 112, from which the present § 5219, Rev. Stats., is derived, a State possessed the power to authorize the taxation of shares of national banks in the hands of stockholders where the capital was wholly invested in stock and bonds of the United States. *Bank of Commerce* v. *New York City*, 2 Black, 620, and *Bank Tax Case*, 2 Wall. 200, were referred to as calling for a negative answer; but the court sustained the tax upon the ground of the very distinction between the stockholders and the bank that is now under consideration, the language of the opinion being (pp. 583, 584): "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. . . . The interest of the shareholder entitles him to participate in the net profits earned

by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed."

In the same case, the court found in the context of the National Bank Act most cogent reasons for holding that Congress intended to permit the States to tax the entire interest of the stockholder, without regard to the character of the investments held by the bank. After referring to certain of the provisions of the act respecting the amount of the capital stock, its division into shares, and the responsibility of the shareholders for the debts of the bank, the opinion proceeds as follows (pp. 587–588): "In view of these several provisions, in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders; when the statute provides, that nothing in this act shall be construed to prevent *all the shares* in any of the said associations, &c., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by state authority, &c., can there be a doubt but that the term 'shares,' as used in this connection, means the same interest as when used in the other portions of the act? Take, for examples, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each; in the personal liability clause, which subjects the shareholder to an amount, and, in

addition, to the amount invested in such shares; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote; in regulations of the payments of the shares subscribed; and, finally, in the list of shares kept for the inspection of the State assessors. In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent. This is an answer to the argument that the *term*, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction. Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization."

This distinction between bank and shareholder has been recognized consistently in the decisions of this court from that time until the present. It will not be necessary to analyze the cases, since the principal ones (*People* v. *Commissioners*, 4 Wall. 244, 258; *National Bank* v. *Commonwealth*, 9 Wall. 353, 359; *Farrington* v. *Tennessee*, 95 U. S. 679, 687; *Tennessee* v. *Whitworth*, 117 U. S. 129,

136; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 402;) were summarized and quoted from in the opinion of the court in *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 677–682, where the distinction was employed to demonstrate the substantial want of equivalency either in law or in fact between a tax on the franchise or property of the bank, such as had been imposed by the State in that case, and a tax upon the shares of stock in the names of the shareholders, permitted by § 5219, Rev. Stats.

The solid basis of the distinction may be further emphasized by considering the practical effect of according to the stockholders of the California Bank, in the estimation of the value of their shares for the purpose of taxation, a deduction of the entire value of the stock held by this bank in the Mills National. This value, according to the admitted facts, is $625,546.30, which is about 4 per cent. of $15,775,252.67, the entire estimated value of the 85,000 shares of California National stock (excluding real estate from the computation). It is incorrect to take the latter sum as the value of all the assets of the California National. There is nothing in the record to show the value of its entire assets; but as the case comes before us as on a demurrer to plaintiff in error's own pleading, and since the $15,775,252.67 represents but the excess of its assets over its outstanding liabilities, it is reasonable to assume that the entire assets are much greater; it being evident that there must be assets to counterbalance all outstanding liabilities, including especially the amounts due to depositors. Let us take, for illustration, the very moderate assumption that plaintiff in error's total assets were four times as much as its capital and surplus or, say, $63,000,000.[1] Of this amount,

[1] According to its Report of Resources and Liabilities at close of business September 2, 1915, plaintiff in error had total resources of $67,396,982. Report of Comptroller of Currency, 1915, vol. 2, p. 585.

the valuation of the Mills National stock is less than one per cent. In other words, applying the theory of the prevailing opinion, the fact that one per cent. of its total assets is in the form of shares in another national bank entitles its own stockholders to an abatement amounting to four times that percentage, or about 4 per cent., from the valuation of their stock-holding interest in the plaintiff in error's bank. And it is easy to see that, upon the same theory, if the shares held by one national bank in another were equal in value to the aggregate of its own shares, although constituting but a small fraction of its entire assets, its shareholders would escape taxation altogether, although participating in the profits of two banking institutions.

As we have seen, the decisions of this court establish that under § 5219 the holder of shares in a national bank is not entitled to have the estimate of their taxable value reduced by reason of the fact that the capital and surplus of the bank are invested in securities that are exempted from state taxation. It also is clear that while the section in terms permits the real property of the bank to be taxed against it, this does not entitle the shareholder to an allowance from the assessed value of his shares by reason of the fact that the bank is thus taxed. It is true that many of the States, when authorizing the taxation of real estate against the bank, make an allowance for this by deducting the value thus taxed when computing the amount at which the shares shall be taxed; but this is not because of any requirement in the federal statute. In *Commercial Bank* v. *Chambers*, 182 U. S. 556, 561, this court expressly so held with respect to a claim for a deduction from the value of national bank shares because of real estate owned by the bank situate outside of the taxing State. In *People's National Bank* v. *Marye*, 107 Fed. Rep. 570, 579, it was held that § 5219 contemplates that the tax on real estate may be imposed independently

of the tax upon the share of the stockholder (affirmed upon another ground, 191 U. S. 272). And in *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, we sustained a tax imposed upon a shareholder under a statute that, while not exempting the real estate of the bank situate in the same State, allowed no deduction of its value in the computation of the taxable value of the shares.

It seems to me that to allow a deduction from the taxable value of national bank shares because the bank happens to hold stock in another national bank is not only contrary to the clear intent of § 5219, but is inconsistent with all previous decisions of this court bearing upon the point, especially those that have denied a similar deduction because of tax-exempt securities held by the bank, or because of real estate taxed against it.

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

BANK OF CALIFORNIA, NATIONAL ASSOCIATION, *v.* ROBERTS, TREASURER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 115. Submitted December 19, 1918.—Decided January 27, 1919.

Decided on authority of *Bank of California* v. *Richardson*, *ante*, p. 476. 173 California, 398, reversed.

Mr. E. S. Pillsbury, *Mr. F. D. Madison*, *Mr. Alfred Sutro* and *Mr. Oscar Sutro* for plaintiff in error. *Mr. A. D. Plaw* was also on the brief.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Raymond Benjamin*, Chief Deputy

Attorney General of the State of California, for defendant in error.

Per Curiam: This case is controlled by the opinion in *Bank of California* v. *Richardson*, *ante*, p. 476. Indeed, it was submitted without briefs upon the briefs filed in that case. For the reasons stated in the previous case, therefore, the judgment here must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

PIERCE OIL CORPORATION *v.* CITY OF HOPE.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 137. Submitted January 16, 1919.—Decided January 27, 1919.

A city ordinance forbidding the storage of petroleum and gasoline within 300 feet of any dwelling, beyond certain small quantities, is within the state police power.

So *held*, where storage of those substances in tanks was necessary to a company's business of selling them, and the plant could not be moved without expense and loss of profits.

The fact that the tanks were moved to their present position at the city's request did not import a contract not to require further removal for the public welfare; nor would such a contract be effective.

Where it cannot be aided by judicial notice, an averment that an ordinance is unnecessary and unreasonable is too general and is not admitted by a demurrer.

Allegations designed to show that petroleum and gasoline were so stored as not to endanger any buildings and that explosion was impossible, though conceding the possibility of some combustion, *held* insufficient on demurrer to exclude the danger of explosion of which the court might take judicial notice.

127 Arkansas, 38, affirmed.

THE case is stated in the opinion.

Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. J. F. Loughborough and *Mr. D. H. Cantrell* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a complaint brought by the plaintiff in error to enjoin the City of Hope from enforcing an ordinance that forbids the storing of petroleum, gasoline, &c., within three hundred feet of any dwelling, beyond certain small quantities specified. A demurrer to the complaint was sustained by the Supreme Court of the State. 127 Arkansas, 38. The plaintiff is engaged in the business of selling petroleum oil and gasoline and has tanks on the right of way of a railroad in the city, which it moved to that place at the city's request. The mode of construction is set forth and it is alleged that an explosion is impossible and that the presence of the tanks in no way endangers any buildings. The tanks are necessary for the business; the present position diminishes the cost of transferring oil from cars and cannot be changed without considerable expense and a reduction of the plaintiff's lawful profits. The plaintiff adds that it knows of no available place in the city where the tanks could be put and oil stored without violating the ordinance, that the ordinance is unnecessary and unreasonable, and that the enforcement of it will deprive the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

A long answer is not necessary. A State may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States. *Patterson* v. *Kentucky*, 97 U. S. 501. And it may make the place where they are kept or sold a criminal nuisance, notwithstanding the Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U. S.

623. The power "is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good." *Dobbins* v. *Los Angeles*, 195 U. S. 223, 238. The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this Court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the Court would not inform itself, as in many cases it would, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, an averment in this general form is not enough. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534, 535. Only facts well pleaded are confessed.

Then as to the allegation that plaintiff's plant is safe and does not threaten the damages that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted, even on demurrer; as in the old case of a plea that the defendant threw stones at the plaintiff *molliter* and that they fell upon him *molliter*, "for the judges say that one cannot throw stones *molliter*." 2 Rolle's Abr. 548, Trespas, (G) 8. As was well observed by the Court below "we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been offered. The unexpected happens." 127 Arkansas, 43. Indeed, the answer admits some possible combustion but undertakes to limit its possible effects. If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204; *Hebe Co.* v. *Shaw*, *ante*, 297. Whether circumstances might make an exception from this principle need not be con-

sidered here. *Reinman* v. *Little Rock*, 237 U. S. 171. It is enough to say that the allegations do not raise the question. The fact that the removal to the present situation was made at the city's request does not import a contract not to legislate if the public welfare should require it, and such a contract if made would have no effect. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 414.

Decree affirmed.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION *v.* MULLINS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 56. Argued November 15, 18, 1918.—Decided January 27, 1919.

The land of a cemetery association was assessed as a whole, and subjected to a single lien, for a local improvement, although much of it had been disposed of to lot holders for burial purposes. It appearing that the fee of the whole tract remained in the association, *held*, that the latter was not deprived of property without due process. P. 504.

Subject to the limitation that a local assessment must not be arbitrary or unreasonable, the question whether it is justified by the benefit conferred is to be determined by the local authorities, as is also the question whether property should be made a separate improvement district or included in a larger one. P. 505.

The fact that the land of a cemetery association is included for the purposes of sewer improvement, and assessment, in a district with a larger area of land devoted to other uses, while other cemeteries have been districted separately for such purposes, does not establish a denial of the equal protection of the laws, where similarity of situation and conditions is not shown. *Id.*

Notice and opportunity to be heard before the creation of a special improvement district are not essential to due process if a full hearing be afforded in subsequent judicial proceedings to enforce the tax. *Id.*

268 Missouri, 691, affirmed.

THE case is stated in the opinion.

Mr. William Moore and *Mr. Clarence S. Palmer*, with whom *Mr. Francis C. Downey* and *Mr. Henry L. McCune* were on the brief, for plaintiff in error.

Mr. Matthew A. Fyke, with whom *Mr. Jesse C. Petherbridge* and *Mr. Emmet L. Snider* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was begun in the Circuit Court of Jackson County, Missouri, to enforce the liens of tax bills upon land of the Mount Saint Mary's Cemetery Association. The tax bills were assessed in part payment of the cost of two district sewers constructed in a sewer district in Kansas City, Missouri. The Mount Saint Mary's Cemetery Association is a corporation organized under the laws of the State of Missouri for the purpose of acquiring and maintaining a cemetery, subdividing it into lots, selling, disposing of, and managing the same. The net proceeds after providing for expenses and a maintenance fund are applied to the support of Catholic orphan asylums.

The case has been three times in the Supreme Court of Missouri. In 239 Missouri, 681, it was held that the cemetery land was liable to assessment under the constitution and laws of Missouri and the charter of Kansas City. In 259 Missouri, 142, the court held that the land was chargeable with its share of the cost of constructing the sewer; that the holder of a lot in the cemetery had no title or interest in the lot except a mere easement or burial right subordinate to the ownership of the cemetery by the corporation; that the special tax bills were properly issued against the entire grounds of the cemetery; that fraud in

laying out the sewer district, if such there were, was not a defense to the action on the tax bills unless the alleged fraud was known to the contractor who did the work. In the third case, 268 Missouri, 691, the court affirmed a judgment in favor of Mullins against the Cemetery Association, holding that the presumption was in favor of the reasonableness of an ordinance which included a cemetery in the sewer district, and assessed its property with the cost of lateral sewers laid in the alleys and streets adjacent to the cemetery, and that such presumption must be satisfactorily overcome by proof in order to be defeated; that when it was shown that the sewer for which the tax bills were issued served to carry away the surface water in the cemetery, and there was no evidence that the sewers were not beneficial in the sanitation of the cemetery, it would be presumed that the city council was fully informed upon the subject, and that its ordinance was reasonable; that the tax, though large, must stand in the absence of a showing that it was unreasonable; that it was not reversible error to exclude evidence that the city in two other cases had made cemetery associations separate sewer districts in the absence of a showing that this was done under a state of facts like those then presented; that such assessments required no notice of the proceedings unless required by some charter, ordinance, or statutory provision; that the sewer tax bills could be issued against the land in its entirety, such ownership being in the Association.

So far as the judgment of the Supreme Court of Missouri turns upon matters of state law it is conclusive. The final judgment is here upon writ of error because of the contention that it violates the Fourteenth Amendment to the Federal Constitution in that its effect is to deprive the plaintiff in error of its property without due process of law, and to deny to it the equal protection of the laws. In passing upon the case the Supreme Court of Missouri,

in the decision under review, found that the sewer district contained about 407 acres; that the Cemetery Association owned about 34 acres of land in said district which was assessed for sewer purposes; that the effect of the sewers was to drain the surface water from some of the land of the association; that there were no openings in the sewer-pipes for house connections, but the evidence showed that such openings were often made by the plumbers when the connections were made; that the grading contractor, in grading a street on the west side of the cemetery, had made a ten-foot fill near the northwest corner of the cemetery, and placed a ten-inch pipe so as to lead the water from the cemetery into the man-hole at that point, thus preventing the formation of a pond; that there are two waterclosets in the cemetery grounds not connecting with these sewers; that the Association has an eight-inch pipe about 400 feet long laid in the cemetery for the purpose of drawing the water to the west; that about one-half of the land in the cemetery had been disposed of in lots for burial purposes. Others facts, not essential to be considered in the disposition of the federal questions, were found.

The plaintiff in error contends that it was deprived of its property without due process of law inasmuch as about one-half of the tract of 34 acres belonging to the Cemetery Association had before the assessment been conveyed for burial lots; that the assessment against the entire tract had the effect to impose a lien upon much of its property arbitrarily as the burial lots had been conveyed to others. But the Supreme Court of Missouri held that the fee in the title to the burial lots, which had been sold or leased, was still in the Association, with an easement of the right of burial in the lot purchasers. We see no deprivation of due process of law in this holding, making the ownership of the Association the subject of assessment. The right of burial, which was all that the lot purchasers or lessees

acquired, for obvious reasons could not be put upon the market and sold to pay assessments. The Association had a title which the court held might be and was the subject of assessment.

It is urged that the Cemetery Association was not benefited by the assessment. But the court found, with evidence to support its conclusion, that the sewers served to carry away surface water; and that there was no evidence to show that the cemetery would not have been benefited as to sanitation as a result of the construction of the sewers. It is well settled that unless such assessment is arbitrary and unreasonable the extent of the benefit, essential to justify the assessment, was a matter within the control of the local authorities. *Spencer* v. *Merchant,* 125 U. S. 345, 356; *Wagner* v. *Baltimore,* 239 U. S. 207.

This case is not within the principle of *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478, where it was sought to embrace property in nowise benefited within the limits of a drainage district.

It is contended that the Cemetery Association might have been made a sewer district of itself and not have been included in so large a district. Again, this was a matter for the local authorities to decide, and, in the absence of arbitrary action, their judgment is conclusive. *Spencer* v. *Merchant, supra; Wagner* v. *Baltimore, supra; Houck* v. *Little River Drainage District,* 239 U. S. 254.

The denial of equal protection of the laws is said to result from the fact that other cemetery grounds had been placed in districts by themselves. But the record fails to show similarity of situation and conditions. In the absence of arbitrary action the making of this assessment upon the district as constituted will be presumed to have been warranted by the circumstances of the case.

It is insisted that no notice was given, or opportunity to be heard, prior to the creation of the sewer district, and,

therefore, due process of law was denied. These tax bills were levied upon districts the creation of which was authorized by legislative authority. The record discloses that the owner has had full opportunity to be heard, in judicial proceedings to enforce the tax, and its contentions of arbitrary action and lack of benefits conferred have been considered and decided. This is due process. *Davidson* v. *New Orleans*, 96 U. S. 97; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 251.

This court has more than once declared that it does not interfere with the taxation and assessment laws of the States as violative of the Fourteenth Amendment unless the State's action has been palpably arbitrary or grossly unequal in its application to the persons concerned. In this case the assessment is a large one, but we are unable to find that the judgment sustaining it has had the effect to deprive the Cemetery Association of its property without due process of law, or has denied to it the equal protection of the laws.

Affirmed.

UNITED STATES ET AL. *v.* NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

UNITED STATES ET AL. *v.* NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

UNITED STATES ET AL. *v.* NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 164, 165, 166. Argued December 10, 11, 1918.—Decided January 27, 1919.

Persons qualified and claiming under the Homestead Law who, before the definite location of the New Orleans Pacific Railway between Whitecastle and Shreveport (November 17, 1882), settled on portions of odd-numbered sections within the primary and indemnity limits of its grant, erecting dwellings and in part cultivating and fencing their respective tracts, and who thereafter maintained their claims, residency, occupation and cultivation, *held* entitled to the benefits of the Act of February 8, 1887, c. 120, 24 Stat. 391, which, while confirming the grant to the Railway Company, provides that lands occupied by actual settlers at the date of said definite location and still remaining in the possession of them or of their heirs, or assigns, shall be excepted from the grant and be subject to entry under the public land laws. Pp. 516–519.

The provisions of the Act of 1887, *supra*, §§ 2 and 6, in favor of settlers, became applicable, when accepted by the confirmee company, to all of the unpatented lands and to such of the patented lands as it had not sold (p. 515), and to indemnity as well as to place lands (p. 521); but not to lands which while vacant and unclaimed, were withdrawn from entry and sale, and were patented to the Railway and by it conveyed to a *bona fide* purchaser, before the act was passed. P. 520.

Subsequent purchasers from the Railway were charged with notice of the Act of 1887, *supra*, and of the claims of settlers, entitled to its benefits, and occupying the tracts purchased. *Id.*

Because of the obligations which the act imposes, the United States

may maintain a suit on behalf of settlers to secure their rights under the act against the Railway and its grantees holding the legal title through patents. P. 518.

In such a suit, affecting a patent issued to the Railway before the Act of March 2, 1896, c. 39, 29 Stat. 42, the five year limitation of that act may be a bar to relief by cancellation, but the bill may stand upon the more appropriate prayer, to affix a trust upon the legal title in favor of the settlers. *Id.*

While the laches of a private person is imputable to the United States in a suit brought by it for his benefit, in this case it is *held*, that settlers, entitled to the benefits of the Act of 1887, *supra*, who maintained peaceable and continued possession, affording notice of their equitable rights which they asserted and sustained before the Land Department, and who relied upon the promise of that Department to secure their titles and on suits brought by the Government to that end, were not guilty of laches, notwithstanding long delays in the litigation. *Id.*

235 Fed. Rep. 846, reversed.

235 Fed. Rep. 841, affirmed in part and reversed in part.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States:

The United States has the capacity to maintain these suits because of its obligation to the interveners and its duty to the public.

The effect of the Act of February 8, 1887, was to reserve from the grant and except from the railroad patents the lands in question for the benefit of the interveners.

The suits are not barred by limitation, because: (*a*) The suits are to establish title by enforcing an exception rather than to vacate or annul patents. (*b*) The lands are not claimed by the Government in its own sole interest as public lands, and it is only to such lands that the limitation applies.

The suits are not barred by laches, because: (*a*) The intervening claimants have always been and are still in the hands of the Government, against whom laches is

not chargeable. (*b*) The claimants having the right to rely upon their possession and the decision of the Land Department, it is not they but the defendants who are guilty of laches.

The defendant lumber companies are not *bona fide* purchasers.

Mr. Mark Norris, *Mr. F. G. Hudson* and *Mr. H. H. White*, with whom *Mr. J. G. Palmer* was on the briefs, for appellees:

The patents were regularly and rightly issued because § 2 of the Act of February 8, 1887, applies neither to lands which were patented previous to the passage of that act ("patented lands"), nor to ("indemnity") lands, selected in lieu of a failure of the lands granted within the primary limits of the grant ("place" lands).

Neither §§ 2, 4, or 6, nor any other part of the Act of 1887, granted to the interveners any special or preferential rights in the lands.

This litigation involves neither an interest of the Government, an obligation to the public nor a duty to these interveners, and therefore is altogether a conflict of private rights, which both the United States and the interveners are without capacity to maintain herein.

The alleged rights of the Government and of the interveners are barred by the prescription, limitation and confirmation, pleaded both in bar of the action and, affirmatively, as a muniment of title.

The bill is without equity. Both the Government, admittedly a nominal party, and the interveners, the settler-claimants, are, alike, estopped to question the patents, 29 years after their issuance.

The appellees are *bona fide* purchasers, for value and without notice, both in the meaning of the general rule and the confirmatory statutes pleaded.

The issuance of the patents was an adjudication that

no one was in possession; that they were public lands in every sense of the term.

The relative rights of a grantee company and an individual occupant or entryman must be determined by record evidence under the New Orleans Pacific Grant the same as under other railroad grants.

The lands were rightly patented under the general location of November 11, 1871, as required by the Act of March 3, 1871, as well as under the definite location of November 17, 1882.

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

These suits are so related that they may be disposed of in a single opinion. Three tracts of land in Vernon Parish, Louisiana, each containing one hundred sixty acres, are in controversy—one in each suit. All are in odd-numbered sections within the limits of the grant of March 3, 1871, to the New Orleans, Baton Rouge and Vicksburg Railroad Company, c. 122, 16 Stat. 573,—one being within the primary and two within the indemnity limits. All were patented under the grant and afterwards sold by the patentee, the purchasers paying a fair price. Through successive sales the title under the patents was passed along to other purchasers. Whether the latter shall be decreed to hold the title in trust for certain homestead claimants whose claims are founded on settlements antedating the issue of the patents, and also the definite location of the road, is the matter in controversy.

The suits were brought by the United States, the defendants being the patentee and the present holders of the title under the patents. The relief prayed was that the patents be canceled, or, if that be not done, that the homestead claimants be decreed to be the equitable owners and that a trust in their favor be declared and enforced. Of

these alternative prayers, the latter was better suited to the case stated. By leave of the court the homestead claimants intervened, set forth their claims, alleged that the patentee and all the purchasers took the title with full notice of their claims, asserted that the title was held in trust for them and sought relief accordingly. Various defenses were set up in the answers, such as the lapse of the period prescribed for bringing suits to cancel patents, laches on the part of the homestead claimants and good faith on the part of the purchasers. On the final hearing the District Court entered a decree for the defendants in each of the suits, and this was affirmed in the Circuit Court of Appeals. 235 Fed. Rep. 841 and 846. The District Court did not make any specific finding of fact or assign any particular reason for its decree, and the Circuit Court of Appeals rested its decision on three grounds: (a) that in so far as the suits sought a cancellation of the patents they were barred because not brought within the time prescribed by law; (b) that, if a trust had arisen in favor of the homestead claimants, its enforcement was a matter in which the United States was without interest or concern; and (c) that, if such a trust had arisen, it had become unenforceable by reason of inexcusable laches on the part of the homestead claimants.

The grant of March 3, 1871, was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, "its successors and assigns," to aid in the construction of a railroad from New Orleans to Shreveport, and embraced all the odd-numbered sections of public land within twenty miles (the primary limits) on each side of the road, subject to enumerated exceptions, one of which excluded any land to which a preëmption or homestead claim may "have attached" at the time the line of the road was definitely located. In lieu of the excepted lands others in odd-numbered sections within prescribed indemnity limits were to be selected. Whenever, and as often as, twenty

consecutive miles of road were completed and put in running order patents were to be issued for the lands opposite to and coterminous with that portion of the road. The entire road was to be completed within five years. Within two years the company was to designate the "general route" of the road and to file a map of the same in the Department of the Interior. There was no provision directly calling for a map showing the definite location of the road, but that such a map was to be filed was plainly implied.

The general route of the road was designated on a map filed and accepted in November, 1871. The Secretary of the Interior, complying with an express provision in the granting act, then caused the odd-numbered sections within the primary limits to be withdrawn from entry and sale. That withdrawal became effective in December, 1871, and included the tract in controversy in No. 166. The Secretary also ordered a like withdrawal of the odd-numbered sections within the indemnity limits, but as the granting act did not authorize, but in effect prohibited, their withdrawal, this part of the order was of no effect. *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675.

No part of the railroad was constructed by the original grantee, and on January 5, 1881, it transferred the grant to the New Orleans Pacific Railway Company. At that time this company had a line of completed railroad extending from New Orleans to Whitecastle in the direction of Shreveport, and thereafter, during the years 1881 and 1882, it constructed, completed and put in running order, the road from Whitecastle to Shreveport. It also filed with the Secretary of the Interior, on November 17, 1882, a map showing the definite location of the part of the road opposite the tracts now in controversy, and the map was accepted. The road as completed was examined and accepted, and the company was recognized by the Secretary of the Interior, the Attorney General and the President,

as rightly entitled to patents for the lands falling within the terms of the grant and lying opposite the road from Whitecastle to Shreveport.

Thereafter, in 1885, patents for a large part of the lands were issued to the New Orleans Pacific Railway Company, the assignee of the grant. Other lands remained as yet unpatented. About that time this company's rights under the grant were persistently questioned by persons who insisted that the grant was not assignable, that all rights under it were extinguished when the road was not constructed within the five years prescribed therefor, and that in any event a forfeiture could and should be declared for the failure to comply with that condition, although the road had been completed in the meantime. Because of this the Secretary of the Interior, although not acceding to the insistence, suspended the issue of patents and called the matter to the attention of Congress, saying in that connection that the company had—

". . . purchased a portion of a line of a railroad already built from New Orleans to Whitecastle, a distance of sixty-eight miles; as to this portion of the road the company waived claim to the land granted. The residue of the road, from Whitecastle to Shreveport, was built by the company upon the belief of the full validity of their right to the land granted, and without this benefit of the grant the road would not have been built. The government railroad examiner reports the road substantially built and equipped, and it would not appear to comport with good faith to those who invested their money on the basis of the grant to take advantage of any technical defect, if such exists, in the transfer to the company. I would, therefore, respectfully suggest for the consideration of Congress the propriety of passing an act curative of defect, if any exists, in the transfer to the New Orleans Pacific Company, and vesting the title, originally granted to the New Orleans, Baton Rouge and Vicksburg Rail-

road Company from Whitecastle to Shreveport, in the New Orleans Pacific Road."

With the matter thus brought to its attention Congress passed the Act of February 8, 1887,[1] c. 120, 24 Stat. 391. By its first section a part of the grant, with which we are not here concerned, was declared to be forfeited and was restored to the public domain. By its second section the part of the grant on the west side of the Mississippi River opposite to and coterminous with the road from Whitecastle to Shreveport, which was constructed by the New Orleans Pacific Railway Company as assignee of the grant, was confirmed to that company save as it was declared in a proviso "that all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States." By this section the map of November 17, 1882, was required to be treated as the "definite location" of the part of the road opposite the lands now in controversy. By the third section the confirmation in the second was conditioned on the acceptance by the company of the provisions of the act. The fourth section is not material here. The fifth section authorized the Secretary of the Interior to make all needful rules and regulations for carrying the act into effect. The sixth section confirmed the patents already issued to the company, but with the express qualification that "the Secretary of the Interior is hereby fully authorized and in-

[1] The general history of the grant, together with the executive and legislative action relating to it, up to the date of this act, is set forth at length in the following: Senate Report No. 711, 47th Cong., 1st sess.; 17 Op. A. G. 370; Senate Ex. Doc. No. 31, 48th Cong., 1st sess.; House Report No. 1556, 48th Cong., 1st sess.; House Ex. Doc. No. 1, pt. 5, p. 43, 49th Cong., 1st sess.; House Report No. 2698, 49th Cong., 1st sess.; House Ex. Doc. No. 1, pt. 5, p. 49, 49th Cong., 2d sess.

structed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act."

The company duly accepted the provisions of the act and in that way assented to and became bound by every provision in it—the unfavorable as well as the favorable. The provisions of special importance here are the proviso in § 2 and the latter part of § 6. By one all lands occupied by actual settlers at the time of the definite location of the road and remaining in their possession, or that of their heirs or assigns, were "excepted from said grant" and made "subject to entry under the public land laws"; and by the other the Secretary of the Interior was authorized and instructed to apply the same rule to all lands for which patents already had been issued, and to protect all settlers on such lands in their rights under the act.

It does not admit of any doubt that these provisions, when accepted, became applicable to all the unpatented lands and to such of the patented lands as had not then been sold by the company. Whether they also became applicable to such of the patented lands as were sold theretofore is a question which will be considered presently.

Of the lands in suit, 80 acres were both patented and sold before the act was passed or accepted, 280 acres were patented before the act was passed and sold after it was accepted, and 120 acres were both patented and sold after the acceptance. Thus all but 80 acres came certainly within the reach of the two provisions as accepted. The 80 acres, as to which the question is left open for the moment, are part of the tract in controversy in No. 166.

As before stated, the part of the road opposite these lands was definitely located November 17, 1882. At that time there was an actual settler on each of the 160-

acre tracts. In each instance the settler had the qualifications named in the homestead law, was expecting to acquire the title under that law, had placed on the land a habitable dwelling in which he and his family were living, had cleared, fenced and was cultivating several acres and was asserting a claim to the entire tract. The settler in No. 164 continued his residence, occupancy and cultivation until 1896, when he died, and thereafter his widow continued the occupancy and cultivation, either personally or through tenants. The settler in No. 165 continued his residence, occupancy and cultivation to the time of the hearing in the District Court. And the settler in No. 166 continued his residence, occupancy and cultivation until 1885, when he sold his improvements and possessory right to another, who had the requisite qualifications and wished to acquire the title under the homestead law. The assignee then settled on the tract and thereafter resided thereon with his family and continued the occupancy and cultivation begun by his assignor. While in No. 164 the widow, and in No. 166 the assignee, succeeded to the rights of the original settler, we shall speak of all the claims as if the original settlers were the present claimants.

The existence and extent of these claims were well known among the people of the neighborhood, and the improvements and evidences of inhabitancy and cultivation on each tract were such that any one purchasing under the land grant would be charged with notice of the nature and extent of the settler's claim.

The settlers applied at the local land office—one in 1888, one in 1890 and the other in 1896—to make homestead entries of the lands and the railway company opposed their applications. Hearings were had and the contests ultimately were determined in favor of the settlers—one in 1893, one in 1896 and the other in 1898. The decision in each contest was to the effect that the proofs established

the right of the settler to receive the title under the proviso in § 2 and the latter part of § 6. All the lands had then been patented, and the settlers were advised by the regulations which the Secretary of the Interior had adopted, as also by the decisions in the contests, that the Land Department would secure a relinquishment of the outstanding title for their benefit. 5 L. D. 688. In 1892, before the contests were decided, the company and the trustees of its land grant had filed the following stipulation with the Secretary of the Interior, 15 L. D. 576:

"That in cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in the possession of actual settlers at date of the definite location of said railway company's road, and title is in said railway company, said railway company and said trustees agree to make without delay conveyance thereof to the United States; and where such lands have been sold by said railway company to third persons, said railway company undertakes to recover title thereto without delay, and convey the same to said settlers or to the United States, and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation."

After the contests were decided the Land Department called on the company to reconvey or surrender the title, but this was not done; and the Secretary of the Interior requested the Attorney General to institute judicial proceedings to secure for the settlers the protection promised in the Act of 1887, which the company had accepted. Acting on this request the Attorney General, on February 27, 1901, brought a suit in the name of the United States against the railway company and others to cancel and annul the patents to these and many other lands similarly situated. Various obstacles were encountered in

the prosecution of that general suit, one being that the purchasers from the company were not made parties, and on January 21, 1915, while that suit was still pending, the Attorney General brought the suits with which we are now concerned.

As the patents were issued before, and the suits were brought more than five years after, the Act of March 2, 1896, c. 39, 29 Stat. 42, the prayer that the patents be canceled must be put out of view, and the alternative prayer—that the title under the patents be declared to be held in trust for the homestead claimants and the trust enforced—must be regarded as if standing alone.

The right of the United States to maintain the suits is questioned on the ground that the enforcement of the asserted trust is a matter in which the United States is without interest or concern. Were the premise tenable, the conclusion would follow as of course. But the premise is not tenable. A pecuniary interest in the relief sought is not essential; it is enough if there be an interest or concern arising out of an obligation to those for whose benefit the suits are brought. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 285–286; *United States* v. *Beebe*, 127 U. S. 338; *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 367; *Heckman* v. *United States*, 224 U. S. 413, 439. By the Act of 1887 the United States undertook to invest settlers coming within the provisions of that act with the title to the lands in their possession, and also "to protect" them in that right. This meant that they were to receive a clear title. The act charged the Secretary of the Interior with the duty of adopting appropriate measures to that end, and when other means failed he invoked the aid of the Attorney General, who brought these suits. Through them the United States seeks to fulfill its obligation under the act to the settlers, and in this it has the requisite interest or concern.

When the United States sues to enforce a public right

or to protect a public interest the defense of laches is not available; but when the suit, although in the name of the United States, is brought for the benefit of a private person his laches may be interposed with like effect as if he were suing. *United States* v. *Beebe, supra.* Applying this view, the court below reached the conclusion that the settlers had been guilty of such laches as would bar them from the relief sought. We are unable to concur in that conclusion. The occupancy of the settlers was both peaceable and continuous and gave notice of their equitable rights. Their claims were asserted before the Land Department, were the subjects of hearings and appeals, and were by it sustained. The land officers, conformably to the published regulations, undertook to secure a restoration of the outstanding title, and to that end the suit of 1901 was brought. The settlers were justified in believing that their rights were being protected, as was required by the Act of 1887. No attempt was made to disturb their occupancy or to assert any right against them. We therefore think it properly cannot be said that they were guilty of any such laches as precluded them from obtaining relief in equity. As a general rule, one who is in peaceable possession under an equitable claim does not subject himself to a charge of laches for mere delay in resorting to equity to establish his claim against the holder of the legal title where the latter manifests no purpose to disturb him or to question his claim. *Ruckman* v. *Cory,* 129 U. S. 387, 389–390. We think that rule is applicable here.

On the merits, we are of opinion that the Act of 1887, as accepted by the company, operated to exclude from the grant and to subject to these settlement claims all the lands in controversy, patented and unpatented, save the 80 acres which are yet to be specially noticed. In so far as these lands were patented it became the duty of the railway company to surrender the title, and in so far as

they were unpatented the act forbade the issue of patents to the company for them. Intending purchasers were bound to take notice of the occupancy of the settlers, and this, with the Act of 1887, which was a public law, renders untenable the claim that those who hold the title under the patents have the status of *bona fide* purchasers. In these circumstances the settlers, whose claims come within the proviso in § 2 and the latter part of § 6, are entitled to have a trust in their favor declared and enforced.

The situation as to the 80 acres which were both patented and sold before the Act of 1887 was passed is not the same. Under an express provision of the Act of 1871, they were withdrawn from entry and sale while they were yet vacant and unclaimed, and the withdrawal was still in force in 1885, when they were patented. No valid claim to them could be initiated by settlement or otherwise in the presence of the withdrawal. *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 536; *Wood* v. *Beach*, 156 U. S. 548; *Spencer* v. *McDougal*, 159 U. S. 62. They were part of an odd-numbered section within the primary limits and opposite a twenty-mile section of the road which was constructed, completed, put in running order and accepted by the President before they were patented. In other words, they were lawfully patented and when the company sold them, in 1886, it had the right to do so. The purpose of the granting act in directing that patents be issued as each section of twenty miles of road was completed was to enable the company to sell the lands and realize on the grant. In these circumstances the purchase was *bona fide* and the purchaser took the full title. It follows that before the Act of 1887 was passed the 80 acres—described as the S. ½ of N. W. ¼ of Sec. 3, T. 3 N., R. 7 W., L. M.—had passed into hands where they were not within the reach of the act or the company's acceptance. The fact that this land was sold before the

act was passed seems not to have been brought to the attention of the Land Department—probably because the purchaser was not a party to the contest proceedings.

The contention is made that the portions of that act which are material here do not embrace lands within the indemnity limits, but only those within the primary limits. A survey of the entire act shows that the contention is without merit.

No. 164. Decree reversed.
No. 165. Decree reversed.
No. 166. Decree affirmed as to S. ½ of N. W. ¼ of Sec. 3, T. 3 N., R. 7 W., L. M., and reversed as to the other lands.

OELWERKE TEUTONIA *v.* ERLANGER ET AL., PARTNERS UNDER THE FIRM NAME OF ERLANGER & GALINGER.

ERLANGER ET AL., PARTNERS UNDER THE FIRM NAME OF ERLANGER & GALINGER, *v.* OELWERKE TEUTONIA.

APPEALS FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 162, 181. Submitted January 20, 1919.—Decided February 3, 1919.

A finding that a vessel was abandoned, concurred in by the court of first instance and the Supreme Court of the Philippine Islands, in a salvage case, will be accepted by this court when supported by evidence. P. 524.

Unless there has been some violation of principle or clear mistake, appeals to this court on the amounts allowed for salvage are not encouraged. *Id.*

The right of a speculative salvor is to share in the benefit resulting

from his work; he is not entitled to reimbursement for his actual expenses, but the necessary work as well as the degree of danger should be considered in fixing his allowance. P. 525.

A decree of the Supreme Court of the Philippines allowing 40% of the net value of cargo as salvage, with interest, affirmed.

34 Phil. Rep. 178, affirmed.

THE case is stated in the opinion.

Mr. Harry W. Van Dyke for Oelwerke Teutonia. *Mr. Charles E. Cotterill* and *Mr. Edmund W. Van Dyke* were also on the brief:

The plaintiffs ought not to have been held by the court below to have been salvors, but should have been regarded and treated as intruders without warrant—as having seized unlawfully the property of the defendant over its protests and as having wrongfully and unlawfully prevented defendant's agents in Manila from recovering possession of the property for the purpose of saving it through the employment of persons who were at hand, ready, willing and competent to undertake the work. There was no impending peril. 2 Bouvier, Rawle's Rev., "Salvage," and cases cited; *Blackwell* v. *Sancelito Tug Co.*, 10 Wall. 1; *Williamson* v. *The Alphonso*, 30 Fed. Cas. 4, 5; Abbott, Law of Merchant Ships & Seamen, 14th ed., 994.

So far at least as this defendant is concerned, the plaintiffs not only ought to have been denied any award, but they ought to have been mulcted in damages to cover the loss of the jettisoned copra, as well as for the deterioration of the wet copra which was sent to Manila and sold. In any event, if this court should be inclined to agree with the court below in its other conclusions, the award of forty per cent., considering all the circumstances disclosed, was grossly excessive.

Mr. F. C. Fisher for Erlanger *et al.*:

This court has jurisdiction and may pass upon all the issues of law and fact presented by the record.

The "Nippon" was a derelict vessel when plaintiffs took possession of her for the purpose of effecting the salvage. Plaintiffs' possession for that purpose was lawful in its inception and was lawfully continued.

The services rendered by plaintiffs as salvors were prompt, skillful, efficient, and successful.

The expenditures incurred by plaintiffs in effecting the salvage operations were properly and necessarily incurred, and were not excessive.

Under the circumstances of the case plaintiffs are entitled to an award sufficient in amount to reimburse them for their expenditures in behalf of defendant and to give them such additional compensation as shall substantially remunerate them for their exertions and the risk incurred, and to interest. *The Edwards*, 12 Fed. Rep. 508; *Hemmenway* v. *Fisher*, 20 How. 255. *The Carl Schurz*, 5 Fed. Cas. 84; *The Adolphe*, 29 Fed. Cas. 1350; *The L. W. Perry*, 71 Fed. Rep. 745, distinguished.

Mr. Justice Holmes delivered the opinion of the court.

These are cross appeals from a judgment on a complaint for salvage of cargo brought by Erlanger & Galinger to which the defendant, Oelwerke Teutonia, answered denying the services and setting up a counterclaim for damages alleged to have been caused by the negligence and incompetence of the plaintiffs. The Court of First Instance found for the plaintiffs and awarded to them one-half of the net proceeds of the property saved. On appeal the Supreme Court of the Philippine Islands, while otherwise confirming the findings of the Court of First Instance, reduced the award to forty per cent. of the main part of the cargo, which was copra, and to twenty per cent. of a small item of agar-agar which does not need further mention. We assume that the plaintiffs receive a corresponding proportion of the interest accruing upon the fund.

The main facts are these. The steamship *Nippon*, loaded principally with copra, went aground on Scarborough Reef, 120 or 130 miles from Luzon, in the afternoon of May 8, 1913. The next day the chief officer and nine of the crew were sent off in the only seaworthy small boat in search of help and on the twelfth reached Santa Cruz, Luzon, and telegraphed to Manila for "immediate assistance for saving crew." Help was sent at once and on the thirteenth the captain and crew went to Hongkong on a mail steamer that stopped for them, the captain preferring to take that course rather than to go to Manila by a coast guard cutter that had been sent to the wreck. On May 14 the plaintiffs chartered a cutter, and took possession of the *Nippon* on the 17th. Shortly after this the work of salvage was begun. It was finished in July when the vessel, the claim for which has been paid, and a great part of the cargo were saved.

There were protests on behalf of interested parties after the plaintiffs had started and it is denied that the vessel was abandoned. But all the earliest communications and circumstances indicate that the only hope when the chief officer left the ship was to save the lives of those left on board, and that there was no greater expectation when the captain was taken off. It is unnecessary to say more about the evidence than that it shows no ground for departing from the usual rule when two courts have agreed about the facts. As the only point of difference with regard to them concerns the amount of salvage allowed, that is the only question upon which we shall say a word.

Unless there has been some violation of principle or clear mistake, appeals to this Court concerning the amount of the allowance are not encouraged. *Hobart* v. *Drogan*, 10 Pet. 108, 119; *Post* v. *Jones*, 19 How. 150, 160. The plaintiffs complain that their expenses were not taken into account or were not given sufficient consideration. But, as was pointed out by the Court below, the

cost was their affair. There was no contract and no request. They went into a speculation and their only claim is a lien upon goods that they have rescued for a share in the saving that they have made for the owners. The right to share in a benefit that is the result of their work is the only ground upon which the plaintiffs can stand. Of course, within that limit the necessary work and the danger are matters to be considered. Here the danger might have been great but it was not, and the work seems to deserve neither much praise nor much blame. There was more of commercial speculation and less of help not to be found elsewhere than is usual in salvage cases, and we are not prepared to say that the Supreme Court ought to have allowed more. We are equally unprepared to say that it should have allowed less. The services were rendered rightfully and were fairly efficient. Neither side would be likely to inspire enthusiasm and both justly may be left where they were left by the Court below.

Decree affirmed.

CENTRAL OF GEORGIA RAILWAY COMPANY *v.* WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 163. Argued January 21, 1919.—Decided February 3, 1919.

The same reasons which led this court to decide that the tax exemptions in the special charters of the Augusta & Savannah and the Southwestern Railroads inured to the Central of Georgia Railway as their lessee and precluded taxing the latter upon the fee of the leased property (*Wright* v. *Central of Georgia Ry. Co.*, 236 U. S. 674),

invalidate an attempt to evade the charter contracts by a tax of the leasehold interests.

Contracts in special charters creating perpetual tax exemptions are not revocable by later provisions of the state constitution.

146 Georgia, 406, reversed.

THE case is stated in the opinion.

Mr. T. M. Cunningham, Jr., and *Mr. A. R. Lawton* for plaintiff in error.

Mr. Samuel H. Sibley, with whom *Mr. John C. Hart* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the Railway Company to prevent the collection of certain taxes, which, it is alleged, would be contrary to Article I, § 10, and to the Fourteenth Amendment of the Constitution of the United States. The case was heard on bill, demurrer and answer and certain agreed facts, and the Court of first instance issued an injunction as prayed. The decree was reversed however by the Supreme Court of Georgia and a writ of error was taken out to bring the case here. It presents another attempt to accomplish, by a change in form, what in *Wright* v. *Central of Georgia Ry. Co.*, 236 U. S. 674, was held to be an unconstitutional result.

In that decision it was explained how the Central of Georgia Railway Company had become the holder of leases from the Augusta and Savannah and the Southwestern Railroad of property which by the charters of the lessors was to be taxed only in a certain way and to a certain amount. An attempt had been made to tax the lessee for the property, the leases being for one hundred and one years, renewable in like periods upon the same terms forever. The tax was laid upon the real estate, road

bed, and franchise value, (with a certain deduction), of the two lessors. It was held that the statutes made the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor. The taxes now attempted to be levied are upon the leasehold interests of the lessee in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the constitution of the State. But the constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that although the decision in the former case necessarily was confined to the question before the Court, the reasoning applies with equal force to that now before us. The cases of *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 236, and *Jetton* v. *University of the South*, 208 U. S. 489, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in *Morris Canal & Banking Co.* v. *Baird*, 239 U. S. 126, 132. We must follow the precedent that was established after full discussion and with recognition of the difficulties involved.

The charter contracts in question are of a kind that goes back to the time when railroads were barely beginning and that would not be likely to be repeated, but of course will be carried out by the State according to what was meant when they were made.

Decree reversed.

AMENDMENT, RULE 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

ORDER: IT IS ORDERED BY THE COURT that Section 3 of Rule 22 of the Rules of Practice of this Court be, and the same is hereby, amended so as to read as follows:

3. One hour on each side will be allowed for the argument, and no more, without special leave of the Court, granted before the argument begins. But in cases certified from the Circuit Court of Appeals, cases involving solely the jurisdiction of the court below, and cases under the Act of March 2, 1907, 34 Stat. 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

Promulgated October 21, 1918.

AMENDMENT, RULE 37

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

ORDER: IT IS ORDERED BY THE COURT that Section 3 of Rule 37 of the Rules of Practice of this Court be amended so as to read as follows:

3. Where an application is submitted to this Court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, but they may be submitted in open court by counsel or by the clerk on request of counsel, and no petition will be received within three days next before the day fixed upon for the adjournment of the Court for the term.

Promulgated November 4, 1918.

DECISIONS PER CURIAM, FROM OCTOBER 7, 1918, TO MARCH 3, 1919, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 135. RED JACKET, JR., COAL COMPANY ET AL. *v.* UNITED THACKER COAL COMPANY. Appeal from the District Court of the United States for the Southern District of West Virginia. Motion to dismiss or affirm submitted October 8, 1918. Decided October 21, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Brolan* v. *United States*, 236 U. S. 216, 218. (2) *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369; *Male* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 240 U. S. 97. (3) *Shapiro* v. *United States*, 235 U. S. 412. See *Omaha Baum Iron Store Co.* v. *Moline Plow Co.*, 244 U. S. 650. *Mr. E. Spencer Miller* for appellants. *Mr. Arthur S. Dayton* for appellee.

No. 544. D. M. PHILLIPS ET AL. *v.* W. O. MITCHELL ET AL. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted October 8, 1918. Decided October 21, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Brolan* v. *United States*, 236 U. S. 216, 218. *Mr. Milton Brown* for plaintiffs in error. *Mr. C. B. Stuart* for defendants in error.

No. —. Original. *Ex parte:* IN THE MATTER OF CHARLES W. COON, PETITIONER. Submitted October 8, 1918. Decided October 21, 1918. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. Charles W. Coon pro se.*

No. 615. COUNTY OF ROCK ISLAND ET AL. *v.* EDMUND M. DUNNE, CATHOLIC BISHOP OF THE DIOCESE OF PEORIA. Error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted October 14, 1918. Decided October 28, 1918. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 303; *Bilby* v. *Stewart*, 246 U. S. 255. (2) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Brolan* v. *United States*, 236 U. S. 216, 218. *Mr. C. J. Searle* for plaintiffs in error. *Mr. George I. Haight* and *Mr. J. T. Kenworthy* for defendant in error.

No. 524. WESTERN UNION TELEGRAPH COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. Appeal from the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted October 14, 1918. Decided November 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *a.* § 128 of the Judicial Code; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300; *b. Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600. (2) *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Western Union Telegraph Co.* v. *Ann Arbor*

R. R. Co., 178 U. S. 239; *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300. See *Western Union Telegraph Co.* v. *Louisville & Nashville R. R. Co.*, 244 U. S. 649. *Mr. William L. Clay* and *Mr. Rush Taggart* for appellant. *Mr. Henry L. Stone* and *Mr. Henry C. Peeples* for appellee. See *post*, 576.

No. 457. Zanesville & Western Railway Company *v.* Charles E. Williams, Administrator, etc. Error to the Court of Appeals of Muskingum County, State of Ohio. Motion to dismiss or affirm, and petition for a writ of certiorari, submitted October 8, 1918. Decided November 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Petition for writ of certiorari denied. *Mr. John H. Doyle* and *Mr. Frederick W. Gaines* for plaintiff in error. *Mr. F. S. Monnett* for defendant in error.

No. 380. Louisville & Nashville Railroad Company *v.* State of Alabama. Error to the Supreme Court of the State of Alabama. Submitted October 14, 1918. Decided November 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111. *Mr. Henry L. Stone, Mr. E. Perry Thomas* and *Mr. George W. Jones* for plaintiff in error. *Mr. F. Loyd Tate* and *Mr. Emmett S. Thigpen* for defendant in error.

No. 352. Deschutes Railroad Company *v.* Eastern Oregon Land Company. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss or affirm submitted October 28, 1918. Decided November 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *a.* § 128 of the Judicial Code; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300; *b. Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600. (2) *a. Bankers Mutual Casualty Co.* v. *Minneapolis, St. Paul &c. Ry. Co.*, 192 U. S. 371, 383, 385; *Hull* v. *Burr*, 234 U. S. 712; *b. Taylor* v. *Anderson*, 234 U. S. 74; *Joy* v. *St. Louis*, 201 U. S. 332. See writ of certiorari denied, *Deschutes R. R. Co.* v. *Eastern Oregon Land Co.*, 245 U. S. 672. *Mr. Arthur C. Spencer* and *Mr. James G. Wilson* for appellant. *Mr. Alexander Britton* and *Mr. Evans Browne* for appellee.

No 1. State of Louisiana ex rel. Wilhelmine G. Schmidt, widow, etc., *v.* Jared Y. Sanders, Governor, et al. Error to the Supreme Court of the State of Louisiana. Submitted November 5, 1918. Decided November 11, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300; *Stewart* v. *Kansas City*, 239 U. S. 14. (2) *Stearns* v. *Minnesota*, 179 U. S. 223; *Board of Liquidation* v. *Louisiana*, 179 U. S. 622. (3) *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225; *Goodrich* v. *Ferris*, 214 U. S. 71; *Brolan* v. *United States*, 236 U. S. 216. *Mrs. Willis J. Roussel* (*Wilhelmine G. Schmidt,*) *pro se. Mr. Harry Gamble* for defendants in error.

No. 369. JOHN C. MADDEN *v.* W. M. FORBES. Error to the Supreme Court of the State of Kansas. Motion to dismiss submitted November 4, 1918. Decided November 11, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300; *Stewart* v. *Kansas City,* 239 U. S. 14. (2) *Empire State-Idaho Mining Co.* v. *Hanley,* 205 U. S. 225; *Goodrich* v. *Ferris,* 214 U. S. 71; *Brolan* v. *United States,* 236 U. S. 216. *Mr. Joseph M. Stark* for plaintiff in error. *Mr. Stephen H. Allen* for defendant in error.

No. 523. WESTERN UNION TELEGRAPH COMPANY *v.* ATLANTA & WEST POINT RAILROAD COMPANY. Appeal from the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted November 4, 1918. Decided November 11, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Western Union Telegraph Co.* v. *Louisville & Nashville R. R. Co., ante,* 532. *Mr. William L. Clay* and *Mr. Rush Taggart* for appellant. *Mr. Sanders McDaniel* and *Mr. Leon Weil* for appellee. See *post,* 575.

No. 290. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* STODDARD LUMBER COMPANY. Error to the Supreme Court of the State of Oregon. Motion to dismiss submitted November 4, 1918. Decided November 11, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Waldemar Van Cott, Mr. Edward M.*

Allison, Jr., and *Mr. William D. Riter* for plaintiff in error. *Mr. W. Lair Thompson* for defendant in error.

No. 41. G. L. Henderson et al. *v.* Helen R. Ressor, or Helen R. Henderson, et al. Error to the Supreme Court of the State of Missouri. Argued November 14, 1918. Decided November 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Farrell* v. *O'Brien*, 199 U. S. 89; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225; *Goodrich* v. *Ferris*, 214 U. S. 71; *Brolan* v. *United States*, 236 U. S. 216. (2) *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 51–52; *Eastern Building & Loan Association* v. *Ebaugh*, 185 U. S. 114; *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, 96; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 416. *Mr. C. W. Prince*, with whom *Mr. Daniel V. Howell* was on the brief, for plaintiffs in error. *Mr. H. M. Langworthy* and *Mr. T. A. Frank Jones*, for defendants in error, submitted.

No. 42. Chicago, Milwaukee & St. Paul Railway Company *v.* Mary O'Connor, Administratrix, etc. Error to the Supreme Court of the State of Wisconsin. Argued November 14, 1918. Decided November 18, 1918. *Per Curiam.* Affirmed with costs upon the authority of *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 574. *Mr. H. J. Killilea*, with whom *Mr. C. H. Van Alstine* was on the briefs, for plaintiff in error. *Mr. Eben R. Minahan*, with whom *Mr. Victor I. Minahan* was on the brief, for defendant in error.

No. 46. EDMUND PENFOLD ET AL., EXECUTORS, ETC., ET AL. *v.* EUGENE M. TRAVIS, AS COMPTROLLER OF THE STATE OF NEW YORK. Error to the Surrogate's Court, New York County, State of New York. Argued November 15, 1918. Decided November 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Municipal Securities Corporation* v. *Kansas City*, 246 U. S. 63, 69; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300. (2) *Farrell* v. *O'Brien*, 199 U. S. 89; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225; *Goodrich* v. *Ferris*, 214 U. S. 71; *Brolan* v. *United States*, 236 U. S. 216. *Mr. William Mitchell* for plaintiffs in error. *Mr. John B. Gleason* for defendant in error.

No. 246. CINCINNATI TRACTION COMPANY ET AL. *v.* CITY OF CINCINNATI. Error to the Supreme Court of the State of Ohio. Motion to dismiss or affirm submitted November 11, 1918. Decided November 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Municipal Securities Corporation* v. *Kansas City*, 246 U. S. 63, 69; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300. *Mr. Joseph Wilby, Mr. Alfred C. Cassatt* and *Mr. Ellis G. Kinkead* for plaintiffs in error. *Mr. Saul Zielonka, Mr. Charles A. Groom, Mr. William Jerome Kuertz* and *Mr. Charles E. Weber* for defendant in error.

No. 69. MILLS W. BARSE *v.* GEORGE W. SAUL. Error to the Supreme Court of the State of New York. Argued

November 20, 1918. Decided November 25, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Stewart* v. *Kansas City,* 239 U. S. 14; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300; *Bilby* v. *Stewart,* 246 U. S. 255, 257. (2) *Empire State-Idaho Mining Co.* v. *Hanley,* 205 U. S. 225; *Goodrich* v. *Ferris,* 214 U. S. 71; *Brolan* v. *United States,* 236 U. S. 216. *Mr. Louis Marshall,* with whom *Mr. Max J. Kohler* was on the briefs, for plaintiff in error. *Mr. Frank Parker Ufford* for defendant in error.

No. 77. WILLIE M. GOING, ADMINISTRATRIX OF NATHAN W. GOING, *v.* NORFOLK & WESTERN RAILWAY COMPANY. Error to the Supreme Court of Appeals of the State of Virginia. Submitted November 21, 1918. Decided November 25, 1918. *Per Curiam.* Affirmed upon the authority of *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp,* 240 U. S. 464, 466; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571, 574. See also *Chicago, Milwaukee & St. Paul Ry. Co.* v. *O'Connor, ante,* 536. *Mr. W. L. Welborn* for plaintiff in error. *Mr. Waller R. Staples, Mr. Theodore W. Reath* and *Mr. Roy B. Smith* for defendant in error.

No. 636. JOHN P. SCHMITT ET AL., ETC., *v.* JOHN SHADRACH, TRUSTEE, ETC. Error to the Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm or place on the summary docket submitted November 25, 1918. Decided December 9, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 4 of Act of January 28, 1915, c. 22, 38 Stat. 803, 804. *Mr. Rush Trescott* for plaintiffs in error. *Mr. Edwin B. Morgan* and *Mr. W. A. Valentine* for defendant in error.

No. 70. MRS. ROSE SNYDER *v.* KING COUNTY, WASHINGTON, ET AL. Error to the Supreme Court of the State of Washington. Argued for plaintiff in error November 20, 1918. Decided December 9, 1918. *Per Curiam.* Affirmed with costs upon the authority of *Magoun* v. *Illinois Trust & Savings Co.*, 170 U. S. 283, 293; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Matthews*, 174 U. S. 96, 103; *Clark* v. *Kansas City*, 176 U. S. 114, 119; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. *Mr. G. Wright Arnold*, with whom *Mr. Dallas V. Halverstadt* and *Mr. Ed. J. Brown* were on the brief, for plaintiff in error. *Mr. Frank P. Helsell* and *Mr. Alfred H. Lundin* for defendants in error.

No. —. Original. *Ex parte:* IN THE MATTER OF ROBERT WEISS, PETITIONER. Submitted November 25, 1918. Decided December 9, 1918. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. William Mayo Atkinson* for petitioner. *Mr. Assistant to the Attorney General Todd* in opposition to the motion.

No. 347. JOHN E. READE *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Arizona. Submitted December 11, 1918. Decided December 16, 1918. *Per Curiam.* Affirmed upon the authority of *Ex parte Mirzan*, 119 U. S. 584; *Riggins* v. *United States*, 199 U. S. 547; *In re Lincoln*, 202 U. S. 178. See *Ex parte Glasgow*, 223 U. S. 709. *Mr. O. T. Richey* for appellant. *Mr. Assistant Attorney General Brown* for appellees.

No. 493. H. C. DRAPER *v.* GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY. Error to the Court of Ap-

peals of the State of Georgia. Motion to dismiss submitted December 9, 1918. Decided December 16, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Hollins N. Randolph* for plaintiff in error. *Mr. T. S. Hawes* for defendant in error.

No. 630. J. W. Ferguson et al. *v.* Babcock Lumber & Land Company. Appeal from the Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss or affirm submitted December 9, 1918. Decided December 16, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 128 of the Judicial Code; *Stevenson* v. *Fain*, 195 U. S. 165; *Hull* v. *Burr*, 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. *Mr. Mark W. Brown* and *Mr. F. A. Sondley* for appellants. *Mr. John Franklin Shields* and *Mr. A. Hall Johnston* for appellee. See *post*, 570.

No. —. Original. *Ex parte:* In the Matter of Jacob Frohwerk, Petitioner. Submitted December 9, 1918. Decided December 16, 1918. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Frans E. Lindquist* for petitioner.

No. 211. Baltimore & Ohio Southwestern Railroad Company *v.* United States. Error to the Circuit Court of Appeals for the Sixth Circuit. Motion to dismiss sub-

mitted December 16, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. George Hoadly, Mr. Judson Harmon, Mr. Edward Colston, Mr. A. W. Goldsmith* and *Mr. Oscar Stoehr* for plaintiff in error. *The Solicitor General, Mr. Assistant to the Attorney General Todd* and *Mr. Assistant Attorney General Frierson* for the United States.

No. 576. GEORGIA STATE BOARD OF EXAMINERS OF OPTOMETRY ET AL. *v.* KENNON MOTT. Error to the Supreme Court of the State of Georgia. Motion to dismiss submitted December 16, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. See *Marshall* v. *Dye*, 231 U. S. 250; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. James K. Hines* for plaintiffs in error. *Mr. Owens Johnson* for defendant in error.

No. 634. ERNEST E. RICHARDS ET AL., PARTNERS, ETC., ET AL. *v.* MINA M. OAKLEY. Error to the Supreme Court of the State of Missouri. Motion to dismiss submitted December 9, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300; *Bilby* v. *Stewart*, 246 U. S. 255, 257. (2) *Goodrich* v. *Ferris*, 214 U. S. 71, 81; *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Brolan*

v. *United States*, 236 U. S. 216. *Mr. John G. Park* for plaintiffs in error. *Mr. William S. Hogsett* and *Mr. Mont T. Prewitt* for defendant in error.

No. 525. Western Union Telegraph Company *v.* Nashville, Chattanooga & St. Louis Railway Company. Appeal from the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted December 16, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *a.* § 128 of the Judicial Code; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300; *b. Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600. (2) *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300. See *Western Union Telegraph Co.* v. *Louisville and Nashville R. R. Co.*, 244 U. S. 649. See also *Western Union Telegraph Co.* v. *Louisville & Nashville R. R. Co.*, *ante*, 532. *Mr. William L. Clay* and *Mr. Rush Taggart* for appellant. *Mr. Henry C. Peeples* and *Mr. Claude Waller* for appellee. See *post*, 576.

No. 60. Herbert M. Sears *v.* Inhabitants of the Town of Nahant, etc. Error to the Superior Court of the State of Massachusetts. Argued December 16, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed

for want of jurisdiction upon the authority of (1) *McCain* v. *Des Moines*, 174 U. S. 168, 181; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. (2) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216. (3) *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304; *Bilby* v. *Stewart*, 246 U. S. 255, 257. *Mr. Burton E. Eames* for plaintiff in error. *Mr. Robert G. Dodge*, with whom *Mr. Arthur D. Hill* and *Mr. Richard H. Wiswall* were on the brief, for defendant in error.

No. 61. Frederick R. Sears et al. *v.* Inhabitants of the Town of Nahant, etc. Error to the Superior Court of the State of Massachusetts. Argued December 16, 1918. Decided December 23, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *McCain* v. *Des Moines*, 174 U. S. 168, 181; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. (2) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216. (3) *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304; *Bilby* v. *Stewart*, 246 U. S. 255, 257. *Mr. Burton E. Eames* for plaintiffs in error. *Mr. Robert G. Dodge*, with whom *Mr. Arthur D. Hill* and *Mr. Richard H. Wiswall* were on the brief, for defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF SAM SYLVESTER, PETITIONER. Submitted December 16, 1918. Decided December 23, 1918. Motion for leave to file a petition for a writ of *habeas corpus* denied. *Mr. Harold O. Mulks* for petitioner.

No. 97. F. A. HOOPER ET AL. *v.* W. S. KINGSBURY, AS SURVEYOR GENERAL AND EX OFFICIO REGISTER OF THE STATE LAND OFFICE OF THE STATE OF CALIFORNIA. Error to the District Court of Appeal, First Appellate District, of the State of California. Submitted December 17, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Messenger* v. *Kingsbury,* 158 California, 611; *People* v. *California Fish Co.,* 166 California, 576; *People* v. *Banning Co.,* 166 California, 635. (2) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.,* 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 137. (3) *Campbell* v. *Wade,* 132 U. S. 34; *Gonzales* v. *French,* 164 U. S. 338, 345; *Banning Co.* v. *California,* 240 U. S. 142, 154. *Mr. Charles C. Boynton* and *Mr. Robert T. Devlin* for plaintiffs in error. *Mr. U. S. Webb* for defendant in error.

No. 98. FRANK H. AYERS ET AL. *v.* W. S. KINGSBURY, AS SURVEYOR GENERAL AND EX OFFICIO REGISTER OF THE STATE LAND OFFICE OF THE STATE OF CALIFORNIA. Error to the District Court of Appeal, First Appellate District, of the State of California. Submitted December 17, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Messenger* v. *Kingsbury,* 158 California, 611; *People* v. *California Fish Co.,* 166 California, 576; *People* v. *Banning Co.,* 166 California, 635. (2) *Equitable Life Assurance*

Society v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137. (3) *Campbell* v. *Wade*, 132 U. S. 34; *Gonzales* v. *French*, 164 U. S. 338, 345; *Banning Co.* v. *California*, 240 U. S. 142, 154. *Mr. Charles C. Boynton* and *Mr. Robert T. Devlin* for plaintiffs in error. *Mr. U. S. Webb* for defendant in error.

No. 99. EDWARD H. CHAVELLE, AS TRUSTEE, ETC., *v.* WASHINGTON TRUST COMPANY. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Submitted December 18, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 4 of the Act of January 28, 1915, c. 22, 38 Stat. 803, 804. See also *Schmitt* v. *Shadrach*, *ante*, p. 538. *Mr. E. C. Hughes* for appellant. *Mr. James B. Murphy* for appellee.

No. 100. ANDY SUNDAY ET AL. *v.* SIDNEY T. MALLORY ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Submitted December 18, 1918. Decided January 7, 1919. *Per Curiam.* Reversed with costs, except as to the one-sixth interest conveyed by Andy Sunday, as to which judgment is affirmed, upon the authority of *Brader* v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104. And see *David* v. *Youngken*, 250 Fed. Rep. 208; *Harris* v. *Bell*, 250 Fed. Rep. 209. *Mr. Assistant Attorney General Kearful*, *Mr. Joseph C. Stone* and *Mr. J. H. Langley* for appellants. *Mr. J. W. Zevely* for appellees.

No. 105. J. W. SELSOR *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Sub-

mitted December 18, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) Act of March 1, 1913, c. 90, 37 Stat. 699. (2) *Seaboard Air Line Ry.* v. *North Carolina,* 245 U. S. 298, 303; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 325. *Mr. J. D. Wilkinson, Mr. A. L. Alexander* and *Mr. T. Alexander* for plaintiff in error. No brief filed for defendant in error.

No. 108. MAGNOLIA BANK *v.* BOARD OF SUPERVISORS OF PIKE COUNTY, MISSISSIPPI. Error to the Supreme Court of the State of Mississippi. Submitted December 19, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Robert B. Mayes* for plaintiff in error. *Mr. R. H. Thompson* for defendant in error.

No. 109. ILLINOIS CENTRAL RAILROAD COMPANY ET AL. *v.* L. A. ANDERSON. Error to the Supreme Court of the State of Mississippi. Argued December 19, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Petition for writ of certiorari denied. *Mr. Robert V. Fletcher,* with whom *Mr. Robert B. Mayes* and *Mr. Blewett Lee* were on the brief, for plaintiffs in error. *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong,* for defendant in error, submitted.

No. 233. THOMAS D. ROBINSON *v.* WESLEY STEELE ET AL. Error to the Supreme Court of the State of

Washington. Motion to dismiss or affirm submitted December 23, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Julian C. Dowell* and *Mr. F. Carter Pope* for plaintiff in error. *Mr. William F. Hall* for defendants in error.

No. 350. AMERICAN PACKING COMPANY *v.* PAUL LUKETA ET AL. Error to the Supreme Court of the State of Washington. Motion to dismiss submitted December 23, 1918. Decided January 7, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Alpheus Byers* for plaintiff in error. *Mr. Benjamin S. Ohnick* for defendants in error.

No. —. Original. *Ex parte:* IN THE MATTER OF DANIEL O'CONNELL ET AL., PETITIONERS. Submitted December 23, 1918. Decided January 7, 1919. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. Joseph L. Tepper* for petitioners.

No. 287. FEDERAL GAS & FUEL COMPANY *v.* CITY OF COLUMBUS, OHIO. Error to the Supreme Court of the State of Ohio. Motion to dismiss or affirm submitted January 7, 1919. Decided January 13, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 599; *Municipal Securities Corporation* v.

Kansas City, 246 U. S. 63, 69; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304; *Bilby* v. *Stewart*, 246 U. S. 255, 257. *Mr. Henry A. Williams*, *Mr. Freeman T. Eagleson* and *Mr. L. B. Denning* for plaintiff in error. *Mr. Henry L. Scarlett* for defendant in error.

No. 120. ELVIE WHEELER, BY HIS NEXT FRIEND, P. T. WHEELER, *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY. Error to the Court of Appeals of the State of Kentucky. Submitted January 14, 1919. Decided January 20, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Buford C. Tynes* for plaintiff in error. *Mr. Edward Colston* and *Mr. John Galvin* for defendant in error.

No. 139. ADAMS EXPRESS COMPANY *v.* W. N. REYNOLDS. Error to the Supreme Court of the State of North Carolina. Argued January 16, 1919. Decided January 20, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. William A. Schnader*, with whom *Mr. Thomas DeWitt Cuyler* was on the brief, for plaintiff in error. *Mr. B. S. Womble* and *Mr. W. M. Hendren*, with whom *Mr. Clement Manly* was on the brief, for defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF GEORGE E. HAMILTON, PETITIONER. Submitted Jan-

uary 13, 1919. Decided January 20, 1919. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. Frederick S. Tyler* for petitioner.

No. 153. ELMIRA VAN BUSKIRK, ADMINISTRATRIX OF WILLIAM VAN BUSKIRK, *v.* ERIE RAILROAD COMPANY. Error to the Circuit Court of Appeals for the Third Circuit. Argued January 20, 1919. Decided January 27, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 241 of the Judicial Code; *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe,* 222 U. S. 185, 186; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101. *Mr. Charles A. Ludlow,* with whom *Mr. Frank F. Davis* was on the brief, for plaintiff in error. *Mr. George S. Hobart* for defendant in error.

No. 160. LARGE OIL COMPANY *v.* E. B. HOWARD, STATE AUDITOR OF THE STATE OF OKLAHOMA. Error to the Supreme Court of the State of Oklahoma. Argued January 20, 21, 1919. Decided January 27, 1919. *Per Curiam.* Judgment reversed with costs, and cause remanded for further proceedings, 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. And see *Howard* v. *Oil Companies,* 247 U. S. 503. *Mr. Frank B. Burford,* with whom *Mr. John H. Burford, Mr. John H. Brennan* and *Mr. J. B. A. Robertson* were on the brief, for plaintiff in error. *Mr. John B. Harrison,* with whom *Mr. S. P. Freeling* was on the brief, for defendant in error.

No. 182. J. D. Boxley *v.* E. M. Scott et al. Error to the Supreme Court of the State of Oklahoma. Submitted January 23, 1919. Decided January 27, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Harry H. Rogers* for plaintiff in error. *Mr. William P. Langston* for defendants in error.

No. 183. Baltimore & Ohio Railroad Company et al. *v.* Louis Block. Error to the Supreme Court of Appeals of the State of Virginia. Submitted January 23, 1919. Decided January 27, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Rudolph Bumgardner* for plaintiffs in error. *Mr. V. R. Shackelford* for defendant in error.

No. 306. New Orleans Land Company et al. *v.* Leader Realty Company. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted January 13, 1919. Decided January 27, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Charles Louque* and *Mr. W. O. Hart* for plaintiffs in error. *Mr. William Winans Wall* and *Mr. Gustave Lemle* for defendant in error.

No. 684. John E. Hartenbower et al. *v.* People of the State of Illinois. Error to the Supreme Court

of the State of Illinois. Motion to dismiss submitted January 20, 1919. Decided January 27, 1919. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Harry C. Kinne* for plaintiffs in error. *Mr. Edward J. Brundage* and *Mr. James H. Wilkerson* for defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF ROBERT D. KINNEY, PETITIONER. Submitted January 20, 1919. Decided January 27, 1919. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Robert D. Kinney pro se.*

No. —. Original. *Ex parte:* IN THE MATTER OF ALBERT PAUL FRICKE, PETITIONER. Submitted January 22, 1919. Decided January 27, 1919. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Thomas J. O'Neill* for petitioner.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM OCTOBER 7, 1918, TO MARCH 3, 1919.

(A.) PETITIONS GRANTED.[1]

No. 472. PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY *v.* ALFRED H. SMITH. October 21, 1918. Petition for a writ of certiorari to the Court of

[1] For petitions denied, see *post*, 558.

Appeals of the State of Maryland granted. *Mr. Frederic D. McKenney* and *Mr. John Spalding Flannery* for petitioner. *Mr. T. Alan Goldsborough* for respondent.

No. 485. WILLIAM KINZELL *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY. October 21, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Idaho granted. *Mr. John P. Gray* and *Mr. Patrick H. Loughran* for petitioner. *Mr. Heman H. Field* and *Mr. George W. Korte* for respondent.

No. 528. B. C. LEE *v.* CENTRAL OF GEORGIA RAILWAY COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia granted. *Mr. William W. Osborne* and *Mr. Alexander A. Lawrence* for petitioner. *Mr. T. M. Cunningham, Jr.*, for respondents.

No. 529. ELIZABETH HULL, ADMINISTRATRIX, ETC. *v.* PHILADELPHIA & READING RAILWAY COMPANY. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland granted. *Mr. Harvey R. Spessard* and *Mr. Frank G. Wagaman* for petitioner. No appearance for respondent.

No. 542. WESTERN UNION TELEGRAPH COMPANY *v.* GEORGE M. BROWN, EXECUTOR, ETC., ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr.*

Rush Taggart and *Mr. Beverly L. Hodghead* for petitioner. *Mr. William J. Hunsaker* and *Mr. E. W. Britt* for respondents.

No. 567. REDERIAKTIEBOLAGET ATLANTEN *v.* AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John W. Griffin* for petitioner. *Mr. Roscoe H. Hupper* for respondent.

No. 568. GEORGE A. COLE ET AL. *v.* JOSEPH RALPH. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. William C. Prentiss* and *Mr. George B. Thatcher* for petitioners. *Mr. Edwin W. Senior* and *Mr. George D. Parkinson* for respondent.

No. 569. GEORGE A. COLE ET AL. *v.* JOSEPH RALPH. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. William C. Prentiss* and *Mr. George B. Thatcher* for petitioners. *Mr. Edwin W. Senior* and *Mr. George D. Parkinson* for respondent.

No. 571. SEABOARD AIR LINE RAILWAY COMPANY *v.* MRS. LESSIE HORTON, ADMINISTRATRIX, ETC. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. Thaddeus A. Adams* and *Mr. E. Marvin Underwood* for petitioner. *Mr. Robert W. Winston* for respondent.

No. 591. UNITED STATES *v.* SUDA REYNOLDS. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *The Solicitor General* for the United States. *Mr. Jesse D. Lydick* for respondent.

No. 614. MECCANO, LIMITED, *v.* JOHN WANAMAKER, NEW YORK. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Reeve Lewis*, *Mr. W. B. Kerkam* and *Mr. Ralph L. Scott* for petitioner. *Mr. H. A. Toulmin* for respondent.

No. 618. BOARD OF PUBLIC UTILITY COMMISSIONERS *v.* YUCHAUSTI & COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Edward S. Bailey* and *Mr. Chester J. Gerkin* for petitioner. *Mr. Alexander Britton* and *Mr. Evans Browne* for respondents.

No. 619. MICHAEL U. BOEHMER *v.* PENNSYLVANIA RAILROAD COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Edwin C. Brandenburg* for petitioner. *Mr. Frederic D. McKenney* for respondent.

No. 637. NEW YORK CENTRAL RAILROAD COMPANY *v.* WILBUR H. MOHNEY. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of Lucas County, State of Ohio, granted. *Mr. John H. Doyle* and *Mr.*

Frederick W. Gaines for petitioner. *Mr. Albert H. Miller* and *Mr. A. Jay Miller* for respondent.

No. 639. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL. *v.* FRED WARD. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. R. J. Roberts, Mr. C. O. Blake, Mr. W. H. Moore, Mr. Thomas P. Littlepage, Mr. Sidney A. Taliaferro* and *Mr. W. F. Dickinson* for petitioners. *Mr. W. S. Pendleton* for respondent.

No. 653. ANA MARIA SUGAR COMPANY *v.* THOMAS QUINONES. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. E. Crosby Kindleberger* for petitioner. No appearance for respondent.

No. 656. LEO WEIDHORN *v.* BENJAMIN A. LEVY, TRUSTEE, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Walter Hartstone* and *Mr. L. P. Loving* for petitioner. *Mr. Lee M. Friedman* for respondent.

No. 671. POSTAL TELEGRAPH-CABLE COMPANY *v.* J. L. DICKERSON. October 28, 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. 675. PIEDMONT & GEORGES CREEK COAL COMPANY *v.* SEABOARD FISHERIES COMPANY, CLAIMANT, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. J. Parker Kirlin, Mr. John M. Woolsey* and *Mr. F. C. Nicodemus, Jr.*, for petitioner. *Mr. Royall Victor* for respondent.

No. 700. COLEMAN J. WARD ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. John Emerson Bennett* for petitioners. No appearance for respondent.

No. 584. ESTATE OF P. D. BECKWITH, INC., *v.* COMMISSIONER OF PATENTS. November 4, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Harry C. Howard* for petitioner. No appearance for respondent.

No. 649. ALVAH CROCKER ET AL., TRUSTEES, *v.* JOHN F. MALLEY, COLLECTOR OF INTERNAL REVENUE. November 4, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Felix Rackemann* for petitioners. No appearance for respondent.

No. 682. BESSIE TYRRELL, ETC., ET AL. *v.* CHARLES B. SHAFFER ET AL. November 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Okla-

homa granted. *Mr. Henry B. Martin* and *Mr. Richard Clyde Allen* for petitioners. *Mr. Malcolm E. Rosser* for respondents.

No. 625. SEABOARD AIR LINE RAILWAY COMPANY *v.* J. J. GRAY. November 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted. *Mr. Jo-Berry S. Lyles* for petitioner. *Mr. Fred H. Dominick* and *Mr. Wallace D. Connor* for respondent.

No. 599. MINERALS SEPARATION, LIMITED, ET AL. *v.* BUTTE & SUPERIOR MINING COMPANY. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Henry D. Williams, Mr. William Houston Kenyon, Mr. Lindley M. Garrison, Mr. Frederic D. McKenney, Mr. Garret W. McEnerney* and *Mr. Odell W. McConnell* for petitioners. *Mr. Thomas F. Sheridan, Mr. Frederick P. Fish, Mr. J. Edgar Bull, Mr. J. Bruce Kremer, Mr. Kurnal R. Babbitt* and *Mr. T. L. Chadbourne* for respondent.

No. 691. BARBER ASPHALT PAVING COMPANY *v.* WILLIAM H. WOERHEIDE ET AL. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Joseph C. Fraley* and *Mr. Henry N. Paul* for petitioner. *Mr. George F. Haid* for respondents.

(B.) PETITIONS DENIED.

No. 442. PENNSYLVANIA RAILROAD COMPANY *v.* ALICE FRANCES BROWN ET AL. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles E. Hughes, Mr. Francis I. Gowen, Mr. Frederic D. McKenney* and *Mr. John Hampton Barnes* for petitioner. *Mr. William A. Glasgow, Jr.*, and *Mr. T. R. White* for respondents.

No. 454. HUBBARD-ZEMURRAY STEAMSHIP COMPANY *v.* AKTIESELSKABET STAVANGEREN. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas J. Freeman* for petitioner. No appearance for respondent.

Nos. 459, 460. COLUMBIA-KNICKERBOCKER TRUST COMPANY *v.* EDWIN HALE ABBOT;

Nos. 461, 462. SAME *v.* PRESTON B. KEITH;

Nos. 463, 464. SAME *v.* JOHN S. AMES;

No. 465. SAME *v.* MARIA A. EVANS, EXECUTRIX;

Nos. 466, 467. SAME *v.* GEORGE E. KEITH;

Nos. 468, 469. SAME *v.* MARY O. CORDINGLY; and

Nos. 470, 471. SAME *v.* F. LOTHROP AMES. October 21, 1918. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert M. Morse, Mr. Julien T. Davies* and *Mr. John R. Lazenby* for petitioner. *Mr. Moorfield Storey, Mr. Robert G. Dodge* and *Mr. Edwin H. Abbot, Jr.*, for respondents.

No. 477. STANLEY POLLUCK *v.* MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY. October 21, 1918. Petition

for a writ of certiorari to the Supreme Court of the State of South Dakota denied. *Mr. Humphrey Barton* for petitioner. *Mr. F. M. Miner* and *Mr. W. H. Bremner* for respondent.

No. 478. BLACK MOUNTAIN RAILWAY COMPANY *v.* LEONA MUMPOWER, ADMINISTRATRIX, ETC. October 21, 1918. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Murray Allen* and *Mr. J. W. Pless* for petitioner. *Mr. A. Hall Johnston* for respondent.

No. 483. UNION TOOL COMPANY *v.* ELIHU C. WILSON. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. S. Gregory* and *Mr. Frederick S. Lyon* for petitioner. *Mr. D. P. Wolhaupter* for respondent.

No. 484. UNION TOOL COMPANY ET AL. *v.* WILSON & WILLARD MANUFACTURING COMPANY. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. S. Gregory* and *Mr. Frederick S. Lyon* for petitioners. *Mr. D. P. Wolhaupter* for respondent.

No. 488. NEW YORK CENTRAL RAILROAD COMPANY *v.* WILLIAM P. GALLAGHER, AS GUARDIAN OF ANNA L. GEARRITY, ET AL. October 21, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New

York denied. *Mr. Robert E. Whalen* and *Mr. Frank V. Whiting* for petitioner. *Mr. Merton E. Lewis* and *Mr. E. Clarence Aiken* for respondent.

No. 489. GULFPORT TOWING COMPANY, CLAIMANT, ETC., *v.* OLLINGER & BRUCE DRY DOCK COMPANY. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Palmer Pillans* for petitioner. *Mr. Harry T. Smith* for respondent.

No. 490. CLAUDE A. P. TURNER *v.* LAUTER PIANO COMPANY ET AL. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank A. Whiteley* and *Mr. Arthur McGuirk* for petitioner. *Mr. Amasa C. Paul* and *Mr. Edward Rector* for respondents.

No. 495. J. CAREY KING *v.* FRED B. RHODES. October 21, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. William Meyer Lewin* and *Mr. Walter C. Balderston* for petitioner. No appearance for respondent.

No. 503. HERBERT E. EDWARDS *v.* UNITED STATES. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Luther Day* and *Mr. Rufus S. Day* for petitioner. *The Solicitor General* for the United States.

No. 518. LAWRENCE F. CONNOLLY, ADMINISTRATOR, ETC., ET AL. *v.* CELIA DIAMOND ET AL. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles W. Beale* for petitioners. No appearance for respondents.

No. 520. GRAND RAPIDS & INDIANA RAILWAY COMPANY *v.* UNITED STATES. October 21, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James H. Campbell* and *Mr. Frederic D. McKenney* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.

No. 498. HOUSTON OIL COMPANY OF TEXAS ET AL. *v.* STATE OF TEXAS ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas M. Kennerly* and *Mr. H. O. Head* for petitioners. No appearance for respondents.

No. 501. PENNSYLVANIA RAILROAD COMPANY *v.* MARY ELLEN LONG, ADMINISTRATRIX, ETC. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Frederic D. McKenney* and *Mr. John Spalding Flannery* for petitioner. *Mr. A. Leftwich Sinclair* for respondent.

No. 530. NORTH MICHIGAN WATER COMPANY *v.* CITY OF ESCANABA ET AL. October 28, 1918. Petition for a

writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Arthur H. Ryall* and *Mr. John E. Tracy* for petitioner. *Mr. Alfred Lucking* for respondents.

No. 533. GEE WOE *v.* UNITED STATES. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. *Mr. Assistant to the Attorney General Todd* and *Mr. Assistant Attorney General Porter* for the United States.

No. 535. LOUIS A. MEYRAN *v.* J. H. WATT, TRUSTEE IN BANKRUPTCY OF H. M. LASKER & COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Macrum* for petitioner. No appearance for respondent.

No. 550. UNION SAVINGS BANK & TRUST COMPANY OF CINCINNATI, TRUSTEE, *v.* GEORGE FEICK ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmund B. King* and *Mr. Malcolm McAvoy* for petitioner. *Mr. H. L. Peeke* for respondents.

No. 552. RIVER SAND & GRAVEL COMPANY *v.* BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, CLAIMANT, ETC., ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Fifth Circuit denied. *Mr. John D. Grace* and *Mr. Frederick S. Tyler* for petitioner. No appearance for respondents.

No. 555. JESSIE G. DARROW *v.* POSTAL TELEGRAPH-CABLE COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank W. Hackett* and *Mr. Paul J. Sherwood* for petitioner. *Mr. Henry A. Knapp* for respondent.

No. 557. CHARLES W. MAYER *v.* A. AND H. G. MUTSCHLER ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin Clark*, *Mr. Eugene L. Dominick* and *Mr. John F. Ryan* for petitioner. *Mr. G. Willard Rich* for respondents.

No. 562. NEWTON MIDKIFF *v.* SABIN W. COLTON, JR., ET AL., TRUSTEES, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Maynard F. Stiles* for petitioner. No appearance for respondents.

No. 570. HARLEY-DAVIDSON MOTOR COMPANY ET AL. *v.* FREDERICK S. ELLETT ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Hayward Fairbanks* and *Mr. William S. Hodges* for petitioners. *Mr. Charles L. Sturtevant* and *Mr. Archibald Cox* for respondents.

No. 573. Louis Malvin et al. *v.* United States. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Marshall* for petitioners. No brief for the United States.

Nos. 574, 575. David H. E. Jones et al., Co-Partners, etc., et al. *v.* United States upon the Relation of Pressprich & Son Company. October 28, 1918. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick M. Brown* for petitioners. *Mr. A. Leo Everett* for respondent.

No. 579. Martha E. Whitaker, Individually and as Executrix, etc., *v.* Whitaker Iron Company et al. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Eugene Sweeney* and *Mr. Henry A. Braun, Jr.*, for petitioner. No appearance for respondents.

No. 582. Clarence P. Browning *v.* Fidelity Trust Company. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Trowbridge Tittmann* and *Mr. Roger Hinds* for petitioner. *Mr. Robert H. McCarter* for respondent.

No. 583. State of Ohio on the Relation of The Hartford Life Insurance Company *v.* Robert H. Langdale et al. October 28, 1918. Petition for a writ of

certiorari to the Supreme Court of the State of Ohio denied. *Mr. Harry B. Arnold, Mr. James C. Jones, Mr. George F. Haid* and *Mr. James C. Jones, Jr.*, for petitioner. *Mr. Smith W. Bennett* for respondents.

No. 586. NELLIE HODGE, AS ADMINISTRATRIX, ETC., ET AL. *v.* ARTHUR L. MEYER ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jules Chopak* and *Mr. Walter Carroll Low* for petitioners. *Mr. Howard Taylor, Mr. Philip W. Russell* and *Mr. Roy C. Gasser* for respondents.

No. 587. ERNEST G. WALKER *v.* GENEVIEVE K. GISH. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. S. Herbert Giesy* for petitioner. *Mr. Henry F. Woodard* for respondent.

No. 588. REICHERT TOWING LINE, INC., *v.* HOME INSURANCE COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis Martin* for petitioner. *Mr. Pierre M. Brown, Mr. Samuel Park* and *Mr. Henry E. Mattison* for respondents.

No. 589. REICHERT TOWING LINE, INC., *v.* JACOB RICE. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Francis Martin for petitioner. *Mr. Pierre M. Brown*, *Mr. Samuel Park* and *Mr. Henry E. Mattison* for respondent.

No. 590. WILLIAM SNYDER *v.* ANNIE SNYDER, USE OF WILLIAM L. HUNT. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. James B. Reilly* for petitioner. *Mr. R. W. Bishop* for respondent.

No. 593. PENNSLYVANIA RAILROAD COMPANY ET AL. *v.* NAAM LOOZE VENNOOT SCHAP ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioners. *Mr. J. Parker Kirlin*, *Mr. Albert C. Ritchie* and *Mr. John M. Woolsey* for respondents.

No. 594. PENNSYLVANIA RAILROAD COMPANY ET AL. *v.* EDWIN DYASON, MASTER, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioners. *Mr. James K. Symmers* for respondent.

No. 596. CLAUDE A. P. TURNER *v.* DEERE & WEBBER BUILDING COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank A. Whiteley* and

Mr. Arthur McGuirk for petitioner. *Mr. Amasa C. Paul* and *Mr. Edward Rector* for respondents.

No. 600. Frank W. Darling *v.* City of Newport News. Error to the Supreme Court of Appeals of the State of Virginia. October 28, 1918. Petition for a writ of certiorari herein denied. *Mr. John Winston Read* and *Mr. Maryus Jones*, for plaintiff in error, in support of the petition. *Mr. John A. Massie*, for defendant in error, in opposition to the petition.

No. 601. Pacific Mail Steamship Company *v.* Panama Railroad Company. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for petitioner. *Mr. Richard Reid Rogers* for respondent.

No. 602. A. C. Robinson, Trustee, etc., *v.* Seaboard National Bank of New York. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Alvin A. Morris*, *Mr. Samuel McClay*, *Mr. Thomas Patterson* and *Mr. J. Merrill Wright* for petitioner. *Mr. Herman Aaron* and *Mr. M. W. Acheson, Jr.*, for respondent.

No. 603. A. C. Robinson, Trustee, etc., *v.* J. H. Purdy. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit

denied. *Mr. Alvin A. Morris, Mr. Samuel McClay, Mr. Thomas Patterson* and *Mr. J. Merrill Wright* for petitioner. *Mr. Herman Aaron* and *Mr. M. W. Acheson, Jr.*, for respondent.

No. 604. A. C. ROBINSON, TRUSTEE, ETC., *v.* EDWARD W. HUTCHINS ET AL., TRUSTEES, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Alvin A. Morris, Mr. Samuel McClay, Mr. Thomas Patterson* and *Mr. J. Merrill Wright* for petitioner. *Mr. Herman Aaron* and *Mr. M. W. Acheson, Jr.*, for respondents.

No. 605. GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* MT. CLEMENS SUGAR COMPANY. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Harrison Geer* for petitioner. *Mr. Thomas A. E. Weadock* and *Mr. John C. Weadock* for respondent.

No. 610. PAUL WIERSE ET AL. *v.* UNITED STATES. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frank J. Hogan* for petitioner. No brief for the United States.

No. 612. R. MCCULLOCH DICK *v.* ANTON HOHMANN, ACTING CHIEF OF POLICE OF MANILA. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. W. A. Kincaid, Mr.*

Alexander Britton and *Mr. Evans Browne* for petitioner. *Mr. Edward S. Bailey* for respondent.

No. 613. MONTEZUMA VALLEY IRRIGATION DISTRICT ET AL. *v.* MARK NORRIS ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. B. W. Ritter* for petitioners. *Mr. Mark Norris, Mr. Clyde C. Dawson, Mr. Fred R. Wright* and *Mr. Charles D. Hayt* for respondents.

Nos. 621, 622. JOHN A. S. BROWN ET AL. *v.* AUSTIN B. FLETCHER, TESTAMENTARY TRUSTEE, ETC., ET AL. October 28, 1918. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Burr* and *Mr. Monroe Buckley* for petitioners. *Mr. Selden Bacon* and *Mr. Austin B. Fletcher* for respondents.

No. 623. TOLEDO & OHIO CENTRAL RAILWAY COMPANY *v.* S. J. KIBLER & BROTHERS COMPANY. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. John H. Doyle* and *Mr. Frederick W. Gaines* for petitioner. *Mr. C. E. McBride* for respondent.

No. 626. BALTIMORE & OHIO RAILROAD COMPANY *v.* JOHN E. FUTHEY ET AL. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District, State of Ohio, denied. *Mr. S. H. Tolles* for petitioner. No appearance for respondents.

No. 627. TERESA O. DE PREVOST *v.* ROBERT A. YOUNG. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frank W. Hackett* for petitioner. *Mr. Frederick de C. Faust, Mr. Charles F. Wilson* and *Mr. George Kearney* for respondent.

No. 629. B. F. WERTZ *v.* DAVID ROSS. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. D. M. Tibbetts* for petitioner. No appearance for respondent.

No. 630. J. W. FERGUSON ET AL. *v.* BABCOCK LUMBER & LAND COMPANY. Appeal from the Circuit Court of Appeals for the Fourth Circuit. October 28, 1918. Petition for a writ of certiorari herein denied. *Mr. Mark W. Brown* and *Mr. F. A. Sondley,* for appellants, in support of the petition. *Mr. John Franklin Shields* and *Mr. A. Hall Johnston,* for appellee, in opposition to the petition. See *ante,* 540.

No. 631. JACOB LANDES, ETC., *v.* PAUL KLOPSTOCK, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernest A. Bigelow* for petitioner. *Mr. Arthur Mayer* for respondent.

No. 632. LOUIS LIEBMAN ET AL. *v.* PAUL KLOPSTOCK, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Mr. Ernest A. Bigelow* for petitioners. *Mr. Arthur Mayer* for respondent.

No. 640. LIFE PRESERVER SUIT COMPANY, INC., *v.* NATIONAL LIFE PRESERVER COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward E. McCall* for petitioner. *Mr. W. Bourke Cockran* for respondents.

No. 643. JOSEPH COHEN *v.* PEOPLE OF THE STATE OF NEW YORK. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Frank Moss* and *Mr. Samuel Marcus* for petitioner. *Mr. Merton E. Lewis* and *Mr. Alfred L. Becker* for respondent.

No. 645. NEW ORLEANS, MOBILE & CHICAGO RAILROAD COMPANY *v.* HILL MANUFACTURING COMPANY. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. James N. Flowers* and *Mr. Joseph C. Rich* for petitioner. *Mr. Francis S. Laws* for respondent.

No. 646. SAMUEL J. ROSENTHAL ET AL. *v.* UNITED STATES. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles B. Stafford* for petitioners. No brief for the United States.

No. 647. NEW YORK CENTRAL RAILROAD COMPANY *v.* KATHRYN G. KIMBALL, ADMINISTRATRIX, ETC. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Frederic D. McKenney* and *Mr. Maurice C. Spratt* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 651. PAUL H. KING ET AL., RECEIVERS, ETC., *v.* EDWIN L. BOYD. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Henry E. Bodman* and *Mr. John C. Shields* for petitioners. *Mr. Benn M. Corwin* for respondent.

No. 654. ERIE RAILROAD COMPANY *v.* WILLIAM H. MAHLA. October 28, 1918. Petition for a writ of certiorari to the Court of Appeals of Richland County, State of Ohio, denied. *Mr. C. E. McBride, Mr. N. M. Wolfe* and *Mr. J. Paul Lamb* for petitioner. *Mr. C. H. Henkel* for respondent.

No. 655. LA CROSSE PLOW COMPANY *v.* LOUIS PAGENSTECHER. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles W. Bunn* for petitioner. *Mr. Wm. F. Gurley* for respondent.

No. 657. CAMP BROTHERS & COMPANY *v.* PORTABLE WAGON DUMP & ELEVATOR COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. Albert H. Graves* for petitioner. *Mr. H. H. Bliss* for respondent.

No. 660. SOUTHERN PACIFIC COMPANY, CLAIMANT, ETC., ET AL., *v.* STAG LINE, LIMITED, CLAIMANT, ETC. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Parker Kirlin* for petitioners. *Mr. William B. Lockhart* for respondent.

No. 662. ALASKA STEAMSHIP COMPANY *v.* NATIONAL CARBON COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harrison Gray Platt, Mr. Henry Crofut White* and *Mr. Robert Treat Platt* for petitioner. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for respondent.

No. 665. BOSTON & ALBANY RAILROAD COMPANY *v.* CHARLES J. BJORNQUIST, BY HIS NEXT FRIEND, ALFRED WIGGIN. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Lowell A. Mayberry* for petitioner. *Mr. Bernard J. Killion* and *Mr. Charles Toye* for respondent.

No. 668. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* PHILIP S. CRAIG ET AL., EXECUTORS, ETC. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

Mr. Charles N. Burch and *Mr. H. D. Minor* for petitioners. No appearance for respondents.

No. 672. STATE INDUSTRIAL COMMISSION OF THE STATE OF NEW YORK *v.* CLARENCE P. HOWLAND COMPANY, INC., ET AL. October 28, 1918. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied. *Mr. E. Clarence Aiken* and *Mr. Merton E. Lewis* for petitioner. *Mr. Andrew J. Nellis* for respondents.

No. 673. STATE INDUSTRIAL COMMISSION OF THE STATE OF NEW YORK *v.* JOHNSON LIGHTERAGE COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied. *Mr. E. Clarence Aiken* and *Mr. Merton E. Lewis* for petitioner. No appearance for respondents.

No. 674. STATE INDUSTRIAL COMMISSION OF THE STATE OF NEW YORK *v.* ROCK PLASTER MANUFACTURING COMPANY ET AL. October 28, 1918. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied. *Mr. E. Clarence Aiken* and *Mr. Merton E. Lewis* for petitioner. No appearance for respondents.

No. 676. CHARLES W. RICE *v.* UNITED STATES. October 28, 1918. Petition for a writ of certiorari to the

Circuit Court of Appeals for the First Circuit denied. *Mr. William Shaw McCallum* for petitioner. No brief for the United States.

No. 680. LOUISA B. SCHNEIDER ET AL. *v.* CITY OF NEW YORK ET AL. October 28, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Charles P. Brown* and *Mr. Merle I. St. John* for petitioners. *Mr. William P. Burr* for respondents.

No. 702. DORA FINLEY *v.* MARY E. HALLIBURTON. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elmer L. Fulton* for petitioner. *Mr. J. H. Everest* for respondents.

No. 705. DULUTH STEAMSHIP COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY. October 28, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harvey D. Goulder*, *Mr. Thomas H. Garry* and *Mr. Chauncey C. Colton* for petitioner. No appearance for respondent.

No. 457. ZANESVILLE & WESTERN RAILWAY COMPANY *v.* CHARLES E. WILLIAMS, ADMINISTRATOR, ETC. See *ante*, 533.

No. 523. WESTERN UNION TELEGRAPH COMPANY *v.* ATLANTA & WEST POINT RAILROAD COMPANY. Appeal

from the Circuit Court of Appeals for the Fifth Circuit. November 4, 1918. Petition for a writ of certiorari herein denied. *Mr. William L. Clay* and *Mr. Rush Taggart*, for appellant, in support of the petition. *Mr. Sanders McDaniel* and *Mr. Leon Weil*, for appellee, in opposition to the petition. See *ante*, 535.

No. 524. WESTERN UNION TELEGRAPH COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. Appeal from the Circuit Court of Appeals for the Fifth Circuit. November 4, 1918. Petition for a writ of certiorari herein denied. *Mr. William L. Clay* and *Mr. Rush Taggart*, for appellant, in support of the petition. *Mr. Henry L. Stone* and *Mr. Henry C. Peeples*, for appellee, in opposition to the petition. See *ante*, 532.

No. 525. WESTERN UNION TELEGRAPH COMPANY *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY. Appeal from the Circuit Court of Appeals for the Fifth Circuit. November 4, 1918. Petition for a writ of certiorari herein denied. *Mr. William L. Clay* and *Mr. Rush Taggart*, for appellant, in support of the petition. *Mr. Henry C. Peeples* and *Mr. Claude Waller*, for the appellee, in opposition to the petition. See *ante*, 542.

No. 558. WESTERN UNION TELEGRAPH COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. November 4, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Adolphus Edward Richards*, *Mr. A. P. Humphrey* and *Mr. Rush*

Taggart for petitioner. *Mr. Henry L. Stone* and *Mr. Helm Bruce* for respondent.

No. 624. CUDAHY PACKING COMPANY *v.* WILLIAM K. BIXBY ET AL., RECEIVERS, ETC. November 4, 1918. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied. *Mr. George T. Buckingham* and *Mr. Charles T. Tittmann* for petitioner. *Mr. James L. Minnis* for respondents.

No. 648. LOUISIANA NAVIGATION COMPANY *v.* OYSTER COMMISSION OF LOUISIANA ET AL. November 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. J. C. Gilmore, Mr. Thomas Gilmore* and *Mr. Edward Nicholls Pugh* for petitioner. No appearance for respondents.

No. 683. STATE OF LOUISIANA *v.* NEW ORLEANS LAND COMPANY. November 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. William Winans Wall, Mr. James Clarke Henriques* and *Mr. I. D. Moore* for petitioner. *Mr. Charles Louque* and *Mr. W. O. Hart* for respondent.

No. 678. S. T. HILLS, AS TRUSTEE, ETC., *v.* C. D. STIMSON COMPANY. November 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Cassius E. Gates* for petitioner. No appearance for respondent.

Nos. 686, 687. MAURICE SUGAR *v.* UNITED STATES. November 4, 1918. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Willis G. Clark* for petitioner. *Mr. Assistant to the Attorney General Todd, Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

No. 703. SAMUEL R. MAYNARD *v.* MATT G. REYNOLDS ET AL., ETC. November 4, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. O. H. Dean, Mr. H. M. Langworthy* and *Mr. Roy B. Thomson* for petitioner. No appearance for respondents.

No. 717. DRUSA STURM ET AL. *v.* JOHN S. STUMP ET AL. November 4, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. E. Haymond* for petitioners. No appearance for respondents.

No. 692. ALTHEIMER & RAWLINGS INVESTMENT COMPANY *v.* E. B. ALLEN, U. S. COLLECTOR OF INTERNAL REVENUE. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. David Goldsmith* for petitioner. *Mr. Assistant to the Attorney General Todd* and *Mr. W. C. Herron* for respondent.

No. 709. JAMES F. BISHOP, ADMINISTRATOR, ETC., *v.* GREAT LAKES TOWING COMPANY. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. Harry W. Standidge* for petitioner. *Mr. Harvey D. Goulder, Mr. Thomas H. Garry, Mr. James H. Wilkerson* and *Mr. Edwin H. Cassels* for respondent.

No. 710. Pittsburgh Coal Company of Illinois *v.* Great Lakes Towing Company. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harrison Musgrave* and *Mr. William S. Oppenheim* for petitioner. *Mr. Harvey D. Goulder, Mr. Thomas H. Garry, Mr. James H. Wilkerson* and *Mr. Edwin H. Cassels* for respondent.

No. 726. Northwestern Electric Equipment Company *v.* Benjamin Electric Manufacturing Company. November 11, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick W. Winter* for petitioner. *Mr. W. Clyde Jones* for respondent.

No. 713. Brennan Construction Company *v.* John L. Newbold. November 18, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George E. Sullivan* and *Mr. John J. Hamilton* for petitioner. No appearance for respondent.

No. 720. Thomas J. Mooney *v.* People of the State of California. November 18, 1918. Petition for a writ

of certiorari to the Supreme Court of the State of California denied. *Mr. Maxwell McNutt* for petitioner. *Mr. C. M. Fickert* for respondent.

No. 723. WILLIAM WRIGLEY, JR., COMPANY *v.* L. P. LARSON, JR., COMPANY. November 25, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert H. Parkinson, Mr. Isaac H. Mayer* and *Mr. Wallace R. Lane* for petitioner. *Mr. Charles H. Aldrich* and *Mr. Frank F. Reed* for respondent.

No. 545. CHESAPEAKE & OHIO RAILWAY COMPANY *v.* UNITED STATES. December 9, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Galvin* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 546. CHESAPEAKE & OHIO RAILWAY COMPANY *v.* UNITED STATES. December 9, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Galvin* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 707. HELEN WELCH *v.* JOHN A. DANIELS, GUARDIAN, ETC., ET AL. December 9, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Eugene S. Quinton, Mr. A. B. Quinton* and *Mr. George D. Rodgers* for petitioner. No appearance for respondents.

No. 725. MONROE BUILDING COMPANY ET AL. *v.* FRANK LAWHEAD, TRUSTEE, ETC. December 9, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harrison Geer* and *Mr. Max Kahn* for petitioners. *Mr. George E. Brand* for respondent.

Nos. 742, 743. JOHN J. SHEA *v.* UNITED STATES. December 16, 1918. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmund H. Moore, Mr. Sherman T. McPherson* and *Mr. Edward P. Moulinier* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Porter* for the United States.

No. 747. HENRY C. HALL, ADMINISTRATOR, ETC., *v.* WILLIAM A. PAINE ET AL. December 16, 1918. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. William R. Sears* for petitioner. *Mr. Robert M. Morse* and *Mr. William P. Everts* for respondents.

No. 749. NELS O. HULTBERG *v.* FRIDEBORG A. ANDERSON. December 16, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Silas H. Strawn* and *Mr. Harris F. Williams* for petitioner. *Mr. Charles Blood Smith, Mr. Axel Chytraus, Mr. John J. Healy* and *Mr. E. Allen Frost* for respondent.

No. 750. *Ex parte:* IN THE MATTER OF CLOYD H. DUNCAN. December 16, 1918. Petition for a writ of certiorari

to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cloyd H. Duncan pro se.*

No. 769. RICHLAND STEAMSHIP COMPANY *v.* BUFFALO DRY DOCK COMPANY. December 16, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harvey D. Goulder* and *Mr. Thomas H. Garry* for petitioner. *Mr. Thomas C. Burke, Mr. Hermon A. Kelley* and *Mr. George W. Cottrell* for respondent.

No. 522. OKLAHOMA CITY MILL & ELEVATOR COMPANY *v.* PAMPA GRAIN COMPANY. December 23, 1918. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph W. Bailey* for petitioner. No appearance for respondent.

No. 537. HENRY A. WISE, TRUSTEE, ET AL., *v.* COMMONWEALTH OF VIRGINIA ET AL. December 23, 1918. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Henry A. Wise* for petitioners. *Mr. J. D. Hank, Jr.*, for respondents.

No. 753. SAM ORR TRIBBLE *v.* SOUTHERN EXPRESS COMPANY. December 23, 1918. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. Ernest F. Cochran* for petitioner. *Mr. Robert C. Alston* for respondent.

No. 109. ILLINOIS CENTRAL RAILROAD COMPANY ET AL. *v.* L. A. ANDERSON. See *ante*, 546.

No. 752. JOSEPH P. O'TOOLE ET AL. *v.* ROBERT L. MEYSENBURG ET AL. January 7, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Marion C. Early* for petitioners. No appearance for respondents.

No. 762. CHARLES FAISON ET AL. *v.* FORREST ADAIR ET AL. January 7, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied. *Mr. Samuel A. T. Watkins* and *Mr. James E. White* for petitioners. *Mr. W. H. Terrell* for respondents.

No. 771. JAMES S. YEATES *v.* UNITED STATES. January 7, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Randolph Cooper* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

No. 772. CHARLES T. WILLIAMS *v.* UNITED STATES. January 7, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Randolph Cooper* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

No. 773. PONTIAC, OXFORD & NORTHERN RAILROAD COMPANY ET AL. *v.* MICHIGAN RAILROAD COMMISSION ET AL. January 7, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Harrison Geer* for petitioners. *Mr. Alexander J. Groesbeck* for respondents.

No. 781. BOSCH MAGNETO COMPANY *v.* SAMUEL W. RUSHMORE. January 7, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abram I. Elkus* for petitioner. *Mr. George C. Dean* and *Mr. Irving M. Obreight* for respondent.

No. 531. J. H. REEVES, TRUSTEE, ETC., *v.* YORK ENGINEERING & SUPPLY COMPANY. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith, Mr. J. A. L. Wolfe* and *Mr. J. D. Williamson* for petitioner. *Mr. N. C. Abbott* for respondent.

No. 650. DAVID F. MITCHELL *v.* HARRY MASON ET AL. January 13, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied. *Mr. David F. Mitchell pro se. Mr. Alexander St. Clair-Abrams* for respondents.

No. 754. JOSEPH A. MURRAY *v.* H. E. RAY, AS TRUSTEE, ETC. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Rufus C. Thayer* for petitioner. *Mr. J. H. Peterson* for respondent.

No. 770. ELBRIDGE HANECY *v.* JAMES W. TAYLOR, TRUSTEE, ETC. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elbridge Hanecy pro se. Mr. Alvin H. Culver* for respondent.

No. 783. OLOF N. TEVANDER ET AL. *v.* ELEANOR M. RUYSDAEL. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Silas H. Strawn* and *Mr. Edward W. Everett* for petitioners. *Mr. Albert Fink* for respondent.

No. 785. SARAH BRESSLER *v.* MARY C. LUDWIG ET AL. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Vinton Pike* for petitioner. *Mr. H. C. Brome* for respondents.

No. 786. WESTERN UNION TELEGRAPH COMPANY *v.* MARY E. PRESTON. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. B. Linn* and *Mr. H. B. Gill* for petitioner. No appearance for respondent.

No. 792. ALBERT J. GALEN *v.* UNITED STATES. January 13, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles Donnelly, Mr. M. S. Gunn* and *Mr. William Wallace, Jr.*, for petitioner. *The Solicitor General* for the United States.

No. 780. MICHAEL PEYSER *v.* ELIZABETH J. GRAUTEN. January 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Maurice B. Gluck* for petitioner. *Mr. Walter B. Milkman* and *Mr. William J. Hughes* for respondent.

No. 410. GIN DOCK SUE *v.* UNITED STATES. January 20, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Mr. Assistant to the Attorney General Todd* and *Mr. Assistant Attorney General Porter* for the United States.

No. 787. METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE, ETC., *v.* CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY ET AL. January 27, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Royall Victor, Mr. Charles E. Hughes, Mr. Brode B. Davis* and *Mr. Frank H. Scott* for petitioner. *Mr. John S. Miller, Mr. George Welwood Murray, Mr. Arthur H. Van Brunt* and *Mr. Roberts Walker* for respondents.

No. 794. ALBERT LE MORE ET AL. *v.* UNITED STATES. January 27, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charlton R. Beattie* and *Mr. George Wesley Smith* for petitioners. *The Solicitor General* for the United States.

No. 800. GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN *v.* SALLIE ANN GROVES. January 27, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry P. Blair* for petitioner. *Mr. W. Gwynn Gardiner* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 7, 1918, TO MARCH 3, 1919.

No. 236. UNITED STATES *v.* FEDERAL PUBLISHING COMPANY; and

No. 237. UNITED STATES *v.* BUTTERICK COMPANY. Error to the District Court of the United States for the Southern District of New York. October 8, 1918. Dismissed, on motion of *Mr. Assistant to the Attorney General Todd* for the United States. *Mr. Herbert Noble* for defendants in error.

No. 693. BRUNSWICK-BALKE-COLLENDER COMPANY *v.* WALTER H. EVANS ET AL. Appeal from the District Court of the United States for the District of Oregon. October 8, 1918. Docketed and dismissed with costs, on motion of *Mr. Frederick S. Tyler* for appellees. *Mr. Lawrence A. McNary* for appellees. No one opposing.

No. 5. INTERNATIONAL HARVESTER COMPANY OF NEW JERSEY ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the District of Minnesota. October 21, 1918. Dismissed, on motion of

counsel for appellants. *Mr. John P. Wilson, Mr. Edgar A. Bancroft, Mr. William D. McHugh* and *Mr. Philip S. Post* for appellants. *The Attorney General, The Solicitor General, Mr. Assistant to the Attorney General Todd* and *Mr. Thurlow M. Gordon* for the United States.

No. 39. JOSEPH HOLT ET AL. *v.* SUPREME LODGE, KNIGHTS OF PYTHIAS. Appeal from the Circuit Court of Appeals for the Seventh Circuit. October 21, 1918. Dismissed with costs, on motion of counsel for appellants. *Mr. Elmer H. Adams, Mr. Henry L. Lazarus* and *Mr. David Sessler* for appellants. *Mr. Sol H. Esarey* for appellee.

No. 103. ANN ARBOR RAILROAD COMPANY *v.* CASSIUS L. GLASGOW ET AL. Appeal from the District Court of the United States for the Eastern District of Michigan. October 21, 1918. Dismissed without costs to either party, per stipulation. *Mr. Alexander L. Smith, Mr. Joseph B. Cotton* and *Mr. Chauncey C. Colton* for appellant. *Mr. Grant Fellows* for appellees.

No. 110. NORFOLK SOUTHERN RAILROAD COMPANY *v.* WILLIAM L. WHITEHURST. Error to the Supreme Court of Appeals of the State of Virginia. October 21, 1918. Dismissed, each party to pay their own costs, per stipulation. *Mr. James G. Martin* for plaintiff in error. *Mr. Sigmund M. Brandt* for defendant in error.

No. 140. ARTHUR A. BONVILLAIN *v.* H. B. HOWELL, TRUSTEE, ETC. Certiorari to the Circuit Court of Appeals

for the Fifth Circuit. October 21, 1918. Dismissed with costs, per stipulation. *Mr. H. Generes Dufour* for petitioner. *Mr. E. A. O'Sullivan* for respondent.

No. 133. H. S. McGowan et al. *v.* Eagle Cliff Fishing Company. Error to the Supreme Court of the State of Oregon. October 21, 1918. Dismissed without costs to either party, per stipulation. *Mr. Franklin T. Griffith* and *Mr. Bert W. Henry* for plaintiffs in error. *Mr. G. C. Fulton* and *Mr. C. W. Fulton* for defendant in error.

No. 257. Ada T. Cushing, Executrix, etc., *v.* John H. Whaley et al. Error to the Supreme Court of the State of Oklahoma. October 21, 1918. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. D. M. Tibbetts* for plaintiff in error. No appearance for defendants in error.

No. 9. Original. State of Missouri *v.* Chicago, Burlington & Quincy Railroad Company. In equity. Stipulation for judgment submitted October 14, 1918. October 28, 1918. Judgment entered as per stipulation of counsel. *Mr. John T. Barker, Mr. Frank W. McAllister, Mr. Lee B. Ewing* and *Mr. W. T. Rutherford* for complainant. *Mr. Frank Hagerman, Mr. O. M. Spencer* and *Mr. Chester M. Dawes* for defendant. *Mr. C. B. Allen, Mr. W. T. Allen, Mr. F. W. Paschal, Mr. Ernest E. Watson* and *Mr. Herbert A. Abernethy,* by leave of court, filed briefs as *amici curiæ.*

No. 376. William B. Bales *v.* United States. Error to the District Court of the United States for the Southern

District of New York. October 28, 1918. Judgment reversed upon confession of error; and cause remanded for further proceedings, on motion of *Mr. Assistant to the Attorney General Todd* for the United States. *Mr. Harry Weinberger* for plaintiff in error.

No. 421. CAMP BIRD, LIMITED, *v.* FRANK W. HOWBERT, AS COLLECTOR, ETC. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 28, 1918. Judgment reversed with costs upon confession of error; and cause remanded for further proceedings, on motion of *Mr. Assistant to the Attorney General Todd* for respondent. *Mr. William V. Hodges* and *Mr. George L. Nye* for petitioner.

No. 719. CLARENCE W. TURNER ET AL. *v.* OLD HOMESTEAD COMPANY ET AL. Error to the Supreme Court of the State of Oklahoma. October 28, 1918. Docketed and dismissed with costs, on motion of *Mr. John J. Shea* for defendants in error. *Mr. Richard W. Stoutz* and *Mr. John J. Shea* for defendants in error. No one opposing.

No. 34. SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* CITY OF DALLAS, TEXAS. Error to the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas. October 28, 1918. Dismissed per stipulation. *Mr. A. P. Wozencraft* and *Mr. S. P. English* for plaintiff in error. *Mr. Horace Chilton* and *Mr. Royall R. Watkins* for defendant in error.

No. 12. STEPHEN W. ALLEN ET AL. *v.* J. F. TRIMMER, AS TREASURER, ETC. Error to the Supreme Court of the

State of Oklahoma. November 7, 1918. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. S. P. Freeling* for defendant in error. *Mr. Albert Rennie* for plaintiffs in error.

No. 30. METROPOLITAN STATE BANK *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. November 11, 1918. Dismissed with costs, pursuant to the nineteenth rule. *Mr. Philip J. McKenna* and *Mr. Howard F. Bishop* for plaintiff in error. *Mr. Edward J. Brundage* and *Mr. James H. Wilkerson* for defendant in error.

No. 32. FRANCIS A. CHURCHILL ET AL., CO-PARTNERS, UNDER THE FIRM NAME OF THE MERCANTILE ADVERTISING AGENCY, *v.* JAMES F. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE OF THE PHILIPPINE ISLANDS. Appeal from and in error to the Supreme Court of the Philippine Islands. November 11, 1918. Dismissed with costs, pursuant to the nineteenth rule. *Mr. E. Allen Frost* for appellants and plaintiffs in error. *Mr. Samuel T. Ansell* for appellee and defendant in error.

No. 48. ATLANTIC COAST LINE RAILROAD COMPANY *v.* A. M. KEELS. Error to the Supreme Court of the State of South Carolina. November 15, 1918. Dismissed with costs, on motion of *Mr. Frederic D. McKenney*, of counsel for plaintiff in error. *Mr. P. A. Willcox* for plaintiff in error. *Mr. A. M. Lumpkin* for defendant in error.

No. 55. PAUL APPENZELLAR *v.* HENRY C. CONRAD, ASSOCIATE JUDGE, ETC., ET AL. Error to the Supreme

Court of the State of Delaware. November 18, 1918. Dismissed with costs, per stipulation. *Mr. Josiah Marvel* and *Mr. David T. Marvel* for plaintiff in error. *Mr. J. J. Darlington* and *Mr. Robert H. Richards* for defendants in error.

No. 229. CLEVELAND-CLIFFS IRON COMPANY *v.* TOWNSHIP OF REPUBLIC. Error to the Supreme Court of the State of Michigan. November 18, 1918. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. William P. Belden* for plaintiff in error. No appearance for defendant in error.

No. 57. JOSEPH FENSTERWALD *v.* SELMA R. BURK. Error to the Court of Appeals of the State of Maryland. November 19, 1918. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. J. Kent Rawley* for defendant in error. *Mr. Samuel Want* for plaintiff in error. *Mr. J. Kent Rawley* and *Mr. Edward M. Hammond* for defendant in error.

No. 71. NEW ORLEANS, MOBILE & CHICAGO RAILROAD COMPANY *v.* T. E. MCCARDLE ET AL. Error to the Supreme Court of the State of Mississippi. November 20, 1918. Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. James N. Flowers* for plaintiff in error. No appearance for defendant in error.

No. 517. I. F. SEARLE ET AL. *v.* MECHANICS LOAN & TRUST COMPANY ET AL. December 9, 1918. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit; dismissed, on motion of counsel for petitioners. *Mr. Elmer H. Adams* and *Mr. Reese H. Voorhees* for petitioners. *Mr. F. T. Post* for respondents.

No. 16. UNITED STATES *v.* E. W. BLISS COMPANY. Appeal from the Circuit Court of Appeals for the Second Circuit. November 20, 1918. Dismissed on motion of *Mr. Assistant to the Attorney General Todd* for the United States. *Mr. Frank H. Platt* and *Mr. Eli J. Blair* for appellee.

No. 320. EMANUAL BALTZER ET AL. *v.* UNITED STATES. Error to the District Court of the United States for the District of South Dakota. December 16, 1918. Judgment reversed, upon confession of error; and cause remanded for further proceedings in accordance with law, on motion of *The Solicitor General* for the United States. *Mr. Joe Kirby* and *Mr. William C. Rempfer* for plaintiffs in error.

No. 321. WILLIAM J. HEAD *v.* UNITED STATES. Error to the District Court of the United States for the District of South Dakota. December 16, 1918. Judgment reversed, upon confession of error; and cause remanded for further proceedings in accordance with law, on motion of *The Solicitor General* for the United States. *Mr. Joe Kirby* and *Mr. William C. Rempfer* for plaintiff in error.

No. 88. D. W. ROUSNEY *v.* M. L. PATTERSON. Error to the Supreme Court of the State of Oklahoma. De-

cember 16, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Milton Brown* for plaintiff in error. No appearance for defendant in error.

No. 81. TRUTH A. MILNER, EXECUTRIX, ETC., ET AL., *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Eighth Circuit. December 16, 1918. Dismissed, pursuant to the sixteenth rule, on motion of *Mr. Assistant Attorney General Kearful* for the United States. *Mr. Adrian C. Ellis, Jr.*, and *Mr. William C. Prentiss* for appellants.

No. 91. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* D. A. MCNEILL, AS ADMINISTRATOR OF W. G. MCNEILL, DECEASED. Error to the Supreme Court of the State of Mississippi. December 17, 1918. Dismissed with costs, on authority of plaintiffs in error. *Mr. Edward Mayes, Mr. Charles N. Burch, Mr. Robert L. McLaurin, Mr. Robert B. Mayes* and *Mr. H. D. Minor* for plaintiffs in error. *Mr. John B. Brunini* for defendant in error.

No. 548. CONRAD KORNMANN *v.* UNITED STATES. Error to the District Court of the United States for the District of South Dakota. December 23, 1918. Judgment reversed upon confession of error; and cause remanded for further proceedings, on motion of *The Solicitor General* for the United States. *Mr. Joe Kirby* and *Mr. William C. Rempfer* for plaintiff in error.

No. 4. UNITED STATES *v.* HARVEY C. SHAUVER. Error to the District Court of the United States for the Eastern

District of Arkansas. January 7, 1919. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. E. L. Westbrooke* for defendant in error.

No. 122. Bluford Wilson et al., Receivers, etc., *v.* Neal Godby. Error to the Appellate Court for the Second District of the State of Illinois. January 7, 1919. Dismissed per stipulation. *Mr. Henry Lyman Child, Mr. Philip Barton Warren* and *Mr. John M. Elliott* for plaintiffs in error. *Mr. Walter A. Johnston* for defendant in error.

No. 292. Bluefields Steamship Company, Limited, to the Use of Elmer E. Wood, Ancillary Receiver, *v.* United Fruit Company. Error to the Circuit Court of Appeals for the Third Circuit. January 9, 1919. Dismissed per stipulation. *Mr. William L. Hughes* for plaintiff in error. *Mr. Moorfield Storey* and *Mr. Robert G. Dodge* for defendant in error.

No. 150. Southern Pacific Company *v.* California Adjustment Company. Certiorari to the Circuit Court of Appeals for the Ninth Circuit. January 13, 1919. Dismissed with costs, on motion of counsel for petitioner. *Mr. C. W. Durbrow* and *Mr. W. F. Herrin* for petitioner. *Mr. Leon E. Morris* for respondent.

No. 790. Kansas City Railways Company *v.* Frank W. McAllister, Attorney General of Missouri, et

AL. Appeal from the District Court of the United States for the Western District of Missouri. January 13, 1919. Dismissed with costs, on motion of counsel for appellant. *Mr. Frank Hagerman, Mr. Richard J. Higgins* and *Mr. Clyde Taylor* for appellant. No appearance for appellees.

No. 791. KANSAS CITY RAILWAYS COMPANY *v.* FRANK W. MCALLISTER, ATTORNEY GENERAL OF MISSOURI, ET AL. Appeal from the District Court of the United States for the District of Kansas. January 13, 1919. Dismissed with costs, on motion of counsel for appellant. *Mr. Frank Hagerman, Mr. Richard J. Higgins* and *Mr. Clyde Taylor* for appellant. No appearance for appellees.

No. 157. MAGGIE L. LUKENS *v.* INTERNATIONAL LIFE INSURANCE COMPANY. Error to the Supreme Court of the State of Missouri. January 16, 1919. Dismissed per stipulation. *Mr. William C. Scarritt* for plaintiff in error. *Mr. Joseph F. Brooks* and *Mr. Fred A. Boxley* for defendant in error.

No. 190. NORFOLK SOUTHERN RAILROAD COMPANY *v.* W. H. GALLUP ET AL., ETC. Error to the Supreme Court of the State of North Carolina. January 30, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. W. B. Rodman* for plaintiff in error. No appearance for defendants in error.

No. 193. SAVANNAH AND NORTHWESTERN RAILWAY ET AL. *v.* MAGGIE ROACH, ADMINISTRATRIX, ETC. Error

to the Court of Appeals of the State of Georgia. January 30, 1919. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Robert M. Hitch* for plaintiffs in error. No appearance for defendant in error.

No. 527. Carolina Spruce Company *v.* Black Mountain Railway Company. Error to the Supreme Court of the State of Tennessee. February 3, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Robert Burrow* for plaintiff in error. *Mr. John W. Price* for defendant in error.

APPENDIX.

Following, in condensed form, is the argument submitted by *Mr. Everett P. Wheeler* and *Mr. Eliot Tuckerman*, as *amici curiæ*, in the case of *Missouri Pacific Railway Company* v. *State of Kansas*, *ante*, 276, touching the vote requisite in the houses of Congress for submission of amendments to the Constitution. This is inserted as an addendum to the report of that case.

The bill, upon its reconsideration, received one vote less than a two-thirds vote of the potential membership of the Senate; or one-third of one vote less a two-thirds vote of the actual membership of that body. It was presumably declared carried in accordance with the legislative precedent which has grown up in the Congress to the effect that each house is constituted as a "house," within the meaning of the Constitution, when a quorum of the membership is present; and that "two thirds of that house," as mentioned in the Constitution, signifies two-thirds of those voting on the measure. Cong. Globe, July 7, 1856, pp. 1543–1550; Hinds' Precedents, §§ 3537, 3538, note.

It is our contention that this precedent is at variance with the express words and the intention of the Constitution, and, therefore, does not represent the supreme law of the land, as defined in subdivision 2 of Article VI. We maintain that the "two thirds" vote required to pass a bill over the President's veto means a vote equal in number to two-thirds of all the members of each house, at least of the actual membership, if not of the potential membership, of that house. We therefore urge that the bill in question, having failed to receive a favorable vote amounting to two-thirds of the actual membership of the Senate, as then constituted, failed of passage in that house

over the President's veto, and never became a law. The question of the interpretation of these words of the Constitution is now presented for the first time to this court.

When the meaning of the clause in question was debated in the Senate, it was recognized, by both sides, that the question was ultimately judicial in character. [Colloquy between Mr. Benjamin and Mr. Bayard, Cong. Globe, July 7, 1856, p. 1546.]

The legislative branch of the Government was not in a disinterested position in relation to the question, and, not unnaturally, they voted to increase rather than to diminish their power. The precedents of Congress on this subject are not, therefore, of any assistance to this court.

We wish to emphasize the far-reaching effect the decision of the question as to the meaning of the words of the Constitution now before the court for interpretation will have, by pointing to the fact that Article V of the Constitution, prescribing the method of its amendment, contains similar wording.

The original draft of the Constitution was revised by a Committee on Style before its final adoption by the Convention; and its language is uniform and accurate, and has been considered a model of clear and simple English. Similar words and phrases will therefore reasonably be interpreted similarly in interpreting the instrument. Clearly, no higher power can exist in a nation than the power to change its organic law. It was recognized that the power to amend the Constitution was necessary to preserve its healthy life. The Confederation, under which the framers of the Constitution were living, permitted of its amendment only by a unanimous vote of the States forming its membership. The same requirement for the Constitution was urged upon the Convention by Roger Sherman; at first generally, (Madison's notes, Monday, Sept. 10, 1787, 2 Farrand, Records of the Federal Convention, 558); and later in regard to the internal police of the States and their equal suffrage in the Senate,

(Madison's notes, Sept. 15, 1787, 2 Farrand, 629–631). The final form of Article V, providing for the proposal of amendments by "two thirds of both houses," and the ratification by three-fourths of the States, however, seemed sufficiently conservative to the framers of the Constitution and was, therefore, adopted.

This fifth Article of the Constitution has, however, fared in Congress, as has the clause now under consideration. [Citing the ruling of Speaker Reed, referred to in the opinion, *ante*, p. 283, Hinds' Precedents, § 7027, and a like precedent in the Senate, *id.*, § 7028.]

In other words, in the existing Senate, having a membership of 96, if 49 Senators are present and two-thirds of those approve a proposed amendment to the Constitution the precedents of the Senate assume that the constitutional requirement of Article V is satisfied, so far as that house is concerned. It seems to us clear, from the language of the Constitution itself, that no such result could have been contemplated. It is evident that the Congress was expected to be on duty, with full ranks. In the House: "When vacancies happen in the representation from any State, the executive authority thereof *shall* issue writs of election to fill such vacancies." Art. 1, § 2, subd. 4. In the Senate (before the Seventeenth Amendment): "If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which *shall* then fill such vacancies." Art. 1, § 3, subd. 2. "A majority of each [house] shall constitute a quorum to do business; but a smaller number . . . may be authorized to *compel the attendance of absent members*, in such manner, and under such penalties as each house may provide." Art. 1, § 5, subd. 1.

It thus seems clear that Congress was expected to be present or accounted for, and that on the matters of the highest importance, such as the passage of bills or resolutions over the veto of the President, or the proposition

of amendments to the Constitution, two-thirds of the whole number of members of each house was required.

The Constitution provides that if the President does not approve a bill "he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration *two thirds of that house* shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by *two thirds of that house*, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively." Art. I, § 7, subd. 2. Nothing is said about "two thirds of those present" or "two thirds of those voting"; but simply, "two thirds of that house."

There are several provisions of the Constitution where the proportion of those present, or of those who vote, was intended to govern the result. For example, when the Senate sits to try impeachments, "no person shall be convicted without the concurrence of *two thirds of the members present*." Art. I, § 3, subd. 6.

"The yeas and nays of the members of either house on any question shall, at the desire of *one fifth of those present*, be entered on the journal." Art. I, § 5, subd. 3.

The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided *two thirds of the Senators present concur*." Art. II, § 2, subd. 2.

Moreover, the meaning of the words "two thirds of that house" as used in the second subdivision of the seventh section of Article I is made doubly clear by the following (third) subdivision, governing orders, resolutions and votes other than bills. Such orders, resolutions and votes may be repassed, if disapproved by the President, "by two thirds of the Senate and House of Repre-

sentatives, according to the rules and limitations prescribed in the case of a bill."

This was not a different requirement from the requirement exacted in the instance of bills. It was the same requirement, differently expressed. Yet it may be clearer to some minds that "two thirds of the Senate" does not mean two-thirds of a quorum of the Senate, than that "two thirds of that house" does not mean two-thirds of such quorum. If the Convention had meant by the words "two thirds of that house" two-thirds of those present, the Committee on Style would have so expressed it, as they did in other instances.

Apparently the original resolution in the Constitutional Convention on the subject under discussion is thus recorded: Journal, Monday, June 4, 1787.

"A question was then taken on the resolution submitted by Mr. Gerry, namely, 'resolved that the national executive shall have a right to negative any legislative act which shall not be afterwards passed unless by two third parts of each branch of the national legislature.'" And on the question to agree to the same it passed in the affirmative. 1 Farrand, 94. The same resolution came up again and again in the debates. 1 Farrand, 226, 230; 2 *id.*, 71, 132, 146, 160–162, 167, 181, 294–295, 298, 568, 582, 585.

Rufus King's notes for Wednesday, June 6, 1787, record: "It will require as great Talents, Firmness & Abilities, to discharge the proper Duties of the Executive, as to interpose their veto, or negative which shall require $^2/_3$ of both Branches to remove." 1 Farrand, 145. Madison's notes state: "10. Resold. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature." *Id.*, 236.

Nothing that we have found in the debates or records gives us any intimation that the Convention had in mind less than the full membership of each branch of the Congress, when they mentioned it as a house, or that by "two

thirds of that house" they meant less than two-thirds of all its members.

The legislative precedents, all made under the influence of a purely legislative atmosphere, are merely statements and applications of the familiar legislative doctrine and practice that, for purposes of ordinary legislative business, a "quorum" is a "house." Here, however, we are dealing with the Constitution of the United States, which in terms specifies a "quorum" (Art. I, § 5, first paragraph) or "those present" (Art. I, § 3, subd. 6, and § 5, subd. 3; and Art. II, § 2, subd. 2) when it intends a "quorum" or those "present"; and with equal emphasis specifies a "house" when it intends a "house" as the description of the whole body or legislative branch in question. (Art. I, § 7, subd. 2; Art. V, etc.)

Indeed the Constitution itself clearly defines these terms. "Each house shall be the judge of the elections, returns, and qualifications of its own members; and *a majority of each shall constitute a quorum* to do business." Art. I, § 5.

This is a definition in the instrument itself that a "house," as such, means all the members of the house, or the sentence means nothing.

It cannot be said that we are confronted by a conclusive, practical construction heretofore placed upon these terms in the Constitution, because, in such a case, it is only the action of the *parties* to the instrument which can possibly create such a practical construction, and such action must have been taken in the light of full knowledge of the *facts*. Here the "parties" to the instrument are the several *States* themselves.

Historically speaking, it may be said that no State, with the facts before it, has ever taken any action whatever bearing on this general question, except the State of New York, in 1918, in the case of the Prohibition Amendment, when the objection was made and the matter of the proposed amendment was dropped.

While it is understood that the question presented to

the Assembly of the State of New York under Article V of the Constitution is not now before this court, and that Article V may possibly receive a different interpretation from that given to the clause now under consideration, the wording of the two clauses is similar, and the attention of the court should be directed to the question arising under Article V, at this time.

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6. *Abating Nuisance.* State may forbid storage of gasoline within 300 ft. of any dwelling; where storage in tanks was necessary to company's business, fact that tanks were moved to present position at city's request does not import contract not to require further removal for public welfare; nor would such contract be effective. *Pierce Oil Corp.* v. *City of Hope* 498

VII. **Copyright.**

See *International News Service* v. *Associated Press* ... 215, 234

VIII. **Indians.**

For safeguarding and advancing dependent Indian people, resident on islands belonging to United States in Alaska, Congress has power to reserve for their use upland of islands and adjacent submerged land and deep waters supplying fisheries essential to Indians' welfare. *Alaska Pacific Fisheries* v. *United States* ... 78

IX. **National Banks.** See also **National Banks.**

Extent to which States may tax property or shares of national banks is determined exclusively by § 5219, Rev. Stats. *Bank of California* v. *Richardson* ... 476
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X. **Public Lands.**

Section 4, Homestead Act 1862, providing that lands shall not become liable to satisfaction of debts contracted prior

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to issuance of patent, applies as well to debts contracted after final entry and before patent as to debts contracted before final proof, and in both respects is within power of Congress. *Ruddy* v. *Rossi* 104

XI. **Trade-marks.** See V, 15, *supra.*

XII. **Privileges and Immunities under Art.** IV.

State law providing that only such persons shall be licensed as insurance brokers as are residents of State and have been licensed there for two years, does not discriminate against citizen of another State desiring to act as broker. *La Tourette* v. *McMaster* 465

XIII. **Fifth Amendment.**

Relates to federal action only; a contention that state decision in suit against State for damages, holding that State had not consented to be sued, deprives of property without compensation, is untenable. *Palmer* v. *Ohio*..... 32

XIV. **Fourteenth Amendment.**

(1) *Notice and Hearing.*

1. *Drainage Districts; Assessments; Eminent Domain.* The Conservancy Act of Ohio, authorizing creation of drainage districts and improvements, affords full opportunity for testing private grievances judicially. *Orr* v. *Allen*..... 35

2. *Sewer District Assessment.* Notice and hearing before creation of special improvement district not essential if full hearing afforded in subsequent judicial proceedings to enforce tax. *Mt. St. Mary's Cemetery* v. *Mullins*..... 501

3. *Property Tax Valuation.* Tax is not wanting in due process, even if valuation originally made *ex parte*, if enforced only through judicial proceeding affording notice and hearing. *Wells, Fargo & Co.* v. *Nevada*..... 165

4. *Railroad Rates.* Where carrier in suit against state commission has opportunity to test whether rates are confiscatory, provision of state law making judgment conclusive against carrier in subsequent actions for reparation is consistent with Amendment. *Detroit & Mackinac Ry.* v. *Fletcher Paper Co*..... 30

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5. *Service on Nonresident.* State may not provide that nonresident individuals, in suits arising from transactions within State through local agent, shall be bound by process served upon him after agency is at an end. *Flexner* v. *Farson*. 289

6. *Id.* The power as against foreign corporations springs from power to exclude from local business, the continued agency to receive service being attributed to implied consent; but consent may not be implied in case of nonresident natural persons, since power of exclusion does not exist as to them. *Id.*

(2) *Liberty and Property; Police Power.*

7. *Insurance Broker's License.* Law that only such persons shall be licensed as insurance brokers as are residents of State and have been licensed there for two years (construed as requiring local residence, as distinguished from citizenship), within police power and does not deprive citizen of another State desiring to act as broker of liberty or property. *La Tourette* v. *McMaster* 465

8. *Farm Produce Broker's License.* Law forbidding sale of farm produce on commission without license, to be procured upon showing as to character, etc., a bond to make honest accounting, and payment of fee of $10, does not violate privileges and immunities, equal protection or due process clauses. *Payne* v. *Kansas* 112

9. *Weight Certificates.* Law forbidding any other than duly authorized state weigher to issue any weight certificate for grain weighed at any warehouse where state weighers were stationed, or to charge for such weighing or certificates, *held* consistent with due process and equal protection clauses, as applied to local corporation, having powers of board of trade, which weighed grain and issued weight certificates, for a charge, at request of its members. *Merchants Exchange* v. *Missouri* 365

10. *Gasoline Storage.* Ordinance forbidding storage within 300 ft. of any dwelling is within police power. So *held*, where storage in tanks was necessary to business of selling products and plant could not be moved without expense and loss of profits. *Pierce Oil Corp.* v. *City of Hope* 498

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11. *Food Products.* Wholesome condensed skimmed milk combined with cocoanut oil, labeled " a compound of evaporated skimmed milk," *held* within prohibition of Ohio Gen. Code, § 12725, forbidding manufacture and sale of condensed milk unless made from pure, whole milk and unless container labeled with true name; as so construed, statute does not violate Amendment. *Hebe Co.* v. *Shaw* 297

12. *Local Improvement Assessment.* Where land of cemetery association assessed as a whole, although part had been disposed of to lot holders for burial purposes, it appearing that fee remained in association, *held*, that latter was not deprived of property without due process. *Mt. St. Mary's Cemetery* v. *Mullins* 501

13. *Id.* A local assessment must not be arbitrary or unreasonable. *Id.*

14. *Repeal of Tax Exemption.* Attempt to evade exemptions in special railroad charters (held in former decision to preclude taxing lessee upon fee of leased property) by a tax on leasehold interest is invalid. *Central of Georgia Ry.* v. *Wright* 525

15. *Right to Sue State.* Whether Ohio constitution gives directly consent to suit by individuals against State or requires legislation to put provision into effect, *held* a question of local law, in no sense involving rights under due process clause of individuals suing State for damage to property. *Palmer* v. *Ohio* 32

16. *Rates; Electric Power; Supersede Prior Contract.* Reasonable rates fixed for electricity supplied to city may supersede lower rates in private contract. *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.* 372

17. *Street Railway Rates*; *Implied Franchise.* Where city, instead of compelling removal of tracks operated by street car company without franchise, passed ordinance looking to continued operation and prescribing fares and transfer privileges, *held* equivalent to grant of right to operate during life of ordinance, entitling company to fair return on investment. *Detroit United Ry.* v. *Michigan.* 429

18. *Id.* Ordinance fixing fares and transfer privileges over street car system, composed of franchise and non-franchise lines, violates due process if it results in deficit to company. *Id.*

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(3) *Equal Protection of the Laws.* See XIV, 8, 9, 11, *supra.*

19. *Drainage Districts.* Conservancy Act of Ohio upheld. *Orr* v. *Allen* 35

20. *Local Assessment.* Inclusion of land of cemetery association for purpose of sewer improvement in district with larger area devoted to other uses, while other cemeteries were districted separately, does not establish denial of equal protection, where similarity of situation not shown. *Mt. St. Mary's Cemetery* v. *Mullins* 501

(4) **Privileges and Immunities.** See XIV, 6–8, *supra.*

XV. **Who May Question Constitutionality of Statutes; Waiver.**

1. *Quære:* How far grantee of Indian may avail himself of Indian's right to assert unconstitutionality of act of Congress. *Fink* v. *County Commissioners* 399

2. Where, in violation of constitutional right, state license fee is paid under protest to avoid penalties and financial loss, the right is not waived. *Union Pac. R. R.* v. *Public Service Comm.* 67

CONSTRUCTION. See **Admiralty; Constitutional Law; Contracts; Criminal Law; Food; Franchises; Indians; Insurance; Interstate Commerce Acts; Jurisdiction; Officers; Ordinances; Public Lands; Seaman's Act; Statutes; Taxation; Treaties.**

Construction of statute on which indictment is based. See **Jurisdiction,** IV, 5.

CONTRACTS. See **Deeds; Franchises; Insurance.**

Charter-party; warranty of seaworthiness. See **Admiralty,** 6–9.

Transportation. See **Carriers; Interstate Commerce Acts.**

Exempting carrier from liability for negligence. See **Carriers,** 1, 2.

Agreements between States. See **Constitutional Law,** III.

Impairment of obligation. See **Constitutional Law,** VI.

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Live stock; written notice of damage. See **Interstate Commerce Acts,** 3.

Exchange of services; railroad and telegraph companies. See **Interstate Commerce Acts,** 4.

1. *Construction Contracts; Integral and Collateral Agreements.* Where Government, in dry-dock contract, required removal and reconstruction nearby of intersecting sewer, on its own specifications, *held,* that latter obligation was not collateral but part of entire contract. *United States* v. *Spearin* 132

2. *Id.; Implied Warranty of Government.* In such case there is an implied warranty that if sewer reconstructed as specified it will be adequate to protect site from back flooding. *Id.*

3. *Id.* Such warranty not overcome by general clauses requiring contractor to examine site, check up plans, and assume responsibility for work until completion and acceptance. *Id.*

4. *Id.; Evidence.* Neither Rev. Stats., § 3744, providing that contracts with Navy Department be reduced to writing, nor parol evidence rule, precluded reliance on such warranty, implied by law. *Id.*

5. *Id.; Rescission.* Contractor, upon breach of warranty, not obliged to reconstruct sewer and proceed at peril, but upon Government's repudiation of responsibility was justified in refusing to resume work. *Id.*

6. *Id.; Damages for Breach.* Having annulled, Government was liable for all damages resulting from breach, including contractor's expenditures on work (less receipts from Government) and profits he would have earned if allowed to perform. *Id.*

7. Building contract construed. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

8. *Id.; Rescission.* Right of subcontractor to rescind on breach of contractor's agreement to furnish foundation of building. *Id.*

9. *Id.; Time Extension.* When provisions for time extension do not supersede right to rescind for undue delay. *Id.*

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10. *Id.; Materials; Quantum Meruit.* When complaint counts upon special building contract and defendant's breach in failing to provide proper foundation and also upon *quantum meruit* for labor and materials, evidence of materials left on premises by plaintiff and appropriated by defendant is admissible under latter count, without regard to bearing on damages recoverable under special contract. *Id.*

11. *Id.; Damages.* Where tools, etc., brought to building and used by plaintiff in performing contract and susceptible of further use in completing work, were left in place and appropriated by defendant, their value should be considered as part of plaintiff's expenditure under contract, in computing damages. *Id.*

12. *Id.; Payments on Account.* Where contract contemplates contractor's ability to perform will depend upon his receiving stipulated payments on account as work progresses, substantial failure to pay as stipulated will justify refusal to proceed. *Id.*

13. *Id.; Form of Requisition.* Amounts due under different branches of contract may be united. *Id.*

14. *Id.; Variance.* Where complaint alleged failure to make payments "in accordance with contract," while demands proved were based on modification of contract, *held* an unimportant variance. *Id.*

15. *Government Contract; Secrecy Clause.* In contract for torpedoes, manufacturer agreed not to make use of or disclose any device the design for which was furnished by United States, if designated for secrecy in writing at time when conveyed to manufacturer. *Held*, not confined to secret devices, or to inventions by United States, but included any devices communicated with certainty and designated for secrecy by United States, even where design subsequently worked out by employees of manufacturer. *Bliss Co.* v. *United States*..... 37

16. *Taking Land; Implied Promise.* Not knowing land on Chicago River had become submerged through excavations privately made without owner's consent, Government, believing it to be within *de jure* stream, and not intending to exercise eminent domain, dredged submerged land under

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power to improve navigation. *Held*, there was no implied promise to compensate owner and that cause of action, if any, was in tort. *Tempel* v. *United States*..... 121

17. *Maritime Contracts; Prepaid Freight.* Provisions of bills of lading construed as relieving carrier of duty to carry and of obligation to return prepaid freight, where voyage frustrated or indefinitely delayed by Government embargo, even though, in two cases, ship did not "break ground." *Allanwilde Transp. Corp.* v. *Vacuum Oil Co.*..... 377
International Paper Co. v. *The Gracie D. Chambers*.... 387
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18. *Id.; Seamen's Wages.* Validity, under Act of 1915, of contracts of alien seamen, with respect to advance payment of wages, valid under foreign law. *Sandberg* v. *McDonald*.. 185
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19. *Id.; Engaging Master; Statute of Frauds.* Contract made orally in California, whereby respondent engaged for one year to serve as master, mainly upon the sea, *held* a maritime contract; California statute of frauds requiring writing for agreements not to be performed within year inapplicable in defense of action for breach. *Union Fish Co.* v. *Erickson*.. 308

20. *Alien Enemy; Foreign Contract.* Jurisdiction of District Court in action on foreign contract between co-belligerent and alien enemy. *Watts, Watts & Co.* v. *Unione Austriaca*.. 9

21. Place of performance. *Id.*

22. *Franchise Ordinance; Legislative Control.* Ordinance respecting service by street car company will not be adjudged to have created contract obligation beyond legislative control if power of municipality under state law, and its intention, to create obligation, do not clearly appear. *Englewood* v. *Denver & South Platte Ry.*..... 294

23. *Illegal Object; Accounting.* Whether in state court principal may recover from agent money collected by latter in carrying out arrangement which involved violation of Crim. Code, § 239, *held* matter of local law. *Danciger* v. *Cooley*.. 319

CONTROVERSIES BETWEEN STATES. See **Boundaries.**

CONVEYANCE. See **Deeds; Indians,** 3–5. PAGE

COPYRIGHT.

1. News article in newspaper may be copyrighted under Act of 1909, but news, as such, is not copyrightable. *International News Service* v. *Associated Press* 215

2. As against public, any special interest of producer of uncopyrighted news matter is lost upon first publication. *Id.*

3. But one who gathers news, at pains and expense, for purpose of lucrative publication, has a quasi property in results, as against rival in same business; appropriation of those results at expense and to damage of one and for profit of other is unfair competition, against which equity will afford relief. *Id.*

CORPORATIONS. See **Anti-Trust Acts; Receivers.**

Reserved power over. See **Constitutional Law,** VI, 1, 3.
Rates and public service. See *id.*, XIV, 4, 16–18.
Special charters; tax exemptions. See *id.*, VI, 1.
Charge for issuing railroad bonds under mortgage. See *id.*, V, 4.
Street car service and fares. See **Franchises,** 5–8.
Railroad right of way. See *id.*, 1–4.
Exchange of services; railroad and telegraph companies. See **Interstate Commerce Acts,** 4.
Power of States to tax national banks. See **National Banks.**
Right of incorporated news-gathering agency to sue to protect its members against illegal acts of rival. See **Parties,** 7, 8.
Taxation of dividends; relation of holding company and subsidiaries. See **Taxation,** I.
Foreign, taxation of. See *Id.*, II, 1, 2.
Foreign, service of process. See *Flexner* v. *Farson* 289

1. In action for triple damages under § 7, Sherman Act, where only ground for holding defendant is responsibility (through stock ownership) for acts of co-defendant, directing verdict for former is harmless if latter exonerated upon merits by jury, after instructions fairly presenting case against it. *Buckeye Powder Co.* v. *DuPont Powder Co.* 55

2. Question whether failure to describe route for railroad right of way through national forest in charter left company

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without power to construct, and unqualified to receive grant, may not be raised by homesteader claiming rights in land crossed by road under federal patent. *Van Dyke* v. *Arizona Eastern R. R.* 49

COURT OF CLAIMS. See **Jurisdiction,** VII.

COURTS. See **Equity; Jurisdiction; Procedure.**

CREDITORS. See **Bankruptcy; Debts; Receivers.**

CREEK INDIANS. See **Creek Nation; Indians,** 1, 3, 8, 9.

CREEK NATION.

1. The Creek Nation as a sovereignty was not liable for injuries resulting from mob violence or failure to keep the peace. *Turner* v. *United States*..... 354

2. Act of May 29, 1908, authorizing suit in Court of Claims against Creek Nation for adjudication of claim, did not validate claim itself or permit that United States be joined as defendant. *Id.*

CRIMINAL APPEALS ACT. See **Jurisdiction,** IV, 5.

CRIMINAL CODE. See **Criminal Law.**

CRIMINAL LAW. See **Statutes,** 6, 7.

1. *Intoxicating Liquors; Crim. Code,* § 239. Practice of collecting price at destination, as condition to delivery, was evil aimed at. *Danciger* v. *Cooley*..... 319

2. *Id.* Such collections when made by agent of seller constitute offense no less than when made by carrier or its agent. *Id.*

3. *Id.; Transportation.* Not completed until shipment arrives at destination and is there delivered. *Id.*

4. *Id.; Accounting.* Whether in state court principal may recover from agent money collected by latter in carrying out arrangement which involved violation of § 239, is matter of local law. *Id.*

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5. *Fraudulent Scheme; Crim. Code,* § 215. Indictment alleging scheme to defraud divers persons through use of mails by representing that land could be purchased under Timber & Stone Act for less than value, and that defendants would secure it in return for fees part payable in advance, and would refund such advances in case of non-success, whereas defendants well knew they could not carry out agreement, but intended to appropriate advance payments to their own use, charges a scheme to defraud. *United States* v. *Comyns* 349

6. *Bill of Particulars,* supplementing indictment,—no part of record on demurrer. *Id.*

CUSTOM.

Creek Indians; assigning children of mixed marriages tribal status of mother. *Campbell* v. *Wadsworth* 169

CUSTOMS OFFICERS.

1. Act of 1909, authorizing Secretary of Treasury "to increase and fix" compensation of inspectors of customs, did not empower him to decrease salaries. *Cochnower* v. *United States.* 405

2. Appointment of clerk by Collector of Customs, "to act as acting U. S. Weigher," at compensation less than fixed by Act of 1866 ($2,500) for weighers, and assignment to, and performance of, duties of weigher, does not place him in that office and entitle him to its salary. *MacMath* v. *United States* 151

DAMAGES.

Irreparable loss as ground for enjoining condemnation proceedings under state law. See **Equity,** 10, 11.

1. In action for triple damages under Sherman Act, § 7, where jury found for defendant, rulings as to damages *held* immaterial. *Buckeye Powder Co.* v. *Du Pont Powder Co* 55

2. Where Government breaks and then wrongfully repudiates its contract, it is liable for all resulting damage, including contractor's expenditures on work (less receipts from Government) and profits he would have earned if allowed to perform. *United States* v. *Spearin* 132

3. When complaint counts upon special building contract and defendant's breach in failing to provide proper founda-

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tion, and also upon *quantum meruit* for labor and materials, evidence of materials left on premises by plaintiff and appropriated by defendant is admissible under latter count, without regard to bearing on damages recoverable under special contract. *Guerini Stone Co.* v. *Carlin Constr. Co* 334

4. Where tools, etc., brought to building and used by plaintiff in performing contract and susceptible of further use in completing work, were left in place, and appropriated by defendant, their value should be considered as part of plaintiff's expenditure under contract, in computing damages. *Id.*

DAWES COMMISSION. See **Indians,** 2.

DEBTS.

Under § 4, Homestead Act 1862, lands acquired under act not liable to satisfaction of debts contracted after final entry and before patent. *Ruddy* v. *Rossi* 104

DECREES. See **Judgments; Procedure,** X.

DEEDS. See **Franchises,** 1–4; **Indians,** 3–5.

Deed of New Jersey, reciting agreement for lease of submerged land at specified rental and larger sum to be paid for conveyance free from rent, proceeded to " bargain, sell, lease and convey " to corporation, with right to exclude tidewater, etc., and to appropriate land to exclusive private use; an habendum declaring that all rights and privileges should be held by company, its successors and assigns, forever, subject to payment of specified rent, and there were covenants for payment of rent and for right of reëntry for nonpayment, and for conveyance discharged of rent upon payment of sum specified. *Held,* that under New Jersey law there was a grant of fee, subject to a rent charge, and that lands were taxable against grantee and its assigns as owners. *Leary* v. *Jersey City* 328

DELEGATION OF POWER. See **Constitutional Law,** I.

Under Ohio constitution. See *Orr* v. *Allen* 35

DEMURRER. See **Equity,** 12; **Jurisdiction,** IV, 5.

1. Bill of particulars supplementing indictment is no part of record on demurrer. *United States* v. *Comyns* 349

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2. Where it cannot be aided by judicial notice, an averment that an ordinance is unnecessary and unreasonable is too general and is not admitted by demurrer. *Pierce Oil Corp.* v. *City of Hope*..... 498

3. Allegations designed to show that petroleum and gasoline were so stored as not to endanger any buildings and that explosion was impossible, though conceding possibility of some combustion, *held* insufficient on demurrer to exclude danger of explosion of which court might take judicial notice. *Id.*

DESCENT AND DISTRIBUTION. See **Indians,** 1.

DISTRICT COURTS. See **Jurisdiction,** IV, (4); V.

DIVIDENDS. See **Taxation,** I.

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DRAINAGE DISTRICTS. See **Waters,** 1–3.

DUE PROCESS OF LAW. See **Constitutional Law,** XIII, XIV.

DURESS.

Where State exacted unconstitutional fee for certificate of authority to issue railroad bonds under mortgage, under statutes threatening heavy penalties and purporting to invalidate bonds if certificate not obtained, *held,* that application for and acceptance of certificate, with payment under protest, were made under duress. *Union Pac. R. R.* v. *Public Service Comm.*..... 67

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In action for triple damages, under Sherman Act, § 7, where case was based on § 2, *held,* that technical error in requiring plaintiff to elect whether it would rely on § 1 or § 2 (whereupon it elected § 2 without asking to amend) was harmless. *Buckeye Powder Co.* v. *Du Pont Powder Co.*..... 55

ELECTRIC POWER COMPANIES. See **Constitutional Law,** XIV, 16.

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EMINENT DOMAIN.

Enjoining condemnation proceedings under state law on ground of unconstitutionality. See **Equity,** 10, 11.

1. Conservancy Act of Ohio, authorizing drainage districts and improvements through administrative boards empowered to exert eminent domain, and to tax, assess for benefits, and issue bonds, affords opportunity for testing private grievances judicially, and, as construed by court below, is consistent with state and federal constitutions. *Orr* v. *Allen*. 35

2. Government, not intending to exercise eminent domain, dredged submerged land under power to improve navigation. *Held*, there was no implied promise to compensate owner; that cause of action, if any, was in tort; and action against United States was not within jurisdiction of District Court under Tucker Act. *Tempel* v. *United States* 121

ENROLLMENT. See **Indians,** 1, 2.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XIV, (3).

EQUITY. See **Demurrer,** 2, 3.

Authority of receiver to sue in foreign jurisdiction. See **Receivers.**

1. *Property Rights.* The right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. *International News Service* v. *Associated Press*. 215, 236

2. *Id.; Suit by United States to Protect Settlers.* To entitle United States to maintain suit to declare a trust, a pecuniary interest is not essential; it is enough if there be an obligation to those for whose benefit the suit is brought. *United States* v. *New Orleans Pac. Ry*. 507, 518

3. *Patents; Limitations; Affixing Trust.* In suit brought by United States on behalf of settlers to secure their rights under Act of 1887 against railway and its grantees holding legal title through patents, affecting patent issued to railway before Act Mar. 2, 1896, the 5-year limitation of that act may

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be a bar to relief by cancellation, but bill may stand upon prayer to affix trust upon legal title in favor of settlers. *Id.*

4. *Id.; Laches.* While laches of private person is imputable to United States in suit brought for his benefit, settlers entitled to benefits of Act of 1887, who maintained peaceable and continued possession, affording notice of equitable rights which they asserted and sustained before Land Department, and who relied upon promise of Department to secure their titles and on suits by Government to that end, *held* not guilty of laches, notwithstanding long delays in litigation. *Id.*

5. *Injunction; Disclosure of Secret Government Device.* In action by United States against manufacturer of torpedoes, to enjoin disclosure (in violation of contract) of device the design for which was furnished by United States, injunction should be confined to devices in use, but without prejudice to right to enjoin disclosure of others, upon proof of intention to make use of them. *Bliss Co.* v. *United States* 37

6. *Id.; Trade-mark Infringement.* Where A had a trade-mark in Massachusetts, in connection with a business there and in neighboring States, and B, afterwards, in good faith, without notice of A's use or intent to injure or forestall A, adopted the same mark in Kentucky, where A's business theretofore had not extended, and built up a valuable business under it there, A, upon entering B's field with notice of the situation, has no equity to enjoin B as an infringer, but is estopped. *United Drug Co.* v. *Rectanus Co* 90

7. *Id.; Administration of Estates.* Administration in State of actual situs of personal property located there at owner's death will not be enjoined, even though property placed there to avoid taxation in another State, which is alleged to be owner's domicile. *Iowa* v. *Slimmer* 115

8. *Id.; Newspapers; Unfair Competition.* Right of news-gathering agency to enjoin premature appropriation of its news by a rival. *International News Service* v. *Associated Press.* 215

9. *Id.; Unclean Hands.* Complainant not debarred from relief by fact that it had used defendant's news items, when published, as " tips " for investigation, the results of which it sold. *Id.*

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10. *Id.; Unconstitutional State Law.* Jurisdiction of federal courts to enjoin execution of state law should be exercised only in clear cases and where intervention is essential to protect against injuries otherwise irremediable. *Cavanaugh* v. *Looney*. 453

11. *Id.; Condemnation Proceedings*, will not be enjoined, on ground that state law is unconstitutional and that filing of petition would cause irreparable damage by impounding land, clouding title and preventing sale pending proceeding, where apprehension of irreparable loss appears fanciful and objections against act could be raised in the condemnation proceeding. *Id.*

12. *Allegations of Bill; When Taken as True.* Where District Court, in denying preliminary injunction, of its own motion dismisses bill, its action is equivalent to sustaining demurrer, and, upon appeal, allegations of bill must be taken as true. *Detroit United Ry.* v. *Detroit*. 429

EQUITY RULES.
Rules 38, 43, 44. See **Parties**, 7, 8.

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1. News-gathering agency estopped to deny rival's interest in news obtained by latter. *International News Service* v. *Associated Press*. 215, 240

2. Where A had a trade-mark in Massachusetts, in connection with a business there and in neighboring States, and B, afterwards, in good faith, without notice of A's use or intent to injure or forestall A, adopted the same mark in Kentucky, where A's business theretofore had not extended, and built up a valuable business under it there, A, upon entering B's field with notice of the situation, has no equity to enjoin B as an infringer, but is estopped. *United Drug Co.* v. *Rectanus Co.* 90

EVIDENCE. See **Judicial Notice; Procedure**, IX.

1. *Creek Custom*,—assigning children of mixed marriages tribal status of mother. *Campbell* v. *Wadsworth*. 169

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2. *Anti-Trust Act; Judgments Inadmissible.* Before the Clayton Act, judgment in government proceeding finding company guilty of attempt to monopolize was inadmissible in private action for triple damages under § 7 of Sherman Act. *Buckeye Powder Co.* v. *Du Pont Powder Co.* 55

3. *Id.; Clayton Act.* Provisions of Clayton Act, § 5, for admitting such judgments, "hereafter rendered" in government cases, in other litigation, and for suspending statute of limitations as to private rights pending government prosecutions, do not affect retrospectively, on review, judgment rendered in action for triple damages before Clayton Act was passed. *Id.*

4. *Id.; Motive.* On question whether plaintiff's failure in trade was due to its incapacity or to defendant's oppression, jury may consider whether motive in organizing plaintiff was to sell out to defendant or compete. *Id.*

5. *Id.; Statements by Third Parties,*—of reasons for refusing or ceasing to do business with plaintiff, inadmissible when wanted not as evidence of motives but as evidence of facts recited as furnishing motives. *Id.*

6. *Government Contract; Implied Warranty.* In action against Government for work performed and damages for annulment, neither Rev. Stats., § 3744, providing that contracts with Navy Department shall be reduced to writing, nor the parol evidence rule, preclude reliance upon a warranty implied by law. *United States* v. *Spearin* 132

7. *Building Contract; Quantum Meruit for Materials.* When complaint counts upon special building contract and also upon a *quantum meruit*, evidence of materials left on premises by plaintiff and appropriated by defendant is admissible under latter count, without regard to its bearing on damages recoverable under special contract. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

8. *Id.; Demands; Variance.* Where complaint alleges failure to make payments upon demands made "in accordance with contract," while demands proved were based on a modification of contract, *held* an unimportant variance not requiring amendment, particularly in view of relation of matter to former decision and mandate of this court. *Id.*

EXCEPTIONS. PAGE

1. Error in admitting evidence cannot be imputed to trial court upon theory that count of complaint was waived at trial, based on statement by plaintiff's counsel in Court of Appeals, which was inconsistent with bill of exceptions. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

2. An exception to an instruction should be specific, directing mind of court to some single point of alleged error. *Id.*

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2. As so construed and applied, statute does not violate Fourteenth Amendment. *Id.*

3. As applied to cans containing product, the prohibition of local sale was not invalid as burden on interstate commerce—the cases in which the cans were shipped, and not the cans, were the original packages. *Id*

4. The Federal Food & Drugs Act does not prevent such regulation. *Id.*

5. As respects retail sales of secondary packages out of original packages in which they were imported in interstate commerce, state laws forbidding sale of food articles containing benzoate of soda are not inconsistent with commerce clause or purpose of federal act, although preservative, as used, is allowed by that act and containers are labeled in conformity therewith. *Weigle* v. *Curtice Bros. Co.* 285

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3. *Id.; Gratuities.* Such a grant, from which public benefit is expected, not a gratuity, within prohibition of Georgia constitution. *Id.*

4. *Irrevocable.* Georgia Act of Oct. 8, 1879, granted perpetual right of way for Cincinnati Southern Ry., not revocable license. *Id.*

5. *Reserved Legislative Power.* Ordinance respecting service by street car company, will not create contract obligation beyond legislative control if power of municipality, and its intention, to do so do not clearly appear. *Englewood* v. *Denver & South Platte Ry*. 294

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7. *Id.; Construction; Confiscation.* A company operated street car lines, for some of which it had franchises entitling it to charge a certain fare and for others no franchises. An

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ordinance, regulating entire system, purported to fix fares for trips over two or more lines, whether franchise or not, declaring that it should not be construed as attempt to impair obligation of any valid contract, but should apply to all passenger traffic in city except where governed by provisions of such contract. *Held:* That latter declaration referred to trips wholly on franchise lines; and that if enforcement resulted in deficit the ordinance violated due process clause. *Id.*

8. *Id.; Contract Obligation.* Ordinance compelling company to carry passengers on continuous trips over franchise lines to and over non-franchise lines, and *vice versa*, for fare no greater than its franchises entitle it to charge upon former alone, impairs obligation of franchise contracts. *Id.*

9. *Tax Exemptions.* Validity of tax on leasehold interest where special charters of lessor railroads contain perpetual tax exemptions. *Central of Georgia Ry.* v. *Wright* 525

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2. *Id.* Power of Dawes Commission, and effect of enrollment. *Id.*, pp. 174 *et seq.*

3. *Id.; Alienation; Taxation to Purchaser.* Upon conveyance of Creek allotment, which was exempt from taxation under Agreement of June 30, 1902, and from which restrictions on alienation were removed by Act of May 27, 1908, the tract

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is subject to state taxation in hands of grantees, for by taking title under Act of 1908 they take subject to its conditions and policy. *Fink* v. *County Commissioners*..... 399

4. *Id.* Act of 1908, *supra*, granting right of alienation, invades no right of Indian in making exercise of that right a surrender of exemption from taxation. *Id.*

5. *Id. Quære.* How far grantee of Indian may avail himself of Indian's right to assert unconstitutionality of act of Congress. *Id.*

6. *Reservation; Power of Congress; Fisheries.* For safeguarding and advancing dependent Indian people, resident on islands belonging to United States in Alaska, Congress has power to reserve for their use not only upland of islands but also adjacent submerged land and deep waters supplying fisheries essential to Indians' welfare. *Alaska Pacific Fisheries* v. *United States*..... 78

7. *Id.* Act setting aside "the body of lands known as Annette Islands," in Alaska, to be held by the Metlakahtla Indians in common, under regulations of Secretary of Interior, *held*, in view of circumstances at time of enactment and its subsequent construction, to include adjacent deep waters; a fish net constructed therein, whose operation might materially reduce supply of fish accessible to Indians, *held* subject to abatement at suit of United States. *Id.*

8. *Creek Nation; Liability for Mob Violence.* While recognized by United States as distinct political community, Creek Nation leased a pasture, the lessees undertaking to fence and pay rent. The fence was destroyed by Creek mob, participated in by Creek Treasurer, and one of lessees, as assignee of rest, sued Creek Nation for cost of fence and loss of benefits of lease. *Held*, that there was no cause of action; for a sovereignty is not liable for injuries resulting from mob violence or failure to keep the peace; and neither the wrong of Treasurer nor any duty under lease created such liability. *Turner* v. *United States*..... 354

9. *Id.; Act Authorizing Suit.* Act of May 29, 1908, authorizing suit in Court of Claims for adjudication of claim, did not validate claim itself or permit that United States be joined as defendant. *Id.*

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1. *Brokers; Police Power.* Power of State over subject of insurance extends to regulation of those who may carry on business as brokers representing insurer and insured. *La-Tourette* v. *McMaster*..... 465

2. *Id.; Excluding Nonresidents.* South Carolina law providing that only such persons shall be licensed as brokers as are residents of State and have been licensed there for two years does not deprive citizen of another State desiring to act as broker in South Carolina of liberty or property or unlawfully discriminate against him. *Id.*

3. *Cash Surrender Value,*—of life insurance policy payable to executors, administrators or assigns of the insured, or to specified persons with right in insured to change beneficiary, is assets subject to distribution under Bankruptcy Act. *Cohn* v. *Malone*..... 450

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4. *Georgia Code*, § 2498,—providing that insured may assign by directing payment to personal representative, widow, children, or assignee, and that no other person can defeat such direction when assented to by insurer, does not withdraw cash surrender value from estate in bankruptcy when assignment made subject to right to change beneficiaries or surrender policy at any time. *Id.*

5. *Loan Agreement; Evading Subrogation.* Where bills of lading give carrier benefit of insurance by shipper, and policies exempt insurer where bills contain such provision or where carrier is liable, an agreement whereby insurer loans shipper amount of loss caused by carrier's negligence, to be repaid in so far as shipper recovers from carrier, otherwise to operate as absolute payment, and whereby, as security, shipper pledges right of action and agrees to sue carrier at expense and under direction of insurer, *held* lawful and enforceable. *Luckenbach* v. *McCahan Sugar Co.* 139

6. *Id.* Such a loan is not a payment of the insurance, and does not enure to carrier. *Id.*

7. *Id.* Libel, in shipper's name, for benefit of insurer, pursuant to such agreement, may be maintained against carrier and ship. *Id.*

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1. Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *Sandberg* v. *McDonald* 185, 195

2. A co-belligerent may maintain suit in our courts against an alien enemy, and the latter is entitled to defend. *Watts, Watts & Co.* v. *Unione Austriaca* 9

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2. *Id.; Bill of Lading.* Cause of action under interstate bill of lading, which arose, if at all, before date of Amendment, depends upon state law. *Missouri, Kans. & Tex. Ry.* v. *Sealy*. 363

3. *Id.; Live Stock Contract; Notice of Loss.* Stipulation in live stock contract releasing carrier from liability for loss unless written claim made on agent within 10 days after unloading, *held* valid; observance not excused by fact that amount of loss could not be ascertained within period specified; nor waived by fact that carrier with knowledge of situation negotiated for compromise before and after period had expired. *Southern Pac. Co.* v. *Stewart*. 446

4. *Railroad and Telegraphs; Exchange of Services.* Under amendment of 1910, § 7, contract for exchange of services rendered by telegraph company for railway company beyond line of railway, and *vice versa*, is valid; and may be arranged upon basis of reciprocal advantage, without regard to rates chargeable for similar services to public. *Postal Telegraph-Cable Co.* v. *Tonopah &c. R. R.* 471

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1. *Interstate Shipment; Collection of Price.* Under Crim. Code, § 239, practice of collecting price at destination, as a condition to delivery, was the evil aimed at. *Danciger* v. *Cooley*. 319

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3. *Id.* Transportation not completed until shipment arrives at destination and is delivered. *Id.*

4. *Power of Congress.* May forbid interstate transportation without regard to policy or law of any State. *United States* v. *Hill* 420

5. *Transportation upon the Person,*—and for personal use, of interstate passenger, is "interstate commerce." *Id.*

6. *Reed Amendment,*—forbidding transportation into any State the laws of which prohibit manufacture or sale for beverage purposes, not limited to cases of importation for commercial purposes; and, as so construed, is within power of Congress. *Id.*

7. *Webb-Kenyon Liquor Act,* sustained. *Missouri Pac. Ry.* v. *Kansas* 276

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1. Where charter-party signed by one owner, but the rest, being impleaded with him, admitted that he acted for all, and liability of all, if liability existed, was not controverted, a decree for damages should run against all. *Luckenbach* v. *McCahan Sugar Co.* 139

2. In action by United States against manufacturer of torpedoes, to enjoin disclosure (in violation of contract) of device the design for which was furnished by United States, *held,* that injunction should be confined to devices in use, but without prejudice to right to enjoin disclosure of others, upon proof of intention to make use of them. *Bliss Co.* v. *United States* 37

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3. When grounds relied on by Circuit Court of Appeals for reversal prove untenable, this court will consider what judgment should have been rendered in view of other assignments of error. *Guerini Stone Co.* v. *Carlin Constr. Co* 334

4. Where carrier, in suit against state commission, has opportunity to test whether rates are confiscatory, provision of state law making judgment conclusive against carrier in subsequent actions for reparation is consistent with Fourteenth Amendment. *Detroit & Mackinac Ry.* v. *Fletcher Paper Co* 30

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1. Of reports of Secretary of War. *Tempel* v. *United States* 121, 130

2. Of action of state legislature in reducing inspection fee on oil and gasoline. *Pure Oil Co.* v. *Minnesota* 158, 164

3. Of fact that free intercourse between residents of this country and of an enemy country is physically impossible. *Watts, Watts & Co.* v. *Unione Austriaca* 9

4. Where it cannot be aided by judicial notice, averment that ordinance is unnecessary and unreasonable is too general and not admitted by demurrer. *Pierce Oil Corp.* v. *City of Hope* 498

5. Allegations that gasoline was so stored as not to endanger buildings and that explosion was impossible, though conceding possibility of some combusion, *held* insufficient on demurrer to exclude danger of explosion of which court might take judicial notice. *Id.*

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1. Jurisdiction is power and matter of fact. *Cordova* v. *Grant* 413, 419

2. Territorial jurisdiction of courts coextensive with *de facto* territorial jurisdiction of United States, and land titles may be determined notwithstanding locus involved in question of boundary with another nation. *Id.*

3. An inadvertent assumption of jurisdiction is not equivalent to decision that jurisdiction exists. *J. Homer Fritch, Inc.*, v. *United States*. 458

4. Jurisdiction to enjoin state law on ground of unconstitutionality exercised only in clear cases and where intervention essential to protect against injuries otherwise irremediable. *Cavanaugh* v. *Looney* 453

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State has no power to provide that nonresident individuals, in suits growing out of transactions within State through local agent, shall be bound by process served upon him after agency is at an end. *Flexner* v. *Farson* 289

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(2) *Original.* See **Administration.**

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(3) *Over Circuit Court of Appeals; Certificates.* See 6, *infra.*

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4. Certificate under Jud. Code, § 239, Rule 37, must state facts pertinent to questions certified, and this cannot be dispensed with by reference to transcript and briefs in Court of Appeals, which are no part of record in this court. *Dillon* v. *Strathearn S. S. Co*..... 182

(4) *Over District Courts.*

5. *Criminal Appeals Act.* Where indictment alleged scheme to defraud divers persons through use of mails, by representing that land could be purchased under Timber & Stone Act for less than value, and that defendants would secure it in return for fees part payable in advance, and would refund such advances in case of non-success, whereas defendants well knew they could not carry out agreement, but intended to appropriate advance payments to their own use, *held,* that decision sustaining demurrer was based upon construction of § 215, Crim. Code, and was reviewable under Criminal Appeals Act. *United States* v. *Comyns*..... 349

6. *Tucker Act.* Judgments of District Courts in suits against United States under act are reviewable directly and exclusively by this court. *J. Homer Fritch, Inc.,* v. *United States* 458

7. *Treaties.* Mexican treaties for determination of boundary *held* not involved in controversy over land between

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present and former beds of Rio Grande, where parties claimed under adverse possession law of Texas and Mexican grants, respectively. *Cordova* v. *Grant* 413

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8. *Error or Certiorari.* Judgment *held* within saving provisions of § 7, Act of 1916, amending Jud. Code, § 237, and limiting jurisdiction in error. *Campbell* v. *Wadsworth* ..169, 173

9. *Id.* Case reviewable by certiorari under Act of 1916, in which Virginia Court of Appeals did not finally deny writ of error until Nov. 13, 1916, cannot be brought here by writ of error, although judgment of Circuit Court preceded act which excepts judgments rendered before it became operative. *Andrews* v. *Virginian Ry* 272

10. *Id.; Treaty Construction.* Under Jud. Code, § 237, as amended, judgment of state court based on construction, but not denying validity, of a treaty, is not reviewable by writ of error, but only on certiorari. *Erie R. R.* v. *Hamilton* 369

11. *Id.; Statutory Construction.* Under Jud. Code, § 237, as amended, error does not lie to judgment of state court holding state workmen's compensation law inapplicable to case of personal injuries governed by maritime law and holding Act Oct. 6, 1917, which changes rule in that regard, inapplicable retrospectively. *Coon* v. *Kennedy* 457

12. *Finality of Judgment.* State judgment not final when still reviewable at discretion of state appellate court. *Andrews* v. *Virginian Ry*..... 272

13. *Frivolous Question.* In action for injury to circus employee while traveling upon circus train being hauled by locomotive of railroad company pursuant to contract declaring company not a common carrier and not liable for negligence, a contention that state law touching validity of contracts exempting carriers from liability to passengers for injuries due to negligence was superseded by Carmack Amendment raises no federal question, since Amendment clearly deals only with shipments of property. *Chicago, R. I. & Pac. Ry.* v. *Maucher*..... 359

14. *Federal Question; Not Supported by Record.* Contention that contract of agency to sell real estate was void because federal lands, under homestead entry, were included, pre-

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sents no federal question where state court found they were not included and record supports finding. *King* v. *Putnam Investment Co.* 23

15. *Id.; Raised too Late.* When not presented within time allowed by state procedure, and refused consideration by state court for that reason, writ of error will not lie under Jud. Code, § 237. *Missouri, Kans. & Tex. Ry.* v. *Sealy* 363

16. *Federal Question.* Objection to approval of contract for sale of water rights by United States to Irrigation District and for sharing drainage expenses, because it exceeded powers of United States and District, and would entail assessments on land otherwise supplied with water, without due process or compensation, presents federal question. *Petrie* v. *Nampa Irrigation Dist* 154

17. *Id.; Independent Local Ground.* But where state court, while holding contract not in violation of constitutional rights, also decided under state law that objection was premature because no burden would be imposed until lands assessed in subsequent proceedings on basis of benefits conferred, and upon notice and hearing, the judgment, based on independent, non-federal ground, is not reviewable. *Id.*

18. *Id.* In mandamus to compel county treasurer to devote proceeds of special tax to satisfaction of county warrants, state court held treasurer had no discretion under state law but to follow levy and remedy was against board of revenue or county. *Held,* judgment not reviewable because based on proposition of state law sufficient to sustain it. *Farson, Son & Co.* v. *Bird* 268

19. *Local Questions.* Questions of law, involving fixing of railroad rates on intrastate traffic and reparation to shippers, *held* local and not reviewable. *Detroit & Mackinac Ry.* v. *Fletcher Paper Co.* 30

20. *Id.* Right of individual to sue State depends upon consent; whether Ohio constitution gives consent directly or requires legislation to put provision into effect is a question of local law, in no sense involving rights under due process clause of individuals suing State for damage to property. *Palmer* v. *Ohio* 32

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21. *Id.* Whether city ordinance regulating peddling and canvassing from house to house for sale of property on subscription is confined to general course of such business or applies also to isolated transactions, is a question of local law. *Watters* v. *Michigan*. 65

22. *Id.* Whether in state court principal may recover from agent money collected by latter in carrying out arrangement which involved violation of Crim. Code, § 239, is a matter of local law. *Danciger* v. *Cooley*. 319

23. *Id.* Subject to limitation that local assessment must not be arbitrary or unreasonable, questions whether it is justified by benefit conferred and whether property should be made separate improvement district are to be determined by local authorities. *Mt. St. Mary's Cemetery* v. *Mullins*. . 501

24. *Id.* This court will not go behind state decision that municipality deriving powers from legislative grant could make no contract not subject to control by legislature. *Englewood* v. *Denver & South Platte Ry*. 294, 296

25. *Waiver of Federal Right; Finding Reëxaminable.* This court will examine for itself whether there is basis in fact for finding by state court that constitutional right has been waived. *Union Pac. R. R.* v. *Public Service Comm*. 67

V. **Jurisdiction of District Courts.** See I, 4; IV, (4), *supra*.

1. Where District Court, in libel *in personam* between alien belligerents brought while United States was a neutral, declined to proceed because of prohibitions by belligerent countries on payment of debts of each other's subjects, and this country entered war after case came to this court, *held*, that libelant as co-belligerent had right to maintain suit against respondent, an alien enemy, and that jurisdiction should not be declined as an act of discretion. *Watts, Watts & Co.* v. *Unione Austriaca*. 9

2. Not knowing land on Chicago River had become submerged through excavations privately made without owner's consent, Government, believing it to be within *de jure* stream, and not intending to exercise eminent domain, dredged land under power to improve navigation. *Held*, there was no implied promise to compensate owner; that cause of action, if any, was in tort; and action against United States was not

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within jurisdiction of District Court under Tucker Act. *Tempel* v. *United States*. 121

3. Plaintiff claimed, under laws of Texas, land lying between present and former beds of Rio Grande. Defendant, claiming under Mexican grants, set up that, as plaintiff's title depended on whether international boundary had shifted with river, and as United States, though exercising *de facto* jurisdiction over locus, by treaties with Mexico had agreed upon commission with exclusive jurisdiction to settle it, the courts were thereby deprived of jurisdiction. United States had rejected action of commission and had waived objection, based on comity, to the litigation. *Held*, that District Court had jurisdiction and that holding to that effect did not involve validity or construction of treaty. *Cordova* v. *Grant*. . 413

4. Chancery receiver has no authority to sue in courts of foreign jurisdiction; and Alabama laws, relating to administration of assets of insolvent banking corporations, *held* not to vest title in receiver so as to enable him to sue in District Court in another State without ancillary appointment. *Sterrett* v. *Second Natl. Bank*. 73

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1. Act of May 29, 1908, authorizing suit in Court of Claims against Creek Nation for adjudication of claim of individual for destruction of property, did not validate claim itself or permit that United States be joined as defendant. *Turner* v. *United States*. 354

2. Jurisdiction under Tucker Act. See IV, 6; V, 2, *supra*.

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LACHES.

1. While laches of private person is imputable to United States in suit brought for his benefit, settlers entitled to benefits of Act of 1887, who maintained peaceable and continued possession, affording notice of their equitable rights which they asserted and sustained before Land Department, and who relied upon promises of Department to secure their titles and on suits by Government to that end, *held* not guilty of laches, notwithstanding long delays in litigation. *United States* v. *New Orleans Pac. Ry.* 507

2. One who is in peaceable possession under equitable claim does not subject himself to charge of laches for mere delay in resorting to equity to establish his claim against holder of legal title where latter manifests no purpose to disturb him or to question his claim. *Id.*, p. 519.

LAND DEPARTMENT. See **Public Lands.**

LAND GRANTS. See **Public Lands.**

LANDS. See **Deeds; Indians; Public Lands; Waters.**

LESSOR AND LESSEE. See **Deeds.**

1. Validity of tax on leasehold interest where special charters of lessor railroads contain perpetual tax exemptions. *Central of Georgia Ry.* v. *Wright.* 525

2. Creek Nation not liable to its lessee for destruction of fence by mob. *Turner* v. *United States* 354

LICENSE. See **Franchises.**

License fees. See **Constitutional Law,** V, 4–8.
Insurance brokers. See *Id.*, XII; XIV, 7.
Farm produce brokers. See *Id.*, XIV, 8.
Peddlers. See **Ordinances,** 4.
As to tide lands. See *Leary* v. *Jersey City* 328, 333

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For salvage. See **Admiralty,** 18.

LIFE INSURANCE. See **Insurance,** 3, 4.

LIMITATION OF LIABILITY. See **Admiralty,** 6; **Carriers,** 1.

LIMITATIONS. See **Laches.**

1. In suit brought by United States on behalf of settlers to secure their rights under Act of 1887 against railway and its grantees holding legal title, through patents, affecting patent issued to railway before Act of Mar. 2, 1896, the 5-year limitation of that act may be a bar to relief by cancellation, but bill may stand upon prayer to affix trust upon legal title in favor of settlers. *United States* v. *New Orleans Pac. Ry*.... 507

2. Provisions of Clayton Act, § 5, for admitting judgments, in government proceedings finding company guilty of attempt to monopolize " hereafter rendered," in other litigation, and for suspending statute of limitations as to private rights pending government prosecutions, do not affect retrospectively, on review, judgment rendered in action for triple damages before Clayton Act was passed. *Buckeye Powder Co.* v. *Du Pont Powder Co*..... 55

LITERARY PROPERTY. See **Copyright.**

LIVE STOCK.

Stipulation for written notice of loss in live stock contract. See **Interstate Commerce Acts,** 3.

LOAN. See **Payment,** 4.

LOCAL LAW. See **Jurisdiction,** IV, 14–24.

MAILS.

Use of, to defraud. See **Criminal Law,** 5.

MANDAMUS. See **Jurisdiction,** IV, 18.

MARITIME CONTRACTS. See **Admiralty.**

MARRIAGE. See **Indians,** 1.

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Advance payment of wages to seamen. See **Admiralty,** 10–12.

Contract of employment for one year. See **Statute of Frauds.**

MASTERS OF VESSELS.

Contract of employment. See **Admiralty,** 13.

" MEAT FOOD PRODUCT." See **Meat Inspection Act.**

MEAT INSPECTION ACT.

1. Oleo oil *held* a " meat food product " within act, when manufactured fit for human consumption and not denatured; and debarred from interstate and foreign commerce unless first inspected and passed. *Pittsburgh Melting Co.* v. *Totten* 1

2. So *held,* where shipper labeled product " inedible," but retained no control of the use and declined to certify, as required by regulations of Secretary of Agriculture, that it was suitable for industrial purposes only, and incapable of being used as food by man. *Id.*

METLAKAHTLA INDIANS. See **Indians,** 6, 7.

MEXICO. See **Boundaries,** 2.

MINING CLAIMS. See **Public Lands,** II, 2.

MOBS.

Action against Creek Nation for destruction of property. See **Claims,** 2, 3.

MONOPOLIES. See **Anti-Trust Acts; Copyright; Trademarks; Unfair Competition.**

MORTGAGES.

Validity of state charge for privilege of issuing railroad bonds under mortgage. See **Constitutional Law,** V, 4.

MOTIONS

To affirm. See **Procedure,** IV.

To file original bill. See *Id.,* I.

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MUNICIPALITIES. See **Ordinances.**
Regulating street car fares and service. See **Franchises**, 5–8.

NATIONAL BANKS.
1. Extent to which States may tax property or shares is determined exclusively by § 5219, Rev. Stats. *Bank of California* v. *Richardson* 476
Same v. *Roberts*. 497

2. The interest represented by shares of state bank, when held by national bank, can be reached only by tax upon shares of the latter, and is not taxable to national bank itself. *Id.*

3. Shares of national bank, when held by another national bank, are taxable to latter as shareholder, and are not to be included in valuing shares of latter when taxing its shareholders. *Id.*

NAVIGABLE WATERS. See **Waters.**

NAVY DEPARTMENT.
Rev. Stats., § 3744, requiring approval in writing of contracts, does not affect implication of warranty by Government. *United States* v. *Spearin*. 132

NEGLIGENCE. See **Carriers**, 3.
1. Power of States to establish and apply their own laws and policies touching validity of contracts exempting carriers from liability to passengers for injuries due to negligence, was not affected by Carmack Amendment, which deals only with shipments of property. *Chicago, R. I. & Pac. Ry.* v. *Maucher*. 359

2. In action for injury to circus employee while traveling upon circus train being hauled by locomotive of railroad company pursuant to contract declaring company not a common carrier and not liable for negligence, *held*, that employee was not a passenger of company, and that cause of action was based on general right not to be injured by negligence of another. *Id.*

NEW JERSEY. PAGE
Conveyance and taxation of tide lands. See **Deeds.**

NEWS. See **Newspapers.**

NEWSPAPERS. See **Unfair Competition.**
Suit by representative of a class. See **Parties,** 7, 8.

1. A news article in a newspaper may be copyrighted under Act of 1909, but news, as such, is not copyrightable. *International News Service* v. *Associated Press* 215

2. As against public, any special interest of producer of uncopyrighted news matter is lost upon first publication. *Id.*

3. But one who gathers news at pains and expense, for purpose of lucrative publication, has a *quasi* property in results, as against rival in same business; and appropriation of those results at the expense and to the damage of the one and for the profit of the other is unfair competition, against which equity will afford relief. *Id.*

NONRESIDENTS.
Service on agent of nonresident individual. See **Jurisdiction,** II.
Right to engage in business of insurance broker. See **Constitutional Law,** XII; XIV, 7.

NOTICE. See **Constitutional Law,** XIV, (1); **Judicial Notice; Public Lands,** II, 6–9; **Trade-marks,** 5.
Live stock contracts; written notice of damage. See **Interstate Commerce Acts,** 3.

NUISANCES. See **Constitutional Law,** VI, 6.

OCCUPANCY.
Notice from. See **Public Lands,** II, 6–9.

OFFICERS. See **Indians,** 7; **Meat Inspection Act,** 2; **Public Lands,** I, 2; II, 2, 7, 9.
Participation by treasurer of Creek Nation does not make it liable for destruction of property by mob. *Turner* v. *United States* 354

OFFICERS—*Continued* PAGE

1. Creation of offices and assignment of their compensation is a legislative function; and fact and extent of any delegation of it must clearly appear. *Cochnower* v. *United States* .. 405

2. Act of 1909, authorizing Secretary of Treasury " to increase and fix " compensation of inspectors of customs, did not empower him to decrease their salaries. *Id.*

3. Appointment of clerk by Collector of Customs, " to act as acting U. S. weigher," at compensation less than fixed by Act of 1866 ($2,500) for weighers, and assignment to, and performance of, duties of weigher, does not place him in that office and entitle him to its salary. *MacMath* v. *United States*. 151

OHIO.

1. Whether Ohio constitution gives directly consent to suit by individuals against State or requires legislation to put provision into effect is a question of local law. *Palmer* v. *Ohio*. 32

2. Conservancy Act, authorizing drainage districts and assessments, etc., for benefits, affords opportunity for testing private grievances judicially. *Orr* v. *Allen*..... 35

3. Gen. Code, § 12725, regulating food standard and labeling of condensed milk, *held* to prohibit sale of wholesome condensed skimmed milk when combined with cocoanut oil and labeled " a compound of evaporated skimmed milk," etc. *Hebe Co.* v. *Shaw*... 297

OHIO RIVER.

Territorial limits of Kentucky. See **Boundaries,** 1.

OILS. See **Meat Inspection Act.**

State inspection. See **Constitutional Law,** V, 6–8.

Regulation of gasoline storage. See **Constitutional Law,** XIV, 10.

OLEO OIL. See **Meat Inspection Act.**

ORDINANCES. See **Franchises.**

1. Forbidding storage of gasoline within 300 ft. of any dwelling is within police power, though storage necessary to company's business and plant could not be moved without expense and loss of profits. *Pierce Oil Corp.* v. *City of Hope* 498

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2. Fact that tanks were moved to present position at city's request does not import contract not to require further removal for public welfare. *Id.*

3. Where it cannot be aided by judicial notice, an averment that an ordinance is unnecessary and unreasonable is too general and is not admitted by demurrer. *Id.*

4. Whether ordinance requiring license for peddling and canvassing for sale of property on subscription is confined to a general course of such business or applies also to isolated transactions is a local question. *Watters* v. *Michigan* 65

ORIGINAL JURISDICTION. See **Jurisdiction,** IV, (2).

ORIGINAL PACKAGE. See **Constitutional Law,** V, 9–11.

PARENT AND CHILD.

Tribal status of children of mixed marriages. See **Indians,** 1.

PAROL EVIDENCE. See **Evidence,** 6.

PARTIES.

Suits against United States under Tucker Act. See **Jurisdiction,** IV, 6; V, 2.

By shipper against carrier for benefit of insurer. See **Admiralty,** 3.

Who may question constitutionality of statutes. See **Constitutional Law,** XV.

1. *State.* Right of individual to sue State depends upon consent; and whether Ohio constitution gives consent is a local question. *Palmer* v. *Ohio* 32

2. *United States.* Where act of Congress reserved for use of dependent Indians islands in Alaska, including adjacent deep waters supplying fisheries, a fish net constructed therein, whose operation might materially reduce supply of fish accessible to Indians, *held* subject to abatement at suit of United States. *Alaska Pacific Fisheries* v. *United States* 78

3. *Id.* Act May 29, 1908, authorizing suit in Court of Claims against Creek nation for adjudication of claim of individual for destruction of property, did not validate

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claim itself or permit that United States be joined as defendant. *Turner* v. *United States*..... 354

4. *Id.* United States may maintain suit on behalf of homestead settlers to secure their rights under Act of 1887 against railway and its grantees holding legal title through patents. *United States* v. *New Orleans Pac. Ry*..... 507

5. *Co-Belligerent.* May sue in our courts against alien enemy; latter is entitled to defend before judgment entered. *Watts, Watts & Co.* v. *Unione Austriaca*..... 9

6. *Chancery Receiver.* May not sue in courts of foreign jurisdiction to recover property therein situated; Alabama laws, relating to administration of assets of insolvent banking corporations, *held* not to vest title in receiver so as to enable him to sue in District Court in another State without ancillary appointment. *Sterrett* v. *Second Natl. Bank*..... 73

7. *Representative.* Incorporated association of newspaper publishers, engaged in gathering news and distributing it to its members, is proper party to represent them in suit to protect their interests in news so collected against illegal acts of a rival organization. Equity Rule, 38. *International News Service* v. *Associated Press*..... 215

8. *Non-Joinder.* Right to object to non-joinder waived if not made specifically in courts below. Equity Rules, 43, 44. *Id.*

PASSENGERS.

Right of carrier to limit liability for injuries due to negligence. See **Carriers,** 1, 2.

Who are passengers. See *Id.*

PATENTS FOR INVENTIONS.

Davison patent, relating to propulsion of torpedoes by balanced turbine method, construed. *Bliss Co.* v. *United States* 37

See **Contracts,** 15.

PATENTS FOR LAND. See **Indians; Public Lands.**

Exemption of homesteads. See **Public Lands,** I, 4.

PAY. See **Officers.**

PAYMENT. See **Duress.** PAGE

1. Where building contract contemplates contractor's ability to perform will depend upon his receiving stipulated payments on account as work progresses, substantial failure to pay as stipulated will justify declining to proceed. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

2. Amounts due under different branches of contract may be united. *Id.*

3. Where complaint alleged failure to make payments "in accordance with contract," while demands proved were based on modification, *held*, an unimportant variance. *Id.*

4. Where insurer loans shipper amount of loss caused by carrier's negligence, to be repaid in so far as shipper recovers from carrier, otherwise to operate as absolute payment, and, as security, shipper pledges right of action and agrees to sue carrier at expense and under direction of insurer, *held*, that loan is not payment of insurance, and does not enure to carrier. *Luckenbach* v. *McCahan Sugar Co* 139

PEDDLERS. See **Ordinances,** 4.

PENALTIES. See **Duress.**

PERFORMANCE. See **Contracts,** 17.

PERSONAL INJURY. See **Negligence; Workmen's Compensation Laws.**

PERSONAL PROPERTY. See **Administration.**

PHILIPPINE ISLANDS.

Finding that vessel was abandoned, concurred in by court of first instance and Supreme Court of Philippines, in salvage case, accepted by this court when supported by evidence. *Oelwerke Teutonia* v. *Erlanger* 521

PLEADING. See **Election of Remedies.**

1. *Bill of Particulars*, supplementing indictment, is no part of record on demurrer. *United States* v. *Comyns*. 349

2. *General Averment.* Where not aided by judicial notice, averment that ordinance is unnecessary and unreasonable

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is too general and not admitted by demurrer. *Pierce Oil Corp.* v. *City of Hope*. 498

3. *Contradicting Judicial Knowledge.* Allegations that gasoline was so stored as not to endanger buildings and that explosion was impossible, though conceding possibility of some combustion, *held* insufficient on demurrer to exclude danger of explosion of which court might take judicial notice. *Id.*

4. *Bill; When Taken as True.* Where District Court, in denying preliminary injunction, of own motion dismisses bill, its action is equivalent to sustaining demurrer, and, upon appeal, allegations of bill taken as true. *Detroit United Ry.* v. *Detroit* 429

5. *Variance.* In action for breach of building contract, complaint alleged failure to make payments "in accordance with contract," while demands proved were based on modification. *Held,* an unimportant variance not requiring amendment, particularly in view of relation of matter to former decision and mandate of this court. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

POLICE POWER. See **Constitutional Law,** V; XIV, (2).

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PRESIDENT.

Overriding veto. See **Constitutional Law,** I, 2–4.

PRESUMPTIONS. See **Statutes,** 1, 2, 10.

PRINCIPAL AND AGENT. See **Criminal Law,** 2, 4; **Insurance,** 1, 2; **Jurisdiction,** II; IV, 14.

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PRIVILEGES AND IMMUNITIES. See **Constitutional Law,** XII; XIV, 6–8.

PROBATE. See **Administration.**

PROCEDURE. See **Demurrer; Election of Remedies; Equity; Evidence; Jurisdiction; Parties; Pleading; Receivers.** PAGE

Affixing trust on patentee where suit to annul patent is barred by limitations. See **Public Lands,** II, 8.

I. **Motion to File Original Bill.**

1. Denied when complaining State clearly not entitled to relief sought. *Iowa* v. *Slimmer* 115

2. Submitted *ex parte;* and when doubt exists may be postponed for full argument on briefs. *Id.*, p. 119.

II. **Certificates from Circuit Court of Appeals.**

1. A certificate consisting of recitals of facts interblended with questions of law, or of recitals which fail in themselves to distinguish between ultimate and merely evidential facts, affords no basis under Jud. Code, § 239, either for answering questions or for exercising discretionary power to call up whole record. *Cleveland-Cliffs Co.* v. *Arctic Iron Co* 178

2. Certificate under Jud. Code, § 239, Rule 37, must state facts pertinent to questions certified, and this cannot be dispensed with by reference to transcript and briefs in Court of Appeals, which are no part of record in this court. *Dillon* v. *Strathearn S. S. Co.* 182

III. **Petitions for Certiorari.**

Rule 37, § 3, amended 529

IV. **Motion to Affirm; Dismissal.**

Upon error to state court, this court, finding no substantial federal question, will dismiss, *sua sponte,* denying a motion to affirm. *Palmer* v. *Ohio.* 32

V. **Arguments.** See I, 2, *supra.*

Rule 22, § 3, amended 528

VI. **Scope of Review.** See **Jurisdiction.**

1. *Examining all Assignments.* When grounds relied on by Circuit Court of Appeals for reversal prove untenable, this court will consider what judgment should have been rendered in view of other assignments of error. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

2. *Excessive Assignments.* See *Buckeye Powder Co.* v. *Du Pont Powder Co.* 55, 64

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3. *Cognizance of Changed Situation; Admiralty.* Upon review this court may make such disposition of case as justice may require at time of decision, and therein must consider changes in fact and in law which have supervened since decree below entered. *Watts, Watts & Co.* v. *Unione Austriaca* 9

4. *Reëxamining State Court's Findings.* This court will examine for itself whether there is any basis in fact for finding that constitutional right has been waived. *Union Pac. R. R.* v. *Public Service Comm* 67

5. *Id.* Where it is contended that contract of agency to sell real estate was void because federal lands, under homestead entry, were included, and state court found they were not included, this court will examine finding. *King* v. *Putnam Investment Co.* 23

6. *Concurrent Findings.* Of fact, by two lower courts, accepted. *Van Dyke* v. *Arizona Eastern R. R.* 49
Luckenbach v. *McCahan Sugar Co.* 139, 145
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7. *Interlocutory Appeal.* When merits decided. *International News Service* v. *Associated Press.* 215, 232

8. *Id.; Salvage Questions.* Finding that vessel was abandoned, concurred in by two lower courts, accepted by this court when supported by evidence. *Oelwerke Teutonia* v. *Erlanger* 521

9. *Id.* Unless there has been some violation of principle or clear mistake, appeals to this court on amounts allowed for salvage are not encouraged. *Id.*

10. *Taking Bill as True.* Where District Court, in denying preliminary injunction, of own motion dismisses bill, action is equivalent to sustaining demurrer, and, upon appeal, allegations of bill must be taken as true. *Detroit United Ry.* v. *Detroit.* 429

11. *Bill of Particulars,* supplementing indictment,—no part of record for purpose of demurrer. *United States* v. *Comyns* 349

VII. **Parties.** See **Parties.**

Right to object to nonjoinder treated as waived if not made

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specifically in courts below. Equity Rules, 43, 44. *International News Service* v. *Associated Press* 215

VIII. **Raising Federal Question.**

When not presented within time allowed by state procedure, and refused consideration by state court for that reason, writ of error will not lie under § 237, Jud. Code. *Missouri, Kans. & Tex. Ry.* v. *Sealy* 363

IX. **Exceptions.**

1. Error in admitting evidence cannot be imputed to trial court upon theory that count of complaint was waived at trial, based on statement of plaintiff's counsel in Court of Appeals, which was inconsistent with bill of exceptions. *Guerini Stone Co.* v. *Carlin Constr. Co* 334

2. An exception to an instruction should be specific, directing mind of court to some single point of alleged error. *Id.*

X. **Scope and Form of Decree.**

1. Where charter-party signed by one owner, but the rest, being impleaded with him, admitted that he acted for all, and liability of all, if liability existed, was not controverted, a decree for damages should run against all. *Luckenbach* v. *McCahan Sugar Co.* 139

2. In action by United States against manufacturer of torpedoes, to enjoin disclosure (in violation of contract) of device the design for which was furnished by United States, *held*, that injunction should be confined to devices in use, but without prejudice to right to enjoin disclosure of others, upon proof of intention to make use of them. *Bliss Co.* v. *United States* 37

3. Where libel *in personam* between alien belligerents came to this court for review after United States entered war, and it was held that libelant as co-belligerent could maintain suit, that jurisdiction should not be declined as an act of discretion, and that respondent, an alien enemy, was entitled to defend, this court directed, in view of impossibility of free intercourse between this and respondent's country, that further prosecution be suspended until adequate presentation of respondent's defense should become possible. *Watts, Watts & Co.* v. *Unione Austriaca* 9

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4. Injunction restraining news-gathering agency from pirating rival's news. *International News Service* v. *Associated Press*. 215, 247

PROCESS. See **Jurisdiction,** II.

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In news. See *International News Service* v. *Associated Press*. 215, 240

PUBLICATION. See **Copyright.**

PUBLIC CONTRACTS. See **Contracts,** 1–16.

PUBLIC LANDS.

Jurisdiction of District Court to determine controversy over title to land lying between present and former beds of Rio Grande, claimed under laws of Texas and Mexican grants. See **Jurisdiction,** V, 3.

Whether contention that contract of agency to sell real estate was void, because federal lands under homestead entry were included, presents federal question. See **Jurisdiction,** IV, 14.

Indictment involving Timber & Stone Act. *United States* v. *Comyns*. 349

I. **Homesteads.** See also II, 2–9, *infra.*

1. *Head of Family; Showing.* To initiate right under homestead act, a minor's application must show he is head of family; general assertion that he is such, by reason of having adopted a minor, but without stating time, place, or mode of adoption, or identifying child, insufficient. *Fisher* v. *Rule*. 314

2. *Withdrawal; Effect on Later Filing.* When Secretary of Interior, after canceling final homestead entry, has ordered suspension of all action pending a reconsideration of decision, no adverse right may be initiated either by settlement and improvement or by filing preliminary application, while suspension remains in force. *Id.*

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3. *Patentee as Trustee.* To fasten trust on patentee of public land, plaintiff must show that better right to land is in himself; not enough to show that patentee ought not to have received patent. *Id.*

4. *Exemption from Debts.* Section 4, Act of 1862, providing that no lands acquired shall become liable to satisfaction of debts contracted prior to issuance of patent, applies as well to debts contracted after final entry and before patent as to debts contracted before final proof, and in both respects is within power of Congress. *Ruddy* v. *Rossi* 104

II. **Railroad Grants and Public Reservations.**

1. *When Subject to Settlement.* Act of 1871 granted lands to Texas Pacific, conditioned that those not sold within 3 years from completion of road should be subject to settlement and preëmption at maximum price, and other lands to Southern Pacific with same rights and subject to same limitations as were granted to Southern Pacific by Act of 1866. *Held,* that condition of Texas Pacific grant was inapplicable to Southern Pacific. *Fullinwider* v. *Southern Pac. R. R.* 409

2. *Right of Way; Acts of 1875, 1899; Forest; Mining Claim; Homestead.* A railroad, having surveyed line over public land and filed map and application for right of way, and land having in interim become part of National Forest, made application upon same map and received permission to construct; amended location so as to lay right of way, 200 ft. wide, across mining claim in Forest; obtained conveyance of 100 ft. in width from mining claimants, and constructed and operated road. Thereafter, original application was approved by Secretary of Interior, and tract crossed was thrown open to entry. *Held,* that its right to full 200 ft. was superior to right of one who held under mining claim until land was thrown open and who then settled, and ultimately obtained patent, although his homestead right was initiated before railroad amended map to show change of location and before Secretary approved application as amended. *Van Dyke* v. *Arizona Eastern R. R.* 49

3. *Id.; Defective Charter; Right of Homesteader.* Whether failure to describe route in charter left company without

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power to construct, and unqualified to receive grant, cannot be raised by homesteader. *Id.*

4. *New Orleans Pacific; Settlers' Rights.* Settlers who, before definite location of road, settled on odd-numbered sections within primary and indemnity limits of grant, and thereafter maintained their claims, residency, occupation and cultivation, *held* entitled to benefits of Act of 1887 confirming grant but excepting lands occupied by such settlers at date of definite location. *United States* v. *New Orleans Pac. Ry.* 507

5. *Id.; Purchasers from Railway.* Provisions of Act of 1887 in favor of settlers became applicable, when accepted by confirmee company, to all unpatented lands, to such of patented lands as it had not sold, and to indemnity as well as place lands; but not to lands withdrawn from entry and sale, and duly patented to railway and by it conveyed to *bona fide* purchasers before act was passed. *Id.*

6. *Id.; Notice from Occupancy.* Subsequent purchasers from railway charged with notice of Act of 1887, and of claims of settlers, entitled to its benefits, and occupying tracts purchased. *Id.*

7. *Id.; Suit by United States.* May be maintained on behalf of settlers to secure their rights under act against railway and its grantees holding legal title through patents. *Id.*

8. *Id.; Patent; Limitations; Trust.* In such suit, affecting patent to railway before Act Mar. 2, 1896, 5-year limitation of that act may be bar to relief by cancellation, but bill may stand upon prayer to affix trust upon legal title in favor of settlers. *Id.*

9. *Id.; Laches.* While laches of private person is imputable to United States in suit brought for his benefit, settlers entitled to benefits of Act of 1887, who maintained peaceable and continued possession, affording notice of their equitable rights which they asserted and sustained before Land Department, and who relied upon promise of Department to secure their titles and on suits by Government to that end, *held* not guilty of laches, notwithstanding long delays in litigation. *Id.*

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III. **Indian Reservations; Rights of Fishery.** See **Indians, 7.**

For safeguarding and advancing dependent Indian people, resident on islands belonging to United States in Alaska, Congress has power to reserve for their use not only upland of islands but also adjacent submerged land and deep waters supplying fisheries essential to Indians' welfare. *Alaska Pacific Fisheries* v. *United States*..... 78

PUBLIC OFFICERS. See **Indians, 7; Meat Inspection Act, 2; Officers; Public Lands,** I, 2; II, 2, 7, 9.

PURE FOOD LAWS. See **Food.**

RAILROADS. See **Carriers; Franchises; Interstate Commerce Acts; Negligence; Public Lands,** II; **Taxation,** II, 13.

Validity of state charge for issuing railroad bonds under mortgage. See **Constitutional Law,** V, 4.

RATES. See **Carriers,** 12, 13.

Exchange of services; railroad and telegraph companies. See **Interstate Commerce Acts,** 4.

Electric power companies. See **Constitutional Law,** VI, 5; XIV, 16.

Street car lines. See **Franchises,** 6–9.

REAL PROPERTY. See **Deeds; Indians; Jurisdiction,** IV, 14; V, 2, 3; **Public Lands.**

Exemption of homesteads. See **Public Lands,** I, 4.

RECEIVERS.

1. Chancery receiver has no authority to sue in courts of a foreign jurisdiction to recover property therein situated. *Sterrett* v. *Second Natl. Bank*..... 73

2. Alabama laws, relating to administration of assets of insolvent banking corporations, *held* not to vest title in receiver so as to enable him to sue in District Court in another State without ancillary appointment. *Id.*

REED AMENDMENT. See **Intoxicating Liquors, 6.**

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Residence as condition to grant of insurance broker's license. See **Constitutional Law,** XII; XIV, 7.

RESTRAINT OF GOVERNMENT.
Effect of embargo on contract of ocean carriage. See **Admiralty,** 14.

RESTRAINT OF TRADE. See **Anti-Trust Acts.**

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RIO GRANDE.
Jurisdiction of District Court to determine controversy over title to land lying between present and former beds of Rio Grande, claimed under laws of Texas and Mexican grants. *Cordova* v. *Grant* 413

RIPARIAN LANDS.
Construction of deed of New Jersey Riparian Commission. See **Deeds; Rio Grande.**

RULES.
Amendment of Rule 22, § 3 528
Amendment of Rule 37, § 3 529
Certificate from Circuit Court of Appeals, Rule 37. See **Jurisdiction,** IV, (3).

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State regulation:
Foods; original and secondary packages. See **Constitutional Law,** V, 9–12.
Farm produce on commission. *Id.*, XIV, 8.
Peddlers. See **Ordinances,** 4.

SALVAGE. See **Admiralty,** 16–19.

SEAMAN'S ACT. PAGE

1. Act of 1915, § 11, prohibiting payment of wages in advance, inapplicable to advancements to alien seamen shipping abroad on foreign vessel, pursuant to contracts valid under foreign law; such advancements may be allowed for in paying such seamen in port of United States. *Sandberg* v. *McDonald* 185

2. Provision for abrogation of inconsistent treaty provisions is not opposed to this construction, but refers to parts of act abolishing arrest for desertion and conferring jurisdiction over wage controversies arising in our jurisdiction. *Id.*

3. Nor does § 11 prohibit such advancements when made by an American vessel to secure seamen in foreign port. *Neilson* v. *Rhine Shipping Co* 205

4. See also *Dillon* v. *Strathearn S. S. Co.* 162

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1. Power to " increase and fix " compensation of inspectors of customs. *Cochnower* v. *United States* 405

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Power of Congress to convey title to public lands exempt from execution. See **Public Lands,** I, 4.

Power of Congress over disposition of public lands under navigable waters, in a Territory. See *Alaska Pacific Fisheries* v. *United States* 78

1. Right of individual to sue State depends upon consent. *Palmer* v. *Ohio* 32

2. A sovereignty, on general principles, is not liable for injuries resulting from mob violence or failure to keep the peace. *Turner* v. *United States* 354

STATUTE OF FRAUDS.

A contract made orally in California, whereby respondent was engaged for one year to serve as master of vessel, mainly upon the sea, *held* a maritime contract; California statute of frauds requiring writing for agreements not to be performed within a year inapplicable in defense of action for breach. *Union Fish Co.* v. *Erickson.* 308

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I. **Principles of Construction.**

1. *Legislation Presumptively Territorial,* and confined to limits over which law-making power has jurisdiction. *Sandberg* v. *McDonald.* 185, 195

2. *Harmony of Parts.* Presumption that law of Congress is territorial is strengthened by provision for criminal punishment of acts in question. *Id.,* p. 196.

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3. *Id.* Provision in Seaman's Act of 1915 for abrogation of inconsistent treaty provisions, *held* not opposed to this court's construction of § 11 as not prohibiting advancements to alien seamen shipping abroad on foreign vessel, where provision may properly be referred to other parts of act. *Id.*

4. *Resort to Genesis, History, Practice.* This construction is same as that adopted by State Department in consular instructions; and reports and proceedings attending legislation in Congress do not require different conclusion. *Id.*

5. *Id.* This court's construction of constitutional provision requiring two-thirds vote to pass bill over veto *held* confirmed by context, proceedings in the Convention, practice of Congress under similar provision for submitting amendments, and practice of States before and since adoption of Constitution. *Missouri Pac. Ry.* v. *Kansas* 276

6. *Id.* Conditions giving rise to enactment of § 239, Crim. Code, respecting interstate transportation of intoxicating liquor, and report of Senate Committee, examined in holding that practice of collecting price at destination, as condition of delivery, was evil aimed at. *Danciger* v. *Cooley* ... 319

7. *Ejusdem Generis.* Never applied to defeat intent. *Id.*

8. *Grant of Use.* In absence of language suggesting different intention, grant of use of railroad right of way taken as granting right of way itself, where purpose to supply roadbed for trunk line, necessitating expenditure by grantee. *Georgia* v. *Cincinnati So. Ry.* 26

9. *Perpetual Grant.* Grant of railroad right of way to corporation, or to perpetual trustees holding for corporate uses, does not need words of succession to be perpetual. *Id.*

10. *Indians; Presumptions.* Statutes passed for benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of Indians. *Alaska Pacific Fisheries* v. *United States* 78

11. *Geographical Name.* "Body of lands known as Annette Islands," *held* a use of geographical name, including islands surrounding and intervening waters. *Id.*

STOCK DIVIDENDS. See **Taxation, I.**

STOCKHOLDERS. See **Corporations**, 1. PAGE

Power of States to tax shares of national banks. See **National Banks.**

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STREETS AND HIGHWAYS. See **Franchises**, 5–8.

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Expropriating submerged lands. See **Waters**, 7.

Construction of deed of New Jersey Riparian Commission. See **Deeds.**

SUBROGATION. See **Insurance**, 5–7.

TAXATION.

Of tide lands in New Jersey. See **Deeds.**

Validity, under commerce clause, of state license and inspection fees. See **Constitutional Law**, V, 4, 6–8.

I. **Income Tax of 1913.**

Dividends of earnings of subsidiaries to company holding all their stock and controlling them in conducting a single enterprise, the result of transfers being merely that main company became holder of debts in the business, previously due from one subsidiary to another, *held* not taxable as income, where earnings accumulated before taxing year and had practically become capital. *Gulf Oil Corp.* v. *Lewellyn* 71

II. **State Taxation.** See **Jurisdiction**, IV, 18.

1. *Property Used in Interstate Commerce.* Where state board, under law providing for *ad valorem* tax on property, valued personal property within State of foreign express company on basis of mileage employed there in local and interstate commerce, and assessor in listing part in his county inaccurately characterized property as right to carry on express business, *held*, that tax was not on privilege of engaging in interstate commerce, but on property in county. *Wells, Fargo & Co.* v. *Nevada* 165

2. *Id.* In action to enforce tax, if valuation excessive and burdensome to interstate commerce, the company, under state law, was entitled to prove facts and secure reduction. *Id.*

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3. *Indian Property.* Upon conveyance of Creek allotment, exempt from taxation under Agreement of June 30, 1902, from which restrictions on alienation were removed by Act of May 27, 1908 (the latter act providing that land from which restrictions have been removed shall be subject to taxation), the tract is subject to state taxation in hands of grantees. *Fink* v. *County Commissioners*. 399

4. *Id.* Act of 1908, *supra*, invades no right of Indian in making exercise of right of alienation a surrender of exemption from taxation. *Id.*

5. *National Banks.* Extent to which States may tax property of national banks is determined exclusively by § 5219, Rev. Stats. *Bank of California* v. *Richardson*. 476
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6. *Id.* Shares of state bank, when held by national bank, can be reached only by tax upon shares of latter, and are not taxable to national bank itself. *Id.*

7. *Id.* Shares of national bank, held by another national bank, are taxable only to latter as shareholder, and are not to be included in valuing shares of latter when taxing its shareholders. *Id.*

8. *Sewer Districts.* Where land of cemetery association assessed as a whole for local improvement, although part had been disposed of for burial purposes, it appearing that fee remained in association, *held*, that latter was not deprived of property without due process. *Mt. St. Mary's Cemetery* v. *Mullins* 501

9. *Id.* A local assessment must not be arbitrary or unreasonable. *Id.*

10. *Id.* Inclusion of cemetery for purpose of sewer improvement and assessment in district with larger area devoted to other uses, while other cemeteries have been districted separately, does not establish denial of equal protection, where similarity of situation and conditions not shown. *Id.*

11. *Id.* Notice and opportunity to be heard before creation of special improvement district not essential to due process if hearing afforded in subsequent proceedings to enforce tax. *Id.*

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12. *Drainage Districts.* Ohio Conservancy Act, authorizing drainage districts and improvements, assessment for benefits, taxation, etc., affords opportunity for testing private grievances judicially, and is consistent with state and federal constitutions. *Orr* v. *Allen*. 35

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13. *Exemptions in Railroad Charters.* Attempt to evade tax exemptions, (held in former decision to preclude taxing of lessee upon fee of leased property) by tax on leasehold interest, is invalid. *Central of Georgia Ry.* v. *Wright* . . . 525

14. *Id.* Contracts in special charters creating perpetual tax exemptions are not revocable by later provisions of state constitution. *Id.*

15. *Valuation; Hearing.* Tax is not wanting in due process where valuation originally made *ex parte*, if enforced only through judicial proceeding affording notice and hearing. *Wells, Fargo & Co.* v. *Nevada* 165

16. *Inheritance.* As to inheritance taxes. See *Iowa* v. *Slimmer* 115, 120

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Power of Congress to reserve land under navigable waters, and rights of fishery, for dependent Indians. *Alaska Pacific Fisheries* v. *United States* 78

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TRADE-MARKS.

1. *Nature of Right.* Not a right in gross; exists only as ap-

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purtenant to established business and for protection of good will thereof. *United Drug Co.* v. *Rectanus Co.* 90

2. *Territorial Extent.* Adoption of trade-mark does not project right of protection in advance of extension of trade. *Id.*

3. *State and Federal Law.* Property in trade-marks and right to exclusive use rest upon state law; power of Congress to legislate on subject is only such as arises from authority to regulate commerce. *Id.*, p. 98.

4. *Priority.* As between conflicting claimants, priority of appropriation determines. *Id.*

5. *Id.; Estoppel.* Where A had trade-mark in Massachusetts, in connection with business there and in neighboring States, and B, afterwards, in good faith, without notice of A's use or intent to injure or forestall A, adopted same mark in Kentucky, where A's business theretofore had not extended, and built up valuable business under it there, *held*, that A, upon entering B's field with notice of situation, had no equity to enjoin B as an infringer, but was estopped. *Id.*

TRADE SECRETS.

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1. Provision in Seaman's Act of 1915 for abrogation of inconsistent treaty provisions, *held* not opposed to construction of § 11 as not prohibiting advancements to alien seamen shipping abroad on foreign vessel, where provision may properly be referred to other parts of act. *Sandberg* v. *McDonald* 185

2. As to jurisdiction of District Court to try conflicting claims of title based on Mexican grants and laws of Texas, respectively, to land between present and former bed of Rio Grande, over which United States has *de facto* sover-

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eignty, and effect of treaties, etc., with Mexico, touching determination of international boundary, and of act of our Government in waiving objection to litigation, based on comity. *Cordova* v. *Grant* 413

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Effect of grant of use of right of way to trustees for a corporation, without words of perpetual succession. See **Franchises,** 2.

To fasten a trust on patentee of public land, plaintiff must show that better right to land is in himself; not enough to show that patentee ought not to have received patent. *Fisher* v. *Rule* 314

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ULTRA VIRES. See **Corporations,** 2.

UNFAIR COMPETITION. See **Trade-marks.**
1. An incorporated association of newspaper publishers gathered news and without copyright telegraphed it daily to its members for their exclusive publication; a rival organization obtained this news through early publications of first company's members, and telegraphed it to its own customers, enabling them to compete in prompt publication. *Held*, that first company and its members, as against second, had an equitable *quasi* property in the news, even after publication; that its use by second company, not as basis for independent investigation but by substantial appropriation, for its own gain, amounted to unfair competition which should be enjoined, irrespective of false pretense involved in rewriting and distributing it without mentioning source. *International News Service* v. *Associated Press* 215

2. Complainant not debarred from relief on ground of unclean hands by fact that, following practice engaged in by defendant and news agencies generally, it had used defendant's news items, when published, as "tips" for investigation, the results of which it sold. *Id.*

UNITED STATES. See **Boundaries, 2; Claims; Contracts,** PAGE 1–16; **Laches; Limitations; Officers; Public Lands.**
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VARIANCE.
In action for breach of building contract, complaint alleged failure to make payments in accordance with contract, while demands proved were based on a modification. *Held* an unimportant variance not requiring amendment, particularly in view of relation of matter to former decision and mandate of this court. *Guerini Stone Co.* v. *Carlin Constr. Co.* 334

VERDICT.
In action for triple damages under § 7 of Sherman Act, where only ground for holding defendant is responsibility (through stock ownership) for acts of co-defendant, error in directing verdict for former is harmless if latter exonerated upon merits by jury, after instructions fairly presenting case against it. *Buckeye Powder Co.* v. *Du Pont Powder Co.* 55

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1. This court must examine for itself whether there is any basis in fact for finding by state court that constitutional right has been waived. *Union Pac. R. R.* v. *Public Service Comm.* 67

2. Right to object to non-joinder of parties waived if not made specifically in courts below. Equity Rules, 43, 44. *International News Service* v. *Associated Press* 215

3. Error in admitting evidence cannot be imputed to trial court upon theory that count of complaint was waived at

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4. Stipulation releasing carrier from loss of or damage to live stock unless written claim made on agent within 10 days after unloading not waived by fact that carrier with knowledge of loss negotiated for compromise before and after period had expired. *Southern Pac. Co.* v. *Stewart* 446

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1. Effect on rights of alien belligerents as parties in our courts where, through entry of United States into war, one becomes alien enemy and the other co-belligerent. *Watts, Watts & Co.* v. *Unione Austriaca* 9

2. Provisions of bills of lading construed as relieving carrier of duty to carry and of obligation to return prepaid freight, where voyage frustrated or indefinitely delayed by government embargo, even though, in two cases, ship did not " break ground."
Allanwilde Transp. Corp. v. *Vacuum Oil Co.* 377
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1. *Drainage Districts.* Ohio Conservancy Act, authorizing drainage districts and improvements, assessment for benefits, taxation, etc., and to issue bonds, affords opportunity for testing private grievances judicially, and is consistent with state and federal constitutions. *Orr* v. *Allen* 35

2. *Irrigation Districts.* Objection to approval of contract for sale of water rights by United States to irrigation District and for sharing drainage expenses, because it exceeded powers of United States and District and would entail assessments on land otherwise supplied with water, without

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due process or compensation, presents federal question. *Petrie* v. *Nampa Irrigation Dist.* 154

3. *Id.* But where state court, holding contract not in violation of constitutional rights, decided under state law that objection was premature because no burden imposed until lands assessed in subsequent proceedings on basis of benefits conferred, and upon notice and hearing, judgment not reviewable. *Id.*

4. *Ohio River; Fish Regulation.* Limits of Kentucky extend across Ohio River to low-water on Indiana side; no limitation on power to protect fish within those limits resulted from establishment of concurrent jurisdiction by Virginia Compact. *Nicoulin* v. *O'Brien* 113

5. *Reservation for Indians; Fishery.* For advancing dependent Indian people, residents on islands belonging to United States in Alaska, Congress has power to reserve for their use not only upland of islands but also adjacent submerged land and deep waters supplying fisheries essential to Indians' welfare. *Alaska Pacific Fisheries* v. *United States* 78

6. *Id.; Obstructions.* Act setting aside "the body of lands known as Annette Islands," to be held by Metlakahtla Indians in common, under regulations of Secretary of Interior, *held* to include adjacent deep waters; fish net constructed therein, whose operation might materially reduce supply of fish, *held* subject to abatement at suit of United States. *Id.*

7. *Expropriating Submerged Land.* District Court without jurisdiction to entertain suit against United States under Tucker Act, where Government dredged submerged land under power to improve navigation; cause of action, if any, is in tort. *Tempel* v. *United States* 121

8. *Rio Grande; Boundary.* As to jurisdiction of District Court to try conflicting claims of title based on Mexican grants and laws of Texas, respectively, to land between present and former beds of Rio Grande, over which United States has *de facto* sovereignty, and effect of treaties, etc., with Mexico touching determination of international boundary, and of act of our Government in waiving objection to litigation, based on comity. *Cordova* v. *Grant* 413

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3. "To furnish" a design. *Id.*
4. "Exchange" of services. *Postal Telegraph-Cable Co.* v. *Tonopah &c. R. R*..... 471
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