UNITED STATES REPORTS

VOLUME 253

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1919

FROM APRIL 20, 1920, TO JUNE 7, 1920

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1920

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

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

A. MITCHELL PALMER, Attorney General.
ALEXANDER C. KING, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES.

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

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

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

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

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

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JOHN H. CLARKE, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

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

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IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

UNITED STATES *v.* ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued March 16, 1920.—Decided April 26, 1920.

The specifications upon which a dredging contract was based described the materials to be removed as believed by the Government to be mainly mud and fine sand; declined to guarantee the accuracy of the description; required bidders to examine and decide for themselves; referred them to maps exhibiting results of test borings made by the Government, confirming the description; declined to guarantee that such borings actually represented the character of the bottom over the entire vicinity in which they were taken, but expressed the Government's belief that the general information thereby given was trustworthy. The representations were deceptive in that the test borings gave information to the Government not imparted to bidders, of materials more difficult to excavate than those shown by the maps and specifications.

Held: (1) That a contractor which relied upon such representations of the results of the borings and of the Government's belief based thereon, and whose reliance was confirmed by the Government's approval of its plant,—adapted only to the lighter materials and submitted for inspection as to its adequacy pursuant to the specifications—was entitled to stop work after part performance,

and recover the difference between the cost of the excavation done and the amount received under the contract. P. 9.

(2) That this right was not lost by proceeding with the work and entering into a supplementary contract, after the heavier materials were encountered, but before the contractor learned of the results of the test borings and that they were inadequate. P. 11.

(3) That the cause of action was in contract, not in tort. P. 12.

53 Ct. Clms. 490, affirmed.

ACTION in the Court of Claims to recover the sum of $545,121.72 from the United States on account of expenditures and loss caused, it is alleged, in the execution of a contract which claimant was induced to enter into by false and misleading statements of the officers of the United States in charge of excavations in the Delaware River.

In pursuance of advertisement by the United States through Colonel Kuhn, the dredging company entered into a contract to do a certain part of the work for the sum of 12.99 cents per cubic yard, scow measurement.

Sealed proposals were required by the advertisement and it was stated that information could be had on application, and bidders were invited to base their bids upon the specifications which had been prepared, and were submitted, by the Government.

The specifications stated that the depth of the channel to be dredged was thirty-five feet, and under the heading "Quality or Character of the Material," contained the following: "The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from Station 54 to Station 55+144, at the lower end of West Horseshoe Range [the latter is not included in the contract] where the material is firm mud, sand, and gravel or cobbles." It was stated that "bidders are expected to examine the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

The further statement was that "a number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy."

To ascertain the character of the material to be dredged the Government officers had subjected the bottom of the river to certain borings, called according to their manner of being made, "test borings and wash borings," and the results thereof were correctly reported and recorded on the log or field notes at the time, that is, that the probe had penetrated or had not penetrated, but there was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made. It was hence shown that the material to be encountered was "mainly mud, or mud with an admixture of sand." In other words, the map did not contain a true description of the character of the material which was to be encountered, and was encountered, by the dredging company in the prosecution of the work. The material dredged, at certain places, differed from that shown on the map exhibited to bidders. The company made no independent examination, though it had time to do so, and in making its proposal it stated that it did so with full knowledge of the character and quality of the work required.

The proposals required the character and capacity of the plant proposed to be employed by the contractor to be stated and that it should be kept in condition for efficient work and be subject to the inspection and approval of the "contracting officer." In compliance with the requirement the plant was submitted to such officer and by him inspected and approved. It was efficient for dredging

the character of material mentioned in the specifications and described on the map to which bidders were referred for information; it was not efficient for dredging the material actually found to exist, and the company secured the services of another concern to do the dredging for it, and that concern did all of the work that was done.

After the company, and the concern it had employed, had been at work for some time, it complained of the character of material which was being encountered, and a supplementary contract was entered into by it and the "contracting officer."

This contract recited that "heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, had been encountered" and provided that such material might be deposited in the Delaware River instead of on shore, as provided in the original contract.

At the time of making the supplemental contract the company was not aware of the manner in which the "test borings" over the area embraced in its contract had been made. Upon learning of this in December, 1915, it discontinued work and declined to do further work. The company then had not been informed of the fact that impenetrable material had been reached by the probe. At the time of the cessation of work there remained approximately 350,000 cubic yards of material to be dredged in the area of the contract. The American Dredging Company completed the dredging at 16.2 cents per cubic yard.

The amount expended by the company was $354,009.19 upon which it had received $142,959.10 making its loss on the contract $211,050.09. For such sum judgment was rendered and the United States prosecuted this appeal.

Mr. Assistant Attorney General Davis for the United States:

There was no misrepresentation in fact or in law by

which claimant was justified in rescinding the contract and suing for damages. *Southern Development Co.* v. *Silva,* 125 U. S. 247, 250. There is no claim that by the action of the Government it was prevented from completing its contract. Claimant's case must rest upon the theory that the Government made a representation which amounted to a warranty or guaranty.

But the Government made no positive statement as to the character of the material; the statements attributed to it are far from being as strong as those held to be mere expressions of opinion in *Southern Development Co.* v. *Silva, supra.* Claimant was shown the facts upon which the opinion was based; though urged to do so, it made its bid without making an independent investigation. It relied on a belief of the Government, knowing that it was only a belief.

Nor was there any concealment of a material fact with reference to the test borings. The specifications stated that test borings had been made, and the results. It is not apparent why, when the specifications showed that test borings had been made and the probe boring method was the one universally used, and no inquiry was made by claimant as to the manner in which they had been made, there was any duty on the part of the Government to state that the probe method had been used. Nor was there any duty to recite that the probe had struck impenetrable material. The specifications purported to show the materials actually encountered, nothing more. There was no recital as to how the test borings were made, but the material encountered was truthfully shown.

In *United States* v. *Stage Co.,* 199 U. S. 414; *Hollerbach* v. *United States,* 233 U. S. 165; *Christie* v. *United States,* 237 U. S. 234; and *United States* v. *Spearin,* 248 U. S. 132, positive statements were made as to material facts, which caused loss to the contractors which they would not otherwise have incurred.

The case falls in the class illustrated by *Simpson* v. *United States,* 172 U. S. 372, where the court refused to imply a warranty. In the case at bar there is no finding that any representation was made to claimant by any officer of the Government. Even if any such statement had been made, it cannot avail the claimant unless the representation is a part of the written contract. *Simpson* v. *United States, supra.* "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." *Spearin* v. *United States,* 248 U. S. 136.

Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped. 2 Pomeroy, Eq. Juris., 4th ed., §§ 916, 917; *Shappirio* v. *Goldberg,* 192 U. S. 232; *Wilson* v. *Cattle-Ranch Co.,* 73 Fed. Rep. 994; *Kingman & Co.* v. *Stoddard,* 85 Fed. Rep. 740; *Richardson* v. *Lowe,* 149 Fed. Rep. 625; *Ripley* v. *Jackson Co.,* 221 Fed. Rep. 209; *Gregg* v. *Megargel,* 254 Fed. Rep. 724; *Simon* v. *Goodyear Metallic Rubber Shoe Co.,* 105 Fed. Rep. 573. That there can be no question as to its election and that it is estopped is further shown by the supplemental contract made after the work had been in progress for more than two years. Even if misrepresentation existed in regard to the first contract, claimant could not disregard the second and rely upon some claim with reference to the first to relieve it from the obligation of the second. *International Contracting Co.* v. *Lamont,* 155 U. S. 303, 309.

Claimant's action and the judgment below were both based, not upon contract, but tort. The Court of Claims had no jurisdiction. *Gibbons* v. *United States,* 8 Wall. 269; *Morgan* v. *United States,* 14 Wall. 531; *Schillinger* v. *United States,* 155 U. S. 163; *Juragua Iron Co.* v. *United States,* 212 U. S. 297; *Basso* v. *United States,* 239 U. S. 602; *Ball Engineering Co.* v. *White & Co.,* 250 U. S. 46; *Smith*

v. *Bolles*, 132 U. S. 125. The Court of Claims has failed to distinguish between cases where the damage is the loss occasioned by a wrongful act, and those where a claimant has recovered from the United States either because without any fault of his own he was prevented from completing the contract, or when, as in the *Christie Case*, *supra*, extra work was required for which the United States was responsible by warranty or otherwise. In these cases the damage is always for the amount necessary to compensate the claimant for the work done and can only be on the theory of *quantum meruit*. See *United States* v. *Behan*, 110 U. S. 338. Here the claimant abandoned the work and rescinded the contract on the theory that a false representation had been made to it and sued for its loss as damages. This it could not do, even if it had been prevented by the United States, without its fault, from proceeding with the contract, because it had rescinded it. *United States* v. *Behan*, *supra*. It sued for damages on account of the tort, a false representation. On the finding of facts, there could be no judgment in any amount on the ground of *quantum meruit*, for there is no showing as to what the dredging was reasonably worth, and the court was not considering what the work was reasonably worth, but only claimant's loss. This loss is only one of the elements and is not determinative at all.

Mr. W. L. Marbury, with whom *Mr. W. L. Rawls* was on the brief, for appellee:

This is an action for breach of a warranty or condition, consisting of the representations made by defendant in its specifications, with respect to the information which it had received, as shown by the maps, to which bidders were referred, in regard to the probable character of the material to be dredged, and also as to the grounds upon which it based its "belief" that the material would be

found to be "mainly mud, or mud with an admixture of fine sand."

The Court of Claims finds that the maps did not show the results of all the test borings which had been made; that two borings had been made, the results of which did not appear upon the maps, and the results of which would have disclosed the fact that material had been encountered in this area of a far more difficult character than that shown to have been found in the ten borings which had been recorded, and would have disclosed the presence of the kind of material which was actually encountered later, when the work was being done under the contract.

The court below having found as a fact the making of this representation, and the further fact that it was not true, the appellee is entitled to recover, as for a breach of warranty or condition. *United States* v. *Spearin*, 248 U. S. 132; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *United States* v. *Stage Co.*, 199 U. S. 414; *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234.

The appellee was justified in refusing to go on with the work when it discovered that the Government had failed to disclose upon the map two borings which had been made by it within that portion of the river covered by the contract in question, when it was definitely and specifically representing that the map showed the result of the borings which had been made by the Government. *United States* v. *Spearin*, 248 U. S. 132. See also cases cited, *supra*.

The *Christie* and *Hollerbach Cases* involved representations as to the character of the work to be done, and clearly establish that such representations are material. The point which those cases did not decide, which is involved here, is what are the rights of the contractor in such a case with respect to stopping work. In both

those cases and in the *Stage Co. Case,* the contractor completed his work under the contract, and claimed an additional amount for damages arising out of the misrepresentations.

The *Spearin Case* makes clear that a breach of warranty or condition, which relates to the character of the work to be done, goes to the root of the contract, and justifies the contractor in stopping work. It further holds that in such an event the contractor does not lose his rights under the contract, but may sue for its breach and recover the amount of his outlay, plus such profit as he would have made had he completed the work.

In *United States* v. *Behan,* 110 U. S. 345, the court says that, "when a party injured by the stoppage of a contract elects to rescind it," his recovery is upon the *quantum meruit.* The authorities are clear that a mere stoppage of the work or an abandonment of a contract, when this is justified by some breach of the contract by the other party, does not work a rescission of the contract in the sense that no right of action can be asserted thereunder by the party who was compelled by the act of the other party to abandon the fulfillment of the contract. To permit this would in effect allow one party by his own wrongdoing at any time to put an end to a contract. See *Anvil Mining Co.* v. *Humble,* 153 U. S. 540.

This is not an action sounding in tort. There is no charge of fraud and no finding of fraud. The petition charges certain misrepresentations, but there is no allegation and no attempt at proof that any of these was made with fraudulent intent.

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

The case turns upon the statement of the Government of its belief of the character of the material to be en-

countered, and, as misrepresentation, the omission from the map exhibited to bidders of the actual borings made and their disclosures.

The Government asserts that there was no misrepresentation, basing the assertion upon the declaration of the specifications that no guarantee was intended and the admonition to bidders that they must decide as to the character of the materials to be dredged, and to "make their bids accordingly."

The assertion puts out of view, we think, other and determining circumstances. There was not only a clear declaration of the belief of the Government that its representation was true, but the foundation of it was asserted to be the test of actual borings, and the reference to maps as evidence of what the borings had disclosed. The finding is that the maps contained a record of twenty-six borings as covering specified sections that were to be dredged, and of these ten were in the section of the river, which by its contract, afterwards made, the plaintiff agreed to dredge.

There was a further assertion of belief, through its "contracting officer," by the approval of the company's plant. As we have seen the Government's care of its interests extended to the inspection of the instrumentalities of the contractor, and required the character and capacity of the plant which was to be used, to be submitted for inspection and approval. In fulfillment of the requirement the company submitted its plant. It was only efficient for dredging material of the character mentioned in the specifications and described on the map, and it was so approved. The significance of the submission and approval are manifest. The character and capacity of the plant conveyed to the officer the fact that the company was accepting as true the representation of the specifications and the map of the materials to be dredged; and reciprocally the approval of the plant by the officer was an

assurance to the company of the truth of the representation and a justification of reliance upon it.

The case is, therefore, within the ruling of *United States* v. *Spearin*, 248 U. S. 132, 136, where it is stated that the direction to contractors to visit the site and inform themselves of the actual conditions of a proposed undertaking, will not relieve from defects in the plans and specifications, citing *Christie* v. *United States*, 237 U. S. 234; *Hollerbach* v. *United States*, 233 U. S. 165, and *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414. It is held in those cases "that the contractor should be relieved, if he was misled by erroneous statements in the specifications." The present case is certainly within the principle expressed. In the cited cases there was no qualification of the requirement; in this case it was accompanied by the expression of belief, and conduct which was, in effect, a repetition and confirmation of the belief and gave assurance that it had a reliable foundation. The company, therefore, was justified in acting upon it.

The Government, however, contends that, at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that having elected the latter, it cannot now resort to the other. In fortification of this contention it is said that "even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.'"

This assumption and the extent of it and the conclusion from it, are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that the company attempted to

struggle on against the difficult conditions with its inefficient plant should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the "test borings" had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work, that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

The Government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the Government and the Court of Claims regarded the representation of the character of the material as the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the Government got the benefit.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE CLARKE dissent.

MAGUIRE *v.* TREFRY, TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 280. Argued March 24, 1920.—Decided April 26, 1920.

The income received by the beneficiary from a trust estate consisting of bonds and equipment certificates held and administered by the trustee in another State, is taxable by the State of the beneficiary's domicile. P. 14.

230 Massachusetts, 503, affirmed.

THE case is stated in the opinion.

Mr. Richard W. Hale, with whom *Mr. John M. Maguire* was on the brief, for plaintiff in error, contended that the tax was direct on the property producing the income. Personal intangible property held in trust and personal tangible property held by a trustee who had leased it on the equipment trust plan had its *situs* where it and the trustee were. The domicile of the *cestui* in Massachusetts did not authorize the taxation over again of the property itself.

Mr. William Harold Hitchcock, with whom *Mr. J. Weston Allen,* Attorney General of the State of Massachusetts, was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Massachusetts has a statute providing for a tax upon incomes (Gen. Acts Mass. 1916, c. 269). In the act imposing the tax it is provided: "If an inhabitant of this commonwealth receives income from one or more executors, administrators or trustees, none of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees."

The plaintiff in error is a resident of the State of Massachusetts, and was taxed upon income from a trust created by the will of one Matilda P. MacArthur formerly of Philadelphia. The plaintiff in error under the will of the decedent was the beneficiary of a trust thereby created. The securities were held in trust by the Girard Trust Company of Philadelphia. Those which were directly taxable to the trustee were held exempt from taxation in Massachusetts under the terms of the statute of that

State. The securities the income from which was held taxable in Massachusetts consisted of the bonds of three corporations and certain certificates of the Southern Railway Equipment Trust. These securities were held in the possession of the trustee in Philadelphia. The trust was being administered under the laws of Pennsylvania. The Supreme Judicial Court of Massachusetts held the tax to be valid. 230 Massachusetts, 503.

Of the nature of the tax the Chief Justice of Massachusetts, speaking for the Supreme Judicial Court, said: "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston*, 5 Cush. 93, at page 99, 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

We see no reason to doubt the correctness of this view of the nature and effect of the Massachusetts statute, and shall accept it for the purpose of considering the federal

question before us, which arises from the contention of the plaintiff in error that the imposition of the tax was a denial of due process of law within the protection of the Fourteenth Amendment to the Federal Constitution, because, it is alleged, the effect of the statute is to subject property to taxation which is beyond the limits and outside the jurisdiction of the State. To support this contention the plaintiff in error relies primarily upon the decision of this court in *Union Refrigerater Transit Co.* v. *Kentucky*, 199 U. S. 194. In that case we held that tangible, personal property, permanently located in another State than that of the owner, where it had acquired a situs, and was taxed irrespective of the domicile of the owner,—was beyond the taxing power of the State, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the Fourteenth Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the State of the owner's residence. In that case this court in the opinion of Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. (199 U. S. 211.)

It is true that in some instances we have held that bonds and bills and notes although evidences of debt have come to be regarded as property which may acquire a taxable situs at the place where they are kept, which may be elsewhere than at the domicile of the owner. These cases rest upon the principle that such instruments are more than mere evidences of debt, and may be taxed in the jurisdiction where located, and where they receive the protection of local law and authority. *Blackstone* v. *Miller*, 188 U. S. 189, 206. *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 576, 585. At the last term we held in *DeGanay* v. *Lederer*, 250 U. S. 376, that stocks and bonds issued by domestic corporations, and mortgages secured

on domestic real estate, although owned by an alien non-resident, but in the hands of an agent in this country with authority to deal with them, were subject to the Income Tax Law of October 3, 1913, 38 Stat. 166.

In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the State to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another State.

In *Fidelity & Columbia Trust Company* v. *Louisville*, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*, was distinguished, and the principle was affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim "*mobilia sequuntur personam*," and justifying, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application and may yield to the exigencies of particular situations. But we think it is applicable here.

It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. "The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others." 2 Story's Equity, 11th ed., § 964. It is this property right belong-

ing to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the State. The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. *Kirtland* v. *Hotchkiss*, 100 U. S. 491.

We find no error in the judgment and the same is

Affirmed.

Dissenting, MR. JUSTICE MCREYNOLDS.

WARD ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 224. Submitted March 11, 1920.—Decided April 25, 1920.

The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable. P. 22.

Certain allotments belonging to Indians in Oklahoma, which by federal right were exempt from taxation, were assessed by county officials, while suits, of which they had full knowledge and in one of which they were defendants, were being litigated in behalf of all such allottees, to maintain the exemption (*Choate* v. *Trapp*, 224 U.

S. 665); and, in response to demands, accompanied by threats of advertisement and sale which were carried out in other cases, the allottees paid the taxes to avoid such sales and the imposition of heavy penalties, but did so under protest denying the validity of the taxation. *Held:* (1) That the payments were clearly made under compulsion, and that no statutory authority was necessary to enable or require the county to refund the money (p. 23). (2) The fact that part of the money, after collection, was paid over by the county to the State and other municipalities, and the absence of a state statute making the county liable for taxes so paid, did not alter the county's obligation to restore the full sums to the allottees. P. 24.

The application of the state statute of limitations, not having been discussed by the state court, is not dealt with here or affected by the decision. P. 25.

68 Oklahoma, —, reversed.

THE case is stated in the opinion.

Mr. J. E. Bennett and *Mr. Geo. P. Glaze* for petitioners. *Estelle Balfour Bennett* was on the brief.

Mr. T. B. Wilkins, Mr. Russell Brown, Mr. Geo. B. Rittenhouse, Mr. P. T. McVay, Mr. Clinton A. Galbraith and *Mr. George Trice* for respondent.

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

This is a proceeding by and on behalf of Coleman J. Ward and sixty-six other Indians to recover moneys alleged to have been coercively collected from them by Love County, Oklahoma, as taxes on their allotments, which under the laws and Constitution of the United States were nontaxable. The county commissioners disallowed the claim and the claimants appealed to the district court of the county. There the claimants' petition was challenged by a demurrer, which was overruled,

and the county elected not to plead further. A judgment for the claimants followed, and this was reversed by the Supreme Court. 68 Oklahoma, —. The case is here on writ of certiorari.

The claimants, who were members of the Choctaw tribe and wards of the United States, received their allotments out of the tribal domain under a congressional enactment of 1898, which subjected the right of alienation to certain restrictions and provided that "the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent." C. 517, 30 Stat. 507. In the Act of 1906, enabling Oklahoma to become a State, Congress made it plain that no impairment of the rights of property pertaining to the Indians was intended, c. 3335, § 1, 34 Stat. 267; and the State included in its constitution a provision exempting from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws." Art. 10, § 6. Afterwards Congress, by an act of 1908, removed the restrictions on alienation as to certain classes of allottees, including the present claimants, and declared that all land from which the restrictions were removed "shall be subject to taxation . . . as though it were the property of other persons than allottees." C. 199, §§ 1, 4, 35 Stat. 312.

Following the last enactment the officers of Love and other counties began to tax the allotted lands from which restrictions on alienation were removed, and this met with pronounced opposition on the part of the Indian allottees, who insisted, as they had been advised, that the tax exemption was a vested property right which could not be abrogated or destroyed consistently with the Constitution of the United States. Suits were begun in the state courts to maintain the exemption and enjoin the

threatened taxation, one of the suits being prosecuted by some 8,000 allottees against the officers of Love and other counties. The suits were resisted, and the state courts, being of opinion that the exemption had been repealed by Congress, sustained the power to tax. *English* v. *Richardson*, 28 Oklahoma, 408; *Gleason* v. *Wood*, *ibid.* 502; *Choate* v. *Trapp*, *ibid.* 517. The cases were then brought here, and this court held that the exemption was a vested property right which Congress could not repeal consistently with the Fifth Amendment, that it was binding on the taxing authorities in Oklahoma, and that the state courts had erred in refusing to enjoin them from taxing the lands. *Choate* v. *Trapp*, 224 U. S. 665; *Gleason* v. *Wood*, *ibid.* 679; *English* v. *Richardson*, *ibid.* 680.

While those suits were pending the officers of Love County, with full knowledge of the suits and being defendants in one, proceeded with the taxation of the allotments, demanded of these claimants that the taxes on their lands be paid to the county, threatened to advertise and sell the lands unless the taxes were paid, did advertise and sell other lands similarly situated, and caused these claimants to believe that their lands would be sold if the taxes were not paid. So, to prevent such a sale and to avoid the imposition of a penalty of eighteen per cent., for which the local statute provided, these claimants paid the taxes. They protested and objected at the time that the taxes were invalid, and the county officers knew that all the allottees were pressing the objection in the pending suits.

As a conclusion from these facts the claimants asserted that the taxes were collected by Love County by coercive means, that their collection was in violation of a right arising out of a law of Congress and protected by the Constitution of the United States, and that the county was accordingly bound to repay the moneys thus collected. The total amount claimed is $7,823.35, aside from interest.

Such, in substance, was the case presented by the petition, which also described each tract that was taxed, named the allottee from whom the taxes were collected and stated the amount and date of each payment.

In reversing the judgment which the district court had given for the claimants the Supreme Court held, first, that the taxes were not collected by coercive means, but were paid voluntarily, and could not be recovered back as there was no statutory authority therefor; and, secondly, that there was no statute making the county liable for taxes collected and then paid over to the State and municipal bodies other than the county,—which it was assumed was true of a portion of these taxes,—and that the petition did not show how much of the taxes was retained by the county, or how much paid over to the State and other municipal bodies, and therefore it could not be the basis of any judgment against the county.

The county challenges our jurisdiction by a motion to dismiss the writ of certiorari and by way of supporting the motion insists that the Supreme Court put its judgment entirely on independent non-federal grounds which were broad enough to sustain the judgment.

As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in *Choate* v. *Trapp*, *supra*, and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love County, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to these claimants, placed them on the county tax roll, and there charged them with taxes like

other property. If a portion of the taxes was to go to the State and other municipal bodies after collection,—which we assume was the case,—it still was the county that charged the taxes *against these lands* and proceeded to collect them. Payment of all the taxes was demanded by the county, and all were paid to it in the circumstances already narrated.

We accept so much of the Supreme Court's decision as held that, if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute, and that there was no such statute. But we are unable to accept its decision in other respects.

The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67; *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, *ibid.* 359, 367; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. And see *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *Huntington* v. *Attrill*, 146 U. S. 657, 683–684; *Boyd* v. *Thayer*, 143 U. S. 135, 180; *Carter* v. *Texas*, 177 U. S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 589. With this qualification, it is true that a judgment of a state court, which is put on

independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof.

The facts set forth in the petition, all of which were admitted by the demurrer whereon the county elected to stand, make it plain, as we think, that the finding or decision that the taxes were paid voluntarily was without any fair or substantial support. The claimants were Indians just emerging from a state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But, notwithstanding this, the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of eighteen per cent. they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian claimants. *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Gaar, Scott & Co.* v. *Shannon, supra*, p. 471; *Union Pacific R. R. Co.* v. *Public Service Commission, supra; Swift Co.* v. *United States*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329. The county places some reliance on *Lamborn* v. *County Commissioners*, 97 U. S. 181, and *Railroad Co.* v. *Commissioners*, 98 U. S. 541; but those cases are quite distinguishable in their facts and some of the

general observations therein to which the county invites attention must be taken as modified by the later cases just cited.

As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Marsh* v. *Fulton County*, 10 Wall. 676, 684; *City of Louisiana* v. *Wood*, 102 U. S. 294, 298–299; *Chapman* v. *County of Douglas*, 107 U. S. 348, 355. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

If it be true, as the Supreme Court assumed, that a portion of the taxes was paid over, after collection, to the State and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants and were being contested in the pending suits. In these circumstances it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own. *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor, supra*, p. 287. In legal contemplation it received the money for the use and benefit of the claimants and should respond to them accordingly.

The county calls attention to the fact that in the demurrer to the petition the statute of limitation (probably meaning § 1570, Rev. Laws 1910), was relied on. This point was not discussed by the Supreme Court and we are not concerned with it beyond observing that when the case is remanded it will be open to that court to deal with the point as to the whole claim or any item in it as any valid local law in force when the claim was filed may require.

Motion to dismiss denied.

Judgment reversed.

BROADWELL *v.* BOARD OF COUNTY COMMISSIONERS OF CARTER COUNTY, OKLAHOMA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 289. Submitted March 25, 1920.—Decided April 26, 1920.

Decided upon the authority of *Ward* v. *Love County*, *ante*, 17. 71 Oklahoma, —, reversed.

THE case is stated in the opinion.

Mr. Geo. P. Glaze for petitioner.

Mr. Geo. B. Rittenhouse, *Mr. Clinton A. Galbraith*, *Mr. P. T. McVay*, *Mr. J. A. Bass*, *Mr. Russell Brown* and *Mr. George Trice* for respondent.

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

This is a proceeding to recover moneys charged to have been paid under compulsion by a number of Choctaw and

Chickasaw Indians to Carter County, Oklahoma, as taxes on allotted lands which were nontaxable. The county commissioners disallowed the claim; the district court of the county to which the claimants appealed sustained a demurrer to their petition and rendered judgment against them, and the Supreme Court affirmed the judgment. 71 Oklahoma, —. The total amount claimed is $22,455.99, aside from interest.

The case as presented here is in all material respects like *Ward* v. *Love County*, just decided, *ante*, 17, and its decision properly may be rested on the opinion in that case.

Motion to dismiss denied.

Judgment reversed.

UNITED STATES *v.* READING COMPANY ET AL.

READING COMPANY ET AL. *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 3, 4. Argued October 10, 11, 1916; restored to docket for reargument May 21, 1917; reargued November 20, 21, 1917; restored to docket for reargument June 10, 1918; reargued October 7, 1919.—Decided April 26, 1920.

Regardless of the use made of it, a power resulting, not from normal expansion and legitimate business enterprise, but from deliberate calculated purchase for control, which enables a holding company to dominate two great competing interstate railroad carriers and two great competing coal companies, engaged extensively in mining and selling anthracite coal that must be transported to interstate markets over those railroads, is a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act. P. 57.

By a scheme of reorganization executed after the enactment of the

26. Syllabus.

Sherman Anti-Trust Act, all the property of the Philadelphia & Reading Coal & Iron Company, a large producer of anthracite coal controlling about two-fifths of the supply in the largest of the three fields in Pennsylvania where substantially all of the anthracite of the country is found, and all the property of the Philadelphia & Reading Railroad Company, owner of all the capital stock of the Coal Company and of an extensive railroad system over which that company's large output found its way to interstate markets, was delivered into the complete control of the Reading Company. That company became the owner of all the stock of the Coal Company, with additional control over it through fiscal provisions of the reorganization; of all the stock of a new railroad company, the Philadelphia & Reading Railway Company, to which the main railroad was transferred; of all the equipment for operating the railroad, and of ships, terminals, short lines and other property which formed part of the railroad system. Besides entering into two schemes with other carriers and coal companies for suppressing competition, which were declared violations of the Anti-Trust Act in *United States* v. *Reading Co.*, 226 U. S. 324 (see *infra*, p. 49), the Reading Company purchased a controlling interest in the capital stock of the Central Railroad Company of New Jersey—a large carrier of anthracite in competition with the Philadelphia & Reading Railway Company, and owner of over eleven-twelfths of the capital stock of the defendant Lehigh & Wilkes-Barre Coal Company, which in turn owned or had leased a very large acreage in another of the Pennsylvania anthracite fields, and was a competitor of the Philadelphia & Reading Coal & Iron Company; and thereby, and through common officers and directors, the Reading Company acquired and exercised active dominating control over the last two-mentioned companies, its power thus including two of the principal competing producers and two of the principal competing initial carriers, of anthracite, in interstate commerce. There was evidence also of its combining with other carriers to fix excessive flat rates to tidewater, and of special privileges extended by it to the Philadelphia & Reading Coal & Iron Company in the way of financial assistance and forbearance, and of similar dealing between the Central Railroad and Wilkes-Barre Companies.

Held, that the combination both before and after the induction of the Central Railroad Company of New Jersey violated the Sherman Anti-Trust Act, and that the relations between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company and the Central Railroad

Company of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of any of the others. Pp. 43–59.

The combination between the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company through the Reading Company must also be dissolved, because the transportation thereunder by the Railway of the coal produced by the Coal Company, violates the commodities clause of the Act of June 29, 1906. P. 60.

While the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. P. 62.

Applying this rule, *held*, that the relation between the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company, with the former owning over eleven-twelfths of the capital stock of the latter and using the latter as the coal mining department of its organization, violates the commodities clause, and for that reason must be dissolved. *Id.*

In 1871, the Lehigh Coal & Navigation Company, owner of extensive coal-producing properties and of the Lehigh & Susquehanna Railroad, leased the railroad for a rental of one-third of its gross earnings to the Central Railroad Company of New Jersey, the line leased and the line of the lessee not being in competition but the one forming a natural extension of the other into the coal fields. *Held*, that a covenant in the lease, assumed to require the lessor to ship to market over the leased line three-fourths of all the coal which it should produce in the future, was not designed to suppress interstate commerce, did not have that effect, and does not violate the Anti-Trust Act. P. 54.

Covenants in leases of coal lands by the Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company, obliging the lessees to ship all coal mined by rail routes

designated or to be designated, are *held* unlawful as part of the scheme to control the mining and transportation of coal herein condemned, and their enforcement is enjoined. P. 55.

As to other charges against the Lehigh Coal & Navigation Company, and as respects the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, the Lehigh & New England Railroad Company, and the surviving individual defendants, the bill is dismissed without prejudice. *Id.*

226 Fed. Rep. 229, affirmed in part, reversed in part.

THE case is stated in the opinion. Motions to modify the decree were made and denied at this term. *Post*, 478.

The Solicitor General, with whom *The Attorney General* and *Mr. A. F. Myers* were on the brief, for the United States.[1]

Mr. Jackson E. Reynolds, with whom *Mr. Charles Heebner* and *Mr. John G. Johnson* were on the brief, for Reading Company, Philadelphia & Reading Railway Company, and the Philadelphia & Reading Coal & Iron Company.[2]

Mr. Robert W. De Forest, with whom *Mr. Charles E. Miller* was on the brief, for Central Railroad Company of New Jersey.

Mr. Henry S. Drinker, Jr., and *Mr. Abraham M. Beitler* filed a brief on behalf of the Lehigh Coal & Navigation Company.

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[1] At the first and second hearings the case was argued by *Mr. Solicitor General Davis* and *Mr. Assistant to the Attorney General Todd*. *Mr. Attorney General Gregory* and *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, also were on the brief.

[2] At the first hearing *Mr. John G. Johnson* argued the case for the Philadelphia & Reading Coal & Iron Company.

Mr. John J. Beattie filed a brief on behalf of the Lehigh & Hudson River Railway Company.

Mr. Wm. Jay Turner filed a brief on behalf of the Lehigh & New England Railroad Company.

The following is a summary of the oral argument for the Reading Company et al.

The appellees are not accused of fixing prices by contract with competitors, bringing about any deterioration in product, acquiring additional coal deposits since 1890, dismantling or abandoning properties, limiting output, exclusive or price controlling sales contracts, monopolization of local dealers, espionage over the business of competitors, partitioning the country into non-competitive districts, discriminating in prices to destroy competitors, adopting unfair business policies, exacting unreasonable prices, deriving excessive profits from the coal business, unfair treatment of employees, or unfair treatment of competitors. Their prices for transportation and for coal have been reasonable, not excessive, "monopoly" prices.

There are in the case three charges: alleged violation of the commodities clause; alleged monopoly in the Schuylkill region; alleged combination in restraint of trade resulting in the Reading's purchase of control of the Jersey Central.

The tests to be applied to determine whether the Reading Railway Company is violating the commodities clause in transporting coal owned by the Philadelphia & Reading Coal & Iron Company at the time of transportation are those laid down in *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, and *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. These tests are also buttressed by the court's declaration of the general object

of the statute to have been to put an end to the carrier's "opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered." *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 231 U. S. 363.

The court is not concerned with the question of who ultimately receives the profit from the sale of the commodity, because it has repeatedly held that the carrier might legally own all of the stock of the corporation which owned the commodity at the time of transportation and thereby receive all the profits from the sale of the same. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 413, 414.

Furthermore, this court, recognizing the fact that in the legislative progress of the commodities clause in the Senate, where it originated, an amendment in specific terms providing that the enactment should embrace common ownership of stock in railroad companies and coal companies by the same stockholders, was rejected (40 Cong. Rec., pt. 7, pp. 7011–7014), has also unequivocally held that such common ownership "cannot be used as a test by which to determine the legality of the transportation of such [a coal] company's coal by the interstate carrier." *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 526.

The Reading Companies were in existence long prior to the time the commodities clause went into effect—two of them for 37 years and the third for 12 years. The Reading Railway has never had any title to coal lands, has never undertaken any mining operations and has never been engaged in merchandising coal; and the Reading Railway and the Reading Coal Company have never been parties to any sales agency contract of the kind condemned in the *Lackawanna Case*. These factors, which are the converse of those presented in

the *Lackawanna Case*, differentiate the two cases completely.

The present state of the law places upon the Government the burden of showing, by a preponderance of the proof, that the affairs of the Railway Company and the Coal Company have been so commingled and the distinctions between them so obliterated, as to disregard the fact that they were separate juridical beings; cause them to be one and inseparable, making their affairs indistinguishable; destroy the entity of the Coal Company; and make it a mere puppet subject to the control of the Railway Company and a mere department thereof.

The origin of the holding of the capital stocks of the Coal Company and the Railway Company by the Reading Company cannot be treated as a "mere subterfuge and sham to defeat the commodities clause." The lower court was correct in finding that the reorganization was carried out with scrupulous regard for the law, in entire good faith, and without subterfuge or sham. It was right in its conclusion that the validity of the charter powers of the Reading Companies cannot be impeached; that their right to exist cannot be denied; that complete legislative authority to do the acts they have done cannot be gainsaid, and never has been questioned by the Commonwealth of Pennsylvania, and that the charters of the three companies gave the undoubted right to issue the securities and make the conveyances described.

The ownership of railroad equipment by the Reading Company and the lease thereof to the Railway Company have not been shown to have resulted in giving the latter as a corporation, for its own corporate purposes, "complete power over the affairs of the Coal Company, as if the Coal Company were a mere department of the railroad."

The purchase money mortgage of the Railway Company scrupulously observes the fact that the Railway Company

and the Reading Company are separate juridical beings and in no manner commingles the affairs of the Railway and Coal Companies so as to cause both such corporations to be one for all purposes.

The general mortgage of the Reading Company does not obliterate the distinctions between the Railway Company and the Coal Company and cause them to be one and inseparable.

The Government's evidence and arguments on the extent to which the Coal Company and the Railway Company have officers and offices in common are largely iteration in the past tense of conditions existing more than a decade ago, not only prior to this court's illuminating decision in 1911 in *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, but even before the commodities clause itself went into effect on May 1, 1908. That evidence is clearly immaterial and irrelevant as to conditions now existing. Equitable decrees normally speak in the present tense and are applied to remedy existing evils and not to characterize or condemn past wrongs. Even in an action under the Sherman Act an opportunity might well be afforded for a *locus pœnitentiæ*. *United States* v. *Lehigh Valley R. R. Co.*, 225 Fed. Rep. 399, 403, 404.

The foregoing facts fully justified the court below in finding that there was a *bona fide* separate administration of the affairs of the Coal Company. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 274.

Attention is directed to the fact that the two companies employ the same counsel and treasurer, and also have the majority of directors in common. Probably no two employees of modern industrial organizations could do less toward the commingling of the administrative and other affairs of two corporations than the counsel and the treasurer. These incidents are of minor importance and do not affect the question of whether the businesses of the companies are rendered indistinguishable. That was an

issue of fact and the record conclusively establishes that no such result has followed from the joint employment of these two individuals. It is repeatedly shown that the funds and accounts of the two companies are scrupulously kept distinct, and there is no evidence whatever of a commingling of the affairs of the two corporations by their counsel.

The proof of the complete autonomy of the Coal Company and the Railway Company was uncontroverted, and conclusive. An excellent summary of the salient features of the testimony appears in Judge McPherson's opinion below.

In view of the entire autonomy of the three Reading Companies, there is no ground for the contention that the Railway Company is transporting in interstate commerce anthracite coal mined or produced by it, or under its authority, or which it owns in whole or in part, or in which it has any interest, direct, or indirect.

As to the alleged monopoly in the Schuylkill Region:

The Government does not raise the issue as to whether the Coal Company in and of itself is a combination in restraint of interstate commerce or a monopolization thereof. That company was created May 18, 1871, and by its charter it was lawful for any railroad company existing under the laws of the State to subscribe for or purchase its stock, or to purchase or guarantee its bonds. The corporation then owning the Reading Railroad properties immediately purchased all the stock of the Coal Company. The latter then immediately set about the purchase and lease of coal lands, acquiring 80,000 acres before the end of 1872. By the year 1881 the Coal Company controlled 98,500 acres of coal land (or slightly in excess of the acreage alleged in the petition). Shortly afterwards, in 1885, the stockholders deliberately adopted a policy opposed to all further acquisition. Thus on the government theory the close relations alleged to exist

between the mining and transportation properties and their owners have existed for almost half a century (or 20 years before the passage of the Anti-Trust Act); and the Coal Company's title to its present holdings of coal lands was vested in it almost 40 years ago, or 9 years antecedent to the passage of that act. The mining and marketing of coal on the one hand and its transportation on the other are not competitive businesses. The court below, with these factors before it, dismissed the petition in respect of this branch of the case, and this court, on its precedents, we believe, will affirm this action because it holds "the disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. The combination was not unlawful so far as it did no more than put the different groups of non-competing [enterprises] into one control." *United States* v. *Winslow*, 227 U. S. 202, 217, 218.

The Government does not contend that the Coal Company is an unlawful combination or a monopoly, and it cannot be contended that the transportation is competitive with the mining and marketing; the transportation is intermediate between the two and supplements them.

This court, like the court below, will be repelled by the consequences of holding with the Government's contentions. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 45, 46.

There was no secrecy indicating a guilty plan or conspiracy. It was all done pursuant to notices to investors all over the world, in the open, and to meet the financial exigencies of the situation. The plan was adopted by Edward M. Paxson, the receiver, who had just resigned as Chief Justice of the Supreme Court of Pennsylvania and the writer of that court's decision in *Commonwealth* v. *New York, Lake Erie & Western R. R. Co.*, 132 Pa. St. 591. The resulting reorganization was declared valid by the Attorney General of the Commonwealth, January 2, 1897.

The legality of the plan was approved by eleven eminent counsel. The Commonwealth of Pennsylvania, by its statutory policy from 1818, had declared to be normal, and affirmatively encouraged, the close inter-relation of mining, transporting and selling anthracite coal. (Const. 1874, Art. XVII, § 5, adopted in convention, of which Judge Dallas was a member.) It was approved by Judge Dallas and Judge Acheson, of the Circuit Court for the Eastern District of Pennsylvania, contemporaneously with the reorganization. It was regarded as entirely legal by Judges Gray, Lanning and Buffington ten years later. *United States* v. *Reading Co.*, 183 Fed. Rep. 427, 457, 459, 490. It was declared to be lawful by Judges McPherson, Hunt and Buffington twenty years later. *United States* v. *Reading Co.*, 226 Fed. Rep. 229, 266–276.

The facts do not indicate monopoly or combination in restraint of trade. The Coal Company is not charged with such guilt. It produces less than 15 per cent. of tonnage. In the Schuylkill region it has 35 operations and one-half the tonnage. Other producers have 53. On the Reading Railway it does not monopolize production or sales. Of production it has only 65 per cent. In sales it must compete with 116 other shippers on 8 other railroads and 60,000,000 tons of competitive tonnage because the Pennsylvania Railroad reaches every community reached by the Reading Railway and makes joint rates with every other anthracite railroad. At tidewater and all distant points it meets the competition of the entire production. The court below unanimously supports the foregoing conclusion. 226 Fed. Rep. 270–271.

The Reading Railway cannot be treated as a monopoly. Its transportation status in the Schuylkill region has been practically the same for 50 years. The Government alleges no acquisition of other carriers there since 1870. Its share of total anthracite transportation is less than 19 per cent; the Lehigh Valley Railroad's is greater. It

does not monopolize the Schuylkill region. It serves 63 collieries, 11,500,000 tons; other railroads serve 34 collieries, 7,000,000 tons. It does not monopolize the collieries it serves. Built in 1833, it has the natural advantages of a pioneer—occupation of passes, and possession of best grades. It serves the region admirably. It encounters the competition of the total tonnage in all markets as does the Coal Company.

The Reading Company is not a monopoly or combination in restraint of trade. It merely coördinates and integrates the non-competitive and complementary businesses of mining, transporting and merchandising anthracite coal, thereby promoting and stimulating interstate trade and commerce. No vice exists in including transportation, because its chief competitors enjoy a like advantage, and government regulations preclude abuse in employing transportation facilities.

There is no basis for the decree requested by the Government, tearing down an investment of $300,000,000, made originally 50 years ago, when the titles vested, and upon the stability of which investors have justifiably relied for a generation,—authorized by state statutes, approved by state officers and courts, reorganized under supervision of federal courts 23 years ago, and approved unanimously by circuit judges in 1915.

The purchase of the Jersey Central stock was a normal industrial development—a defensive measure with no intent to unduly suppress competition.

The railroads combined were not competing in the sense of Mr. Justice Day's definition in the *Union Pacific Case.* One was never striving for traffic which the other was seeking to gain. 226 U. S. 87. They did not render service to the same shipper, *id.* 87, nor cater to demands of identical patrons. *Id.* 88. They were not engaged in the same carrying trade from the same point of origin to the same destination. *Id.* 99. They were, on the con-

trary, complementary and supplementary, one to the other, in the sense described in this court's opinion respecting the form of decree permitting the combination of the Union Pacific and Central Pacific. If, as a fact, they are thus supplementary the Government concedes the propriety of their combination.

Even if the Government's theory, that the two roads are competitive because both transport anthracite, be indulged; nevertheless their unification was valid because "the extent of the control thereby secured over instrumentalities which commerce is under compulsion to use," under the tests laid down in *United States* v. *St. Louis Terminal*, 224 U. S. 383, 394, 395, "left the competitive conditions in the coal carrying business very slightly affected by the elimination of competition between the Central and the Philadelphia and Reading." 183 Fed. Rep. 488, 490.

The Government's theory of competition is unsound. It makes all carriers competitive, and is contrary to the settlement in the *Union Pacific Case*. Its theory of competition is impossible of application. No court can discover the necessary directness of relationship of cause and effect to enable it to say that the abatement of competition of such an intangible character necessarily results in a case of unlawful restraint. This impossibility arises from the factors of uncertainty, speculation and remoteness, illustrated by the extent of competition of anthracite coal with other fuels; by the situation in the New England market, where 70,000,000 tons are in potential competition, and there are numerous uncontrolled rail and water routes, the Reading handling only 3½ per cent. of the potential supply; and by similar conditions at New York and elsewhere—even on the Reading Railway itself.

But even according to the government theory, competition was unaffected. The Central did not reach the Reading territory, and competition was continued by eight

other lines in close proximity to the Central and Reading. See 183 Fed. Rep. 457, 488, 490. The vital question is not the amount of competition suppressed, but the amount remaining. If, as here, the competitors remaining are numerous, large, and powerful the restriction of competition cannot be deemed undue. The issue is one of fact and not of law and must be decided on the evidence, not on theory or speculation. The evidence covering the period since 1901 when this combination was formed shows the facts to be that the Reading's powerful competitors have increased their anthracite traffic by much greater percentages than has the Reading; that any diminution of the Reading's service to the public or attempted restraint on interstate trade would be frustrated immediately by the preponderant competitive power of its eight powerful rivals; that the public has been benefited for any loss of competition resulting from the combination by the more than compensating advantage derived from the upbuilding of the half dozen through routes for freight and passenger traffic competing with the Pennsylvania Railroad. This court would not be justified in destroying these routes and their advantage to the public merely to guard against a speculative possibility of injury which the evidence shows cannot ensue. In view of its decision in the *St. Louis Terminal Case*, this court should hold the lower court's view of the evidence,—considering the lessons of the war as to what restrains trade, the joint operation of railroads, and the provisions of impending railroad legislation.

As for the Coal Companies, the Reading Company's influence over the Wilkes-Barre Company was only incidental and negligible. There is no evidence of a motive to control production. Competition was practically unaffected, and the management of the two companies was not amalgamated.

The Reading Company did not create a monopoly or

combination in restraint of the anthracite trade in 1901. The trade as a whole has expanded; the number of employees, their employment and earnings have increased; and production has kept pace with population.

The Reading did not acquire in 1901 sufficient power to monopolize or restrain the trade had it sought to do so. The combined business of the two coal companies was then only one-fourth of the total business, and in the interim has shrunk until now it is only one-fifth. It does not now possess the power to monopolize or restrain the trade even if it wished to do so.

If the Government's most extravagant contention had been sustained by proof, their criticism of the coal land holdings makes no case presently calling for the interposition of the action of this court. It will be time enough to destroy such a monopoly when it appears and when it has gained power to injure the public. Now the court should deal only with the present actualities. By the time that such a monopoly arises, if it ever does, it may be that the public policy will foster it, or we may have a nationalization of all mines.

Finally, the Government's contentions now are inconsistent with its attitude in the *Harvester Case*. On November 2, 1918, the Department of Justice consented to a decree in that case in and by which, in order to "restore competitive conditions and bring about a situation in harmony with law," the company was only required to sell such of its lines of harvesting machines as would leave it at least 66 per cent. of the industry.

Mr. Justice Clarke delivered the opinion of the court.

These are appeals from a decree entered in a suit instituted by the Government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they

constitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce in violation of the first and second sections of the Anti-Trust Act of Congress, of July 2, 1890, c. 647, 26 Stat. 209; and also for the alleged reason that the defendants, Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey are violating the commodities clause of the Act of Congress of June 29, 1906, c. 3591, 34 Stat. 585, by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as the Holding Company; Philadelphia & Reading Railway Company, as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company, as Wilkes-Barre Company; Lehigh Coal & Navigation Company, as Navigation Company.

Practically all of the anthracite coal in this country is found in northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes these coal areas are designated: the most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal; the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles, and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles, and Philadelphia, distant

about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and to some extent, through the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York Harbor, viz: The Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadelphia and New York, viz: The Reading and the Pennsylvania Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.[1]

The essential claims of the Government in the case have become narrowed to these, viz:

First: That the ownership by the Holding Company of controlling interests in the shares of the capital stocks of the Reading *Railway* Company, of the Reading Coal Company and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce and an attempt to monopolize and a monopolization of a part of the same in violation of the Anti-Trust Act of July 2, 1890.

Second: That the Holding Company in itself constitutes a like violation of the act.

Third: That certain covenants and agreements between the Central Railroad Company and the Navigation Com-

[1] *United States* v. *Reading Co.*, 183 Fed. Rep. 427; *United States* v. *Reading Co.*, 226 Fed. Rep. 229; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516; *United States* v. *Reading Co.*, 226 U. S. 324.

pany contained in a lease, by the latter to the former, of the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth: That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the Act of June 25, 1910, c. 428, 36 Stat. 854, the case was heard by three Circuit Judges of the Third Circuit, who while holding against the contention of the Government on many of the prayers for relief in the bill, some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal and that their union through the Holding Company and the Central Company constituted a combination in restraint of trade within the Anti-Trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds and other securities of the Wilkes-Barre Coal Company owned by it and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads, named or to be designated, were unlawful and void.

The case has been appealed by both parties and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by the Holding Company will be of value for the assistance it will be in determining the intent and purpose

with which the combinations here assailed were formed. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46, 76.

The Philadelphia & Reading *Railroad* Company was chartered by special act of the Pennsylvania General Assembly in 1833, and it conducted the business of a railroad carrier prosperously for about thirty years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the Company for 1871 contains the following:

"Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired and will be held by an auxiliary company, known as the Philadelphia and Reading Coal and Iron Company, of which the Philadelphia and Reading Railroad Company *is the only stockholder.* The result of this action has been to secure—and *attach to the company's railroad*—a body of coal land capable of *supplying all the coal-tonnage that can possibly be transported over the road for centuries.*"

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company, and the only doubt in the past about the permanency of the earning power of the company as a transporter was due to the *fear that rival companies would tap the Schuylkill region,* and divert the coal tonnage to their own lines. *This danger was happily averted by the purchase of the coal lands.*"

And this from the report of 1881:

"The coal estates of the Philadelphia and Reading Company . . . consist of 91,149 acres (142 square miles) of coal lands, *which is sixty per cent of all the anthracite lands in the Schuylkill district, and thirty per cent of all in Pennsylvania.*"

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

"The coal lands comprise in extent about 33 per cent of the entire anthracite coal fields of the State, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions which has been going on for many years, it must be conceded that we have *at least 50 per cent of the entire deposit remaining unmined.*"

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthracite carriers, competing with the Reading and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds and receivers were appointed who operated both properties until 1896 when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

1st. To the Reading *Railway* Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of

the equipment) which had been owned or leased by the former Reading *Railroad* Company. The capital stock of this company was fixed at $20,000,000 and it issued $20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at $90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite,—more than one-fifth of the then total production of the country. But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars and ships, owned by the former Railroad Company, and its tidewater terminals at Philadelphia and on New York Harbor, were allotted to the Holding Company.

2nd. By the decree of sale the Reading Coal and Iron Company was released from its former obligations and to it thus freed the principal part of the property (coal and other), owned by it before the sale, was allotted and re-transferred upon condition, that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for $135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased,—almost two-thirds of the entire acreage of the Schuylkill coal field,—stocks and bonds in other coal companies, coal in storage and other property, all of the estimated value of $95,000,000.

3rd. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the General Assembly of Pennsylvania, but unused for twenty years, was utilized. This charter was of the class denominated "omnibus" by the Supreme Court of Penn-

sylvania, and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue,—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed to "Reading Company," its capital stock was increased from $100,000 to $140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned by the Reading *Railroad* Company, together with stocks which gave it control of more than thirty short line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railway* Company and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal and Iron Company, was that the Holding Company without any outlay—solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of $34,400,000; plus all of the capital stock and bonds of the new Railway Company, $40,000,000; plus all of the capital stock of the Coal Company, $8,000,000, and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds and mortgages owned by the former Railroad Company of the estimated value of over $38,000,000,—making a total value, as represented at the time to the New York Stock Exchange, of $193,613,000.

Thus, this scheme of reorganization, adopted and exe-

cuted six years after the enactment of the Anti-Trust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost one thousand miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61.

Obviously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder,—the Holding Company—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating $28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of $135,000,000 and its capital stock of $140,000,000. The Holding Company thus served to pool the property, the activities and the profits of the three companies. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 327, 362.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

In 1898 this Holding Company entered into a combination with five other anthracite carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater, which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders for the purpose of providing $5,000,000 with which the properties of the chief independent operators, Simpson and Watkins, were purchased and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise and that company, although only one of six, became responsible for thirty per cent. of the required financing. In *United States* v. *Reading Co.*, 226 U. S. 324, 351, this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

"The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at p. 355:

"We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated or which might thereafter be opened and operated," and to pay therefor

65% of the average price of coal prevailing at tidewater points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: that they were made for the purpose of eliminating the competition of independent operators from the markets and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed"; that before these contracts, there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants, but that after the contracts were made "such competition was impracticable"; that the case fell well within not only the *Standard Oil* and *Tobacco Cases*, 221 U. S. 1, 106, but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally that the defendants had combined, by and through the instrumentality of the 65% contracts with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within two years and again within four years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and of corporate agency, for the purpose of violating, in a flagrant manner, the Anti-Trust Act of 1890.

Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite,—almost one-half of its total freight traffic. Its capital stock was then $27,436,000 and its funded debt was $46,881,000.

This Central Company owned, at the time, in excess of

eleven-twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over $9,000,000 and a funded debt of about $17,000,000. And that company owned or had leased in excess of 14,000 acres of coal bearing lands—13,000 acres in the Wyoming field—and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over $20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the commencement of this suit, and from one-third to one-half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading system were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

"Q. You are president of the defendants, the Reading Company, Philadelphia and Reading Railway Company, Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey, the Lehigh and Wilkes-Barre Coal Company and the Temple Iron Company?

"A. I am. . . ."

"Q. What do you regard as the competitors of the Philadelphia and Reading now in New York Harbor, as to anthracite coal? . . .

"A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware and Lackawanna, the Delaware and Hudson,

the Erie, Ontario and Western. I guess those are all the roads leading to New York directly or indirectly. [He did not name the Central Company because it was a part of the Reading system when he testified.]"

"Q. Those roads are all carrying anthracite coal to the New York harbor?

"A. Yes, sir."

"Q. And you regard them as competitors who must be considered in fixing rates?

"A. Yes, sir; unquestionably."

Mr. Harris testified:

"Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

"A. We came in competion with all the roads that were carrying coal from Pennsylvania."

"Q. Name the principal ones in reference to carrying coal from the coal mines to New York harbor.

"A. The Reading, the Lehigh Valley, *the Central Railroad of New Jersey*, the Delaware, Lackawanna and Western, the Erie, and the Pennsylvania Railroad."

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer put this also beyond dispute by testifying:

"Q. Prior to 1901 were the Philadelphia and Reading Coal and Iron Company and the Lehigh and Wilkes-Barre Company competitors as sellers of coal in New York harbor?

"A. Yes; and they are today."

"Q. And generally throughout the eastern territory they were competitors at that time?

"A. Yes, sir; through that northern territory. Not in this territory, nor in the southern."

Thus, by this purchase, the Reading Holding Company

acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies, in the country. The anthracite tonnage of the Central and Reading Railway Companies thus combined, exceeded, at the time, 18,000,000 tons,—over one-third of the then total production of the country,—and the revenue derived from it was more than one-third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "Rates, practices, rules and regulations governing the transportation of anthracite coal," which had been in progress for three years. The eleven initial anthracite carriers which have lines penetrating the coal producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the Commission found: that since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of coöperation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading companies. The Commission also found, and this appears in the record of this case, that the Reading Coal Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding $68,000,000 for advances of capital made by the Reading *Railroad* Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than $30,000,000 of equaling 4% per

annum on the indebtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted save as to some findings of the Interstate Commerce Commission, we must proceed to judgment, and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the Government claims requires the Navigation Company to ship to market over the leased line three-fourths of all of the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-Trust Act.

It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the

Government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh and Susquehanna Railroad was about 100 miles in length and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal producing properties and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh and Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage producing coal districts. The rental to be paid was one-third of the gross earnings of the railroad and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained and the decree of the District Court with respect to it will be affirmed and the bill, as to it, dismissed.

In many leases for the operation of coal producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree of the District Court enjoining the lessors and the other defendants herein from attempting to enforce such covenants will be affirmed.

The other charges against the Lehigh Coal and Navi-

gation Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company are substantially abandoned in the Government's brief and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the District Court as to all but the Wilmington and Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading companies, the Central Railroad Company of New Jersey and the Wilkes-Barre Coal Company.

Before the reorganization of 1896 the gathering of more than two-thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation and sale of the anthracite coal of the largest of the three sources of supply.

When in 1896 the problem was presented of reorganizing the financial affairs of the two companies, it was not solved, as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the

contrary, and very obviously for the purpose of evading the provision of the constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Constitution of Pennsylvania, 1874, Art. 17, § 5), and also of evading the provisions of the Federal Anti-Trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when in 1901 a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal carrying system, with its extensive coal owning and mining subsidiary. This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court.

Thus, in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 327, when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise . . . in restraint of commerce among the several States or with foreign nations,'—or could more effectively and certainly suppress free competition between the constituent companies. . . . *The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect,* and which the public is entitled to have protected."

And again, in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88, decided nine years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. . . . Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when discussing a similar state Anti-Trust Act in *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209, it was said:

"The specification under this head is that the Supreme Court [of Missouri] found, it is contended, benefit—not

injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intention and has had some good effect.* . . . The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-Trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time, successfully until this court condemned the 65% contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. It is difficult to imagine a clearer case and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by *United States* v. *Union Pacific R. R. Co., supra.*

For flagrant violation of the first and second sections of the Anti-Trust Act, the relations between the Reading

Company, the Reading Railway Company and the Reading Coal Company and between these companies and the Central Railroad Company of New Jersey must be so dissolved as to give to each of them a position in all respects independent and free from stock or other control of either of the other corporations.

With respect to the contention that the commodities clause of the Act of June 29, 1906, 34 Stat. 584, 585, is being violated by the Reading Railway Company and the Central Railroad Company:

The Circuit Judges centering their attention: upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 413, that the evidence did not justify holding that in transporting the products of the Reading Coal Company's mines to market the Reading Railway Company was carrying a commodity "mined, or produced by it, or under its authority" or which it owned "in whole, or in part," or in which it had "any interest direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was to put an

end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—any discriminating practice which would harm the general shipper would profit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity . . . mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the en-

tire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines. The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-Trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven-twelfths of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, *supra*, is especially pressed in argument,—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 272, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 529. It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for

the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 272, 273; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 529; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic & Commerce Association*, 247 U. S. 490, 501.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven-twelfths of the capital stock of the latter and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal and Navigation Company, the Lehigh and New England Railroad Company, the Lehigh and Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia and Reading Coal and Iron Company and the Lehigh and Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington and Northern Railroad Company and as to the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company and the

Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company, existing and maintained through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia and Reading Railway Company, the Philadelphia and Reading Coal and Iron Company, the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh and Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

Affirmed in part; reversed in part, and remanded with direction to enter a decree in conformity with this opinion.

MR. CHIEF JUSTICE WHITE, MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER, dissenting.

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States brought to sever the existing relations

26. WHITE, Ch. J., HOLMES and VAN DEVANTER, JJ., dissenting.

between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade in violation of the Sherman Act and gave rise to a disregard of the commodities clause of the act of Congress.

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed and virtually the full relief prayed by the Government is therefore granted. We are unable to concur in this conclusion because in our opinion neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view because the court below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took and also demonstrates the error involved in the decree of this court reversing its action. *United States* v. *Reading Co.*, 226 Fed. Rep. 229. To that opinion we therefore refer as stating the reasons for our dissent.

WALLACE ET AL. *v.* HINES, DIRECTOR GENERAL OF RAILROADS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 683. Argued April 21, 1920.—Decided May 3, 1920.

In the absence of an adequate remedy at law plainly allowed against the State, equity has jurisdiction to restrain state officials from enforcing an illegal tax, the effect of which if not paid would be to cloud plaintiff's title and subject him to pecuniary penalties. P. 67.

Held, that the law of North Dakota permitting actions respecting title to property or arising upon contract to be brought against the State as against a private person does not clearly allow such an adequate remedy, since an action to recover money wrongfully extorted is a case in contract only in an artificial sense. *Id.*

The method of taxing an interstate railroad company by assessing the value of its property within the State at that proportion of the total value of its stocks and bonds that the main track mileage within the State bears to the main track mileage of the entire line, is indefensible when it is shown that the cost of construction per mile was much less within than without the taxing State, and that the large and valuable terminals are elsewhere. P. 68.

No property of such an interstate railroad situate beyond the State can be taken into account in taxation unless it can be seen in some plain, intelligible way that it adds to the value of the road and of the rights exercised, within the taxing State. P. 69.

Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant or other property elsewhere, adding to the riches of the corporation but not affecting the road in the taxing State, can afford no ground for increasing the tax there, whatever the tax may be,—on property or an excise on doing business. P. 70.

North Dakota law of March 7, 1919, c. 222, as administered, *held* an unwarrantable interference with interstate commerce and a taking of property without due process of law. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. F. E. Packard, Assistant Attorney General of the State of North Dakota, with whom *Mr. William Langer,* Attorney General of the State of North Dakota, was on the brief, for appellants.

Mr. E. Marvin Underwood, with whom *The Solicitor General, Mr. D. F. Lyons, Mr. M. L. Countryman, Mr. H. H. Field, Mr. H. B. Dike* and *Mr. Alexander Koplin* were on the brief, for the Director General of Railroads, appellee.

Mr. Charles W. Bunn, with whom *Mr. Burton Hanson, Mr. E. C. Lindley* and *Mr. A. H. Bright* were on the brief, for the railway companies, appellees.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from an order of three judges restraining the defendants, the appellants, from taking steps to enforce taxes imposed by an Act of North Dakota, approved March 7, 1919, (c. 222,) until the further order of the Court. The plaintiff railroads are corporations of other States with lines extending into North Dakota. The defendants are the State Tax Commissioner, the State Treasurer, the State Auditor, the Attorney General and the Secretary of State for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the State and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State, to which the tax is to be paid. *Shaffer* v. *Carter,* 252 U. S. 37. *Gaar, Scott & Co.* v. *Shannon,* 223 U. S. 468, 472. The only ground for supposing that there is such a remedy is a provision that "an action respecting the title to property, or arising upon contract may be brought in the district court against the

state the same as against a private person." Compiled Laws, N. Dak. 1913, § 8175. This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought. *Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282.

We quote the tax law in full.[1] It will be seen that it

[1] (2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other State, the United States or a foreign country, and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the State; provided, that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of

purports to be a special excise tax upon doing business in the State. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the

this tax an exemption of $10,000.00 from the amount of capital invested in the State shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart*, 193 U. S. 490. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282.

The Attorney General of the State in his very candid argument suggested that if the mode adopted by the tax commissioner were open to objections the statute might be construed to give him an election as to the method of distribution, and that he should take gross earnings, or, if more easily ascertainable, the property or mileage basis of distribution. As we are dealing only with a preliminary injunction we confine our consideration to a general view of the mode actually followed, and upon that we are of opinion that the decree should be affirmed.

Decree affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* CAHILL ET AL., COPARTNERS AS REDMAN & CAHILL, ET AL.

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

No. 124. Argued January 13, 1920.—Decided May 17, 1920.

An order of a state railroad commission requiring a railroad to install and maintain cattle scales, passed to facilitate trading in cattle and not for any reason having substantial relation to their transportation, violates due process of law. P. 75. *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340.
40 S. Dak. 55, reversed.

THE case is stated in the opinion.

Mr. E. C. Lindley, with whom *Mr. M. L. Countryman*, *Mr. F. R. Aikens* and *Mr. H. E. Judge* were on the brief, for plaintiff in error.

Mr. Oliver E. Sweet, Assistant Attorney General of the State of South Dakota, with whom *Mr. Clarence C. Caldwell*, Attorney General of the State of South Dakota, and *Mr. P. W. Dougherty* were on the brief, for defendants in error.

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

In *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, the question was whether an order of the Railroad & Warehouse Commission of Minnesota directing the railway to install at a named station a cattle-weighing scale was rightly sustained by the Supreme Court of the State. It

was found by that court (a) that out of 259 stations on the railway line in Minnesota where stock yards for handling cattle existed there were but 54 supplied with cattle-weighing scales, all of which the railway had voluntarily installed; (b) that although such scales had no direct part in transportation, they were convenient in stock dealings and a station possessing one had an advantage over a place where none existed; in fact, that at the 54 stations where they had been voluntarily installed it had come to pass that they were used, not by shippers for the purposes of their transportation business, but by those who bought and sold cattle.

Coming to consider the contention of the railway that the order to put in the scales was repugnant to the Fourteenth Amendment as a taking of its property without due process, since as a carrier no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that as the duty of the railway was confined to furnishing appliances for its business of transportation and that cattle scales were not of such a character it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle however much the public might be benefited thereby, the defense of the railway was maintained and the order of the Commission was held to be wanting in due process and void. The result, it was pointed out, could not be avoided by the suggestion that the order was intended to correct a discrimination which existed in favor of certain stations which had scales, since in substance to say that would be to correct one discrimination by creating another.

Shortly before the argument in this court of the *Minnesota Case* just referred to, the firm of Cahill and Redman

petitioned the Board of Railroad Commissioners of South Dakota for an order requiring the Great Northern Railway Company to install and maintain a cattle scale adjacent to its cattle yards at Albee station. It was alleged in the petition that no means otherwise of weighing cattle existed at Albee; that the public necessities of the cattle trade required the scale and that the number of cattle shipped from the place justified the outlay by the railway.

The railway answered denying any duty on its part to install the scale and asserted that to compel it to put the scale in would deprive it of its property without due process and would besides deny it the equal protection of the laws, both in violation of the Fourteenth Amendment.

At the hearing which followed there was no showing that any cattle had been shipped over the railway into Albee. It was indisputably established, however, (a) that not only the defendant railway but the other roads operating in the State of South Dakota had at some of their stations installed stock yard scales which presumably, in the absence of all proof to the contrary, had been voluntarily installed; (b) that all shipments of cattle from Albee during the preceding three years amounted only to 56 carloads, all of which were moved in interstate commerce, that is, to St. Paul, Minnesota, and that with regard to less than carload lots two cattle shipped in intrastate commerce constituted the sole movement; (c) that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purposes of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery; (d) that the business of dealing in cattle at Albee would be facilitated and probably increased by the existence there of a cattle scale where cattle dealt in could be weighed, and that the public want in this respect had come to be increasingly felt since the removal by its owner of a

private scale which the public had used at a time previous to the demand made upon the railway to install the cattle scale here in question.

The Commission in its findings, while pointing out that the complainants had testified that, besides the benefit to the public, there would be an advantage to shippers by the establishment of the scale as it would enable the shippers to load their cattle so as to avoid any loss resulting from a failure to bring the loaded car up to the minimum weight required for carload shipments, added the following: "The testimony of the other witnesses, including those appearing for the railway company, is to the effect that the only use to which a stock scale is put is for the accommodation and convenience of stock buyers and persons making sales of live stock to the buyers at stockyards in arriving at the weights as to the basis for the purchase and sale."

In the meanwhile the *Minnesota Case* had been decided and therefore, when the Commission came to apply the law to the facts by it found in this case, it was called upon to determine how far the ruling in that case deprived it of power to grant the relief prayed in this. Discharging that duty, it held that the *Minnesota Case* was inapplicable because in South Dakota there was a common knowledge that railroad cattle scales when established were for the benefit of both the public and shippers, enabling all who took cattle into the railroad yards whether for shipment or otherwise to ascertain their weight. After referring to the relation in certain aspects which cattle scales when installed bore to carload and less than carload shipments and that a law of the State provided for the inspection of cattle scales when installed by railways at their cattle yards, it was pointed out that, in accordance with many adjudged cases establishing that it was a part of the duty of a carrier to install stock yards in which to hold cattle intended for shipment and to receive inbound cattle when unloaded, it had by further legislation been made the duty of carriers

to establish stock yards at their stations. Declaring that no difference in principle existed between the duty to furnish stock yards and the duty to install stock scales, the conclusion of the Commission was thus summed up:

"After a very careful examination of the evidence in this record, this commission is of the opinion and finds that live stock scales are a necessary facility at stockyards for the weighing of live stock received for the purposes of shipment, not only for the convenience of the public at large, live stock buyers and individual shippers, but in the necessary weighing preliminary to properly loading and subsequent to the unloading of live stock at such stockyards, and that there is an actual public necessity for the installation of a stockyards scale at the stockyards of the defendant at its station at Albee, in Grant County, in this state."

Conforming to these conclusions, the order awarded directed the installation of a stock scale of a certain capacity "in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee."

An intermediary court to which the case was removed held that as the furnishing of a stock scale was no part of the duty of a common carrier, the railway could not be compelled to furnish it without taking its property without due process of law, and that this result would be all the more flagrantly brought about by compelling the railway to furnish the scale upon the theory that if furnished it would afford a facility for the trading in cattle at the place where it was installed.

The complainant and the Board of Railroad and Warehouse Commissioners, as appellants, in invoking the reversal of the judgment of the intermediary court and the affirmance of the order of the Board, as stated by the Supreme Court of the State, in that court relied solely upon

two grounds: "First, that local buyers and sellers of live stock have the right to demand the installation of stockyard scales for their own convenience in buying live stock; and second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight."

Disposing of the first of these contentions the court said: "The fallacy of the first proposition is so clear that discussion would be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment."

In passing upon the second proposition the court quoted a passage from a text book (10 Corpus Juris, 59, 79) in which, after stating the general duty of a common carrier to furnish appliances necessary or appropriate for discharging its duties as a common carrier, it was declared: "The duty of a carrier of live stock, it is said, cannot be efficiently discharged without the aid of pens or yards in which the live stock offered for shipment can be received and handled, with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported; and such duty is strictly analogous to the duty of the carrier to construct and to maintain a secure depot for inanimate freight."

Applying such doctrine the court, without citation of authority or reference to any legislative enactment or administrative practice supporting the view, and without referring to the South Dakota statutes relied upon by the Board, making it obligatory upon the carrier to put in cattle pens at all stations, without imposing any such duty to put in cattle scales, but on the contrary giving power only to inspect such scales when put in, held, wholly as a matter of first impression, that the identity between the two (cattle yards and cattle scales) was so complete that

the obligation which existed to erect cattle yards at every station also established the duty to install a cattle scales at every station. The judgment of the intermediary court was therefore reversed and the order of the Board affirmed.

Eliminating, as this conclusion did, all the questions pressed before the Board obviously with the purpose of taking the case out of the reach of the *Minnesota* decision, based upon a supposed duty to put in scales because of the advantage which would result to dealers in cattle, it clearly follows that this case is decisively controlled by the ruling in the *Minnesota Case,* and therefore leaves us only the duty to apply that ruling. Coming to do so, the judgment below is therefore reversed and the cause remanded with directions for further proceedings not inconsistent with this opinion.

It is so ordered.

ERIE RAILROAD COMPANY *v.* COLLINS.

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

No. 348. Argued January 8, 1920.—Decided May 17, 1920.

Plaintiff's duties on a railroad engaged in interstate and intrastate commerce were to attend to a signal tower and switches and also, in a nearby building, to run a gasoline engine to pump water into a tank for the use of the locomotives, whether operating intrastate or interstate trains. While engaged in the latter employment, he was injured and disfigured by burns resulting from an explosion of gasoline. *Held,* employed, at time of injury, in interstate commerce, within the Federal Employers' Liability Act. P. 82.

Damages may be allowed by a jury for shame and humiliation resulting from an injury and personal disfigurement due to negligence. P. 85.

259 Fed. Rep. 172, affirmed.

THE case is stated in the opinion.

Mr. John W. Ryan, with whom *Mr. Adelbert Moot* was on the brief, for petitioner:

The character of employment at the time of injury, whether interstate or intrastate, depends upon the work in which the employee, at the time, was engaged. The mere expectation of presently being called upon to perform a task in interstate commerce is immaterial. *Erie R. R. Co.* v. *Collins,* 259 Fed. Rep. 172; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571, 574; *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473, 478; *Erie R. R. Co.* v. *Welsh,* 242 U. S. 303, 306. See also *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 163. As in *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439, respondent, at the time of injury, was employed in preparing an article for consumption by the instrumentalities of interstate commerce, and therefore was not employed in such commerce.

If a railroad employed an engineer to pump water from the earth at a distance from its right of way and transported the water by cars or a pipe line to a water tank upon its right of way, for use there upon engines engaged in interstate commerce, we should have a situation exactly like the one presented in the *Yurkonis Case.* The engineer pumping the water has no closer relationship to interstate commerce than the miner has in mining coal for use in interstate commerce. In pumping water, the character of the employment, whether interstate or not, does not depend upon the proximity of the source of supply to the point of use.

In addition to drawing the water from the earth, the engine operated by respondent placed the water in a tank from which it could be taken with convenience, as required for use. This phase of the work was analogous to that done by the injured employee in *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington,* 241 U. S. 177, who,

when injured, was placing cars of coal on a trestle from which it could be unloaded through chutes to the tenders of locomotives. See also *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183.

It is argued that, without the service which respondent was rendering when injured, commerce would be seriously interrupted, if it did not cease. Commerce would not continue without machine shops for the repair of cars and locomotives, but the courts have held that employment in the shops in which cars and locomotives which hauled interstate commerce were repaired, was not a part of interstate commerce. The erection and maintenance of the structures in which the instrumentalities of commerce are built, repaired and housed, the construction and repair of the instrumentalities of commerce, the procurement and placing for convenient use of the articles consumed in commerce, when they have relationship to interstate commerce are properly classified as work *for* interstate commerce and not as work *in* interstate commerce. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556. See *Kelly* v. *Pennsylvania R. R. Co.*, 238 Fed. Rep. 95; *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353.

Gallagher v. *New York Central R. R. Co.*, 180 App. Div. 88; 222 N. Y. 649 (certiorari denied 248 U. S. 655); and *Vollmers* v. *New York Central R. R. Co.*, 180 App. Div. 60; 223 N. Y. 571, indicate that the repair of the pump house in which the gasoline engine was located, or the repair of that engine itself, was not employment in interstate commerce.

On the question of damages for mental suffering, the following were cited: *Southern Pacific Co.* v. *Hetzer*, 135 Fed. Rep. 272; *Kennon* v. *Gilmer*, 131 U. S. 22, 26; *McDermott* v. *Severe*, 202 U. S. 600, 611.

Mr. Hamilton Ward, with whom *Mr. Irving W. Cole* was on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages under the Federal Employers' Liability Act brought in the District Court for the Western District of New York.

The following are the allegations of the complaint stated narratively:

December 25, 1915, and prior thereto, defendant was an operator of a steam railroad and engaged in interstate commerce. On and prior to that date plaintiff as an employee of defendant operated a signalling tower and watertank in the town of Burns, New York, the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a close by well into the tank by a gasoline engine which plaintiff ran.

In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine the gasoline suddenly exploded burning him and seriously and painfully and permanently injuring him, causing him immediate and permanent suffering and the expenditure of large sums of money, by all of which he was damaged in the sum of $25,000.

The engine was defective, which was the cause of the explosion, plaintiff being guilty of no negligence.

Judgment was prayed in the sum of $25,000.

Defendant by demurrer attacked the sufficiency of the complaint and the jurisdiction of the court.

The court (Judge Hazel) overruled the demurrer, and in doing so expressed the conflicting considerations which swayed for and against its strength, but finally held the complaint sufficient, "and that plaintiff was engaged in interstate commerce, or that his work was so closely connected therewith as to be a part of it." To this conclusion

the court seemed to have been determined by *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146.

Defendant answered putting at issue the allegations of the complaint, and set up as separate defences assumption of risk and contributory negligence.

A trial was had to a jury during the course of which it was stipulated that at the time of plaintiff's injury and prior thereto "trains carrying interstate commerce ran daily" and at such times "water from the water tank . . . was supplied daily in part to defendant's engines at the time engaged in hauling interstate freight and in part to . . . engines at the time hauling intrastate freight."

Motions for nonsuit and for a directed verdict were successively made and overruled.

The jury returned a verdict for plaintiff in the sum of $15,000 upon which judgment was entered against motion for arrest and new trial.

Error was then prosecuted to the Court of Appeals, which court affirmed the judgment, and to review its action this certiorari was granted.

The evidence presents very few matters of controversy. It establishes the employment of plaintiff by defendant, and its character, and presents the question whether it was in interstate commerce or intrastate commerce, in both of which, it is stipulated, defendant was engaged. And on this question the courts below decided the employment was in interstate commerce though exhibiting some struggle with opposing considerations.

They seemed to have been constrained to that conclusion by the same cases, and a review of them, therefore, is immediately indicated, to see whether in their discord or harmony, whichever exists, a solution can be found for the present controversy.

They all dealt with considerations dependent upon the

distinctions of fact and law between interstate and intrastate commerce. A distinction, it may at once be said, is plain enough so far as the essential characteristics of the commerces are concerned; but how far instruments or personal actions are connected with either and can be assigned to either, becomes in cases a matter of difficulty, and ground, it may be, of divergent judgments. With this in mind we review the cases.

But first as to the facts in this. Defendant is an interstate railroad and upon its line running from other States to New York it operated in New York a signal tower and switches to attend which plaintiff was employed. It also had near the tower a pumping station, consisting of a water-tank and a gasoline engine for pumping purposes through which instrumentalities water was supplied to its engines in whichever commerce engaged. While in attendance at the pumping station plaintiff was injured. And such is the case, that is, while in attendance at the pumping station, it being his duty to so attend, was he injured in interstate commerce?

It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have on occasion signalled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping station he put off an interstate character and took on one of intrastate quality or, it may be, was divested of both and sank into undesignated employment. A rather abrupt transition it would seem at first blush, and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within it at one point of time and without it at another—within it when on the signal tower, but without it when in the pump house, though in both places being concerned with trains engaged in interstate commerce.

But let us go from speculation to the cases. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, and *Roush* v. *Baltimore & Ohio R. R. Co.*, 243 Fed. Rep. 712, were considered by the Court of Appeals. Some state cases were also referred to.

In *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, it was held that one carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train was entitled to invoke the Employers' Liability Act. In other words, that one employed upon an instrumentality of interstate commerce was employed in interstate commerce. And it was said, citing cases, "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In the *Yurkonis Case* the injury complained of happened to Yurkonis in a mine or colliery of the railroad by the explosion of gases when Yurkonis was engaged in and about the performance of his duties. It was held that an injury so received, though the coal was destined for use in interstate commerce, was not one occurring in such commerce.

In *Roush* v. *Baltimore & Ohio R. R. Co.*, 243 Fed. Rep. 712, the decision was that one employed in operating a pumping station which furnished water to interstate and intrastate roads was engaged in work incidental to interstate commerce. The court deducing that conclusion from cases from which it liberally quoted.

Chicago, Burlington & Quincy R. R. Co. v. *Harrington*, 241 U. S. 177, the Court of Appeals considered as substantially the same in incident and principle with the *Yurkonis Case, supra.* The case concerned an injury

while handling coal. It was a step or steps nearer the instrumentality of use. It was being removed when the injury complained of occurred from storage tracks to chutes. The employment was considered too distant from interstate commerce to be a part of it or to have "close or direct relation to interstate transportation." The *Yurkonis Case* was cited and applied.

Shanks v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, was considered of like character. The employment asserted to have been in interstate commerce was the taking down and putting up fixtures in a machine shop for repairing interstate locomotives.

Before summarizing these cases we may add *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353, and *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571. In the *Winters Case* the work was repairing an engine. The engine, it was said, had no definite destination. "It simply had finished some interstate business and had not yet begun upon any other." As to such instrumentalities the determining principle was said to be that their character depends upon their "employment at the time not upon remote probabilities or upon accidental later events."

In the *Puckett Case* an employee (car inspector) going to the relief of another employee stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces the differences between them are easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

In the *Pedersen Case* it was said that the questions which naturally arise: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it"? Or as said in *Shanks* v. *Delaware, Lackawanna & Western R. R. Co., supra,* was the "work so closely related to it [interstate commerce] as to be practically a part of it"? The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as was demanded, and the test of the cases satisfied.

There is only one other assertion of error that demands notice. The others (regarding assumption of risk and contributory negligence) counsel neither argue nor submit; their abandonment, therefore, may be assumed.

It is asserted against the verdict that it is "outrageously excessive," caused by the instruction of the court that plaintiff could recover "for shame and humiliation." Counsels' argument is not easy to represent or estimate. They say that "mental pain" of the designated character, "the suffering from injured feelings, is intangible, incapable of test or trial," might vary in individuals, "rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal." If all that be granted it was for the consideration of the jury. It certainly cannot be pronounced a proposition of law that personal mutilation or disfiguration may be a matter of indifference to anybody

or that sensitiveness to it may vary with "temperaments" and be incapable of measurement. We see no error in the instruction.

Judgment affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

ERIE RAILROAD COMPANY *v.* SZARY.

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

No. 355. Argued January 8, 1920.—Decided May 17, 1920.

An employee of a railroad engaged in both interstate and intrastate commerce, whose duty it was to dry sand in stoves in a small structure near the tracks and supply it to the locomotives, whether operating in the one kind of commerce or the other, was injured while returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives bound to other States. *Held*, employed in interstate commerce within the meaning of the Federal Employers' Liability Act. P. 89.
Erie R. R. Co. v. *Collins*, *ante*, 77, followed.
259 Fed. Rep. 178, affirmed.

THE case is stated in the opinion.

Mr. Theodore Kiendl, Jr., with whom *Mr. William C. Cannon* and *Mr. Coulter D. Young* were on the brief, for petitioner:

Plaintiff's duties as sand-drier, apart from actually delivering sand to an engine, may be divided into (1) preparing the sand for storage, and (2) caring for the stove and fire with which the sand was prepared for storage.

It seems clear that the preparation of the sand for, or placing it in, storage would not constitute interstate commerce. *Cf. Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177.

If the plaintiff had been placing the dried sand in storage he would have been engaged in the same kind of work as Harrington was, not interstate commerce. But the plaintiff here was even more remote from an act of interstate commerce, for he was, at best, engaged in work which was antecedent to putting engine materials into storage, viz., the work of caring for the fire which prepared the sand for storage. *Cf. Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183; *Hudson & Manhattan R. R. Co.* v. *Iorio*, 239 Fed. Rep. 855; *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353.

As to the other phase of the plaintiff's employment: At the time of his injury he was not even engaged in removing the ashes. But assuming that his act was a part of his cleaning the stove, it did not have to do with any interstate operation. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.

It would seem that the nearest the plaintiff came to being engaged in interstate commerce at the time of his injury was in removing ashes from a fixture. To paraphrase the language in the *Shanks* opinion, the connection between the fixture and the interstate transportation was remote at best, for the only function of the fixture was to convey heat to sand which was placed in storage and then used in supplying engines, some of which were used in interstate transportation. All this stove was used for was heating and drying of sand as it was moved from storage to storage and such a use cannot be said to make it an instrument of interstate commerce, as the sand which was prepared might never have been used in such commerce. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439.

There is no conceivable way in which the plaintiff can be held to have been employed in interstate commerce unless we are to disregard the decisions in the *Harrington*, *Yurkonis* and *Shanks Cases*. See also *Illinois Central R. R.* v. *Cousins*, 241 U. S. 641; *Baltimore & Ohio R. R. Co.* v. *Branson*, 242 U. S. 623; *Southern Ry. Co.* v. *Pitchford*, 253 Fed. Rep. 736; *Giovio* v. *New York Central R. R. Co.*, 176 App. Div. 230; 223 N. Y. 653; *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473; *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353; *O'Dell* v. *Southern Ry. Co.*, 248 Fed. Rep. 345.

Mr. John C. Robinson for respondent.

Mr. Justice McKenna delivered the opinion of the court.

Action for damages under the Employers' Liability Act, for the loss of a leg in the railroad company's service. The verdict and judgment were for $20,000. The contest in the case is whether the injury was received in interstate or intrastate service.

The judges below concurred in the judgment but disagreed upon the grounds of it. Judges Hand and Hough concurred on the authority of the *Collins Case* (259 Fed. Rep. 172), though Judge Hand did not sit in it, and Judge Hough dissented from its judgment.

As we have just affirmed that case, if it is not distinguishable from the case at bar, the latter must also be affirmed. A distinction is not asserted but both cases are attacked. In our opinion in the *Collins Case*, *ante*, 77, we have reviewed most of the cases upon which the company relies in this, and whether their principle applies depends upon the facts. We collect them from the testimony and represent them as the jury had a right to consider them, omitting conflicts.

Sand is necessary to an engine and must be used dry. Szary and two others were employed in its preparation, which was done in what is called the "sand house," a small structure standing in the yards of the company along side of the tracks. The drying was done in four large stoves which it was the duty of Szary and his associates to attend. Soft coal was the heating means and the resulting ashes were dumped in an ash pit, to do which a track had to be crossed.

On the night of the accident, January 5, 1917, Szary began his duties at 6 o'clock, and sanded about seven engines whose destinations were other States. He sanded the last engine at 9 o'clock, and after doing so, he removed the ashes from the stove and carried them to the ash pit in a pail according to his custom; in doing which he was compelled to cross one of the tracks. He emptied the pail and left it on the ground while he went to the engine-room to get a drink of water, and when returning for the pail and crossing the track he was hit by an engine. He had looked and saw no engine and heard no signal. He described the night as "very dark and very foggy and rainy and misty," and testified that he could not see anything, the steam and smoke from the engines in all parts of the yard being so thick that he could see nothing.

The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital and his left leg was amputated the same night from two to three inches below the knee.

We think these facts bring the case within the *Collins Case* and the test there deduced from prior decisions. There were attempts there, and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. Indeed something is attempted to be made of an omission, or an asserted omission, in the evidence, of the kind of commerce in which the last engine served was engaged.

The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character.

The conclusion that the service of Szary was rendered in interstate commerce determines the correctness of the ruling of the District Court upon the motion to dismiss made at the close of plaintiff's evidence, and afterwards for particular instructions and the objections to the charge by the court. All of the rulings were based on the character of the commerce, the court adjudging it to be interstate.

It hence follows that the judgment must be and it is

Affirmed.

MR. JUSTICE VANDEVANTER and MR. JUSTICE PITNEY dissent.

WHITE, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO, *v.* CHIN FONG.

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

No. 506. Argued April 22, 1920.—Decided May 17, 1920.

When a Chinaman seeking to reënter this country on the ground that he was formerly engaged here as a merchant presents due evidence of his right as prescribed by the Act of November 3, 1893, c. 14, 28 Stat. 7, the immigration officials have no authority under the Exclusion Laws to ignore such evidence and exclude him upon the ground that his original entry was in violation of them. P. 91.

The Exclusion Laws provide a judicial hearing to determine the liability to deportation in such cases and a mere executive order of exclusion is void. P. 92.

258 Fed. Rep. 849, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Stewart, with whom *Mr. H. S. Ridgely* was on the brief, for petitioner.

Mr. Jackson H. Ralston, with whom *Mr. George W. Hott* was on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Certiorari to review a judgment of the Court of Appeals discharging respondent from the custody of the Commissioner of Immigration, he holding respondent for deportation as a Chinese person not entitled to be in the United States. 258 Fed. Rep. 849. The judgment of the Court of Appeals reversed that of the District Court, the latter court having remanded respondent to the custody of the Commissioner for deportation.

The evidence establishes the fact that respondent entered the United States as a merchant and was such at a fixed place of business for at least a year before his departure for China and that his stay in China was intended to be temporary. He hence contends that the Commissioner, as representing the executive branch of the Government, had no authority to determine that his original entry was unlawful. This contention the District Court ruled against and the Circuit Court of Appeals ruled in favor of, and constitutes the question in the case. The Circuit Court of Appeals, by Circuit Judge Morrow, passing upon it said: "The Acting Secretary of Labor, in approving the decision of the Commissioner of Immigration, did so upon the ground that 'the original entry of this man [respondent] was obtained by fraud;' but this was not the question submitted to the Commissioner of Immigration or to the Secretary of Labor for

decision. The question was not whether the applicant was legally admitted in 1896–1897, or 1906. The question was whether he had been a merchant in the United States at least one year before his departure from the United States in 1912 (*Chin Fong* v. *Backus*, 241 U. S. 1, 5)," and upon that question, it was decided that, "the evidence was all one way, establishing beyond controversy all the facts required by the statute and the rule of the Department of Labor."

The conclusion was that the Commissioner did not consider this evidence or pass upon it, but deciding that respondent's original entry was fraudulent, ordered his deportation. In other words, it was held that the Commissioner ignored the question presented to him and the evidence pertaining to it, reviewed and reversed the judgment of another time and tribunal, took away the right that had been exercised under it and which gave the assurance that respondent could go to China and return again. The order of deportation was, therefore, declared to be void. For this the court cited the case of *Chin Fong* v. *Backus*, *supra*, and the various statutes applicable to the exclusion of Chinese persons from entry into the United States. 22 Stat. 58; 23 Stat. 115; 25 Stat. 476; 31 Stat. 1093, and the Act of November 3, 1893, c. 14, 28 Stat. 7.

In the case of *United States* v. *Woo Jan*, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who has been in the United States and has departed from it with the intention of returning, is entitled under existing legislation to have his right to do so judicially investigated with "its assurances and sanc-

tions," as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action.

And such is the provision of the Act of November 3, 1893, 28 Stat. 7. It is there provided that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant, must establish the fact by two credible witnesses, other than Chinese, that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except what was necessary in the conduct of his business.

The Government appeals against the explicit words of the provision to the purpose of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or if they fraudulently enter, to expel them, and it is insisted that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and in emphasis it is said, "such a legislative absurdity is unthinkable." But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this court has declared, and,in the present case, the right that had been adjudged and had been exercised in reliance upon the adjudication.

Judgment affirmed.

LEARY ET AL., ADMINISTRATORS OF LEARY, *v.* UNITED STATES.

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

No. 314. Argued April 30, 1920.—Decided May 17, 1920.

L went bail for G in a federal prosecution, upon an understanding that a fund standing in certain securities should be held for his indemnification, and not knowing that it represented moneys of which G had defrauded the United States through the crimes charged in the indictment; and, upon G's default, suffered judgment on the bond, which was paid by his estate. (See *s. c.* 224 U. S. 567; 245 U. S. 1.)

Held: (1) That since the duty to pay the judgment was absolute, L's estate was not entitled to be reimbursed out of the fund for the expense of defending against proceedings by the United States in the Surrogate Court to secure payment of its judgment. P. 95.

(2) That, since the upholding of L's claim of indemnity against the United States could not have been contemplated in L's agreement and he have the status of *bona fide* purchaser upon which his paramount equity depended, the expense of establishing and protecting the claim in the suit by which the Government impounded the fund could be charged against the fund only as costs, which would be inadmissible, the United States not being liable to costs directly or indirectly. P. 97.

(3) That, in allowing L's estate the amount paid on the judgment on the bail bond, with interest, the District Court properly deducted the clerk's poundage of 1 per cent. under Rev. Stats., § 828. P. 95.

257 Fed. Rep. 246, affirmed.

THE case is stated in the opinion.

Mr. Aubrey E. Strode, with whom *Mr. J. T. Coleman, Jr.,* was on the brief, for appellants.

Mr. Marion Erwin, Special Assistant to the Attorney General, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

The United States brought a bill to charge Kellogg with a trust in respect of funds received by him from Greene and obtained from the plaintiff by Greene through his participation in some well known frauds. In 224 U. S. 567, the representative of Leary was allowed to intervene and to assert a paramount claim upon the funds. In 245 U. S. 1, it was established that the funds were held by Kellogg primarily as security to Leary against his liability upon a bail bond for Greene. The United States having obtained a judgment on the bail bond and the same having been paid by the Leary estate the present appellants filed a petition in the cause, in the District Court, to have the funds applied to the reimbursement (1) of expenditures in defending against proceedings in the Surrogate Court to secure payment of the judgment, (2) of expenditures in establishing and protecting the trust; and (3) of the sum of $40,802, the amount paid on the judgment, with interest from July 26, 1910, the date when the judgment was paid. The District Court allowed the last claim with interest at six per cent., less the clerk's poundage of one per cent. under Rev. Stats., § 828. (The details are immaterial.) It denied the other claims, and its decree was affirmed by the Circuit Court of Appeals. 257 Fed. Rep. 246. 168 C. C. A. 330. Leary's administrators appealed.

The only reason suggested for the claim on account of defending against proceedings on the judgment is that the United States in the present suit had impounded the funds available for payment. But the obligation to pay the judgment was absolute, not confined to a payment from these funds, and the claim for the cost of resisting it has no foundation. We also are of opinion that the deduction of poundage by the clerk was proper as in other

cases of money kept and paid out by him. But it is said that this item and the expense of defending the trust should be borne by the residue of the funds in the clerk's hands after deducting the amount paid in respect of the judgment. It is argued that the trust informally established by letters of Kellogg stating that he held it for Leary's protection to be applied in payment of his obligation in case it should be established, if construed with reasonable liberality, must embrace these elements to make the protection complete. Of course the upholding of Leary's claim against the United States was not contemplated in the terms of the trust because Leary's ignorance of the interest of the United States was essential to the validity of his position as a purchaser without notice. But it is thought that indemnity includes defences of the indemnifying fund against unexpected attacks, that if the trustee fails to make it the *cestui que trust* may do so, and that in either event the fund should be charged. It does not matter that the United States is the opposing party, as its rights in the fund are inferior to those that Leary now has successfully affirmed. *Trustees* v. *Greenough*, 105 U. S. 527.

To these arguments the Government replies in the first place that they come too late; that the decree of the Circuit Court of Appeals that was before this court on the last occasion was treated as a final decree, which therefore fixed the amount that the appellants could recover beyond enlargement, and that as the prayer of the appellants was only for the transfer of so much of the fund as would pay the judgment on the bail bond with interest, nothing more can be asked now. This objection might raise difficulty if otherwise our opinion were in favor of the appellants; but as we think that the Circuit Court of Appeals was right with regard to the merits, we will assume for purposes of decision that the previous proceeding did not so precisely determine the appellants'

rights as to prevent their demanding the foregoing items as incident to the claim allowed.

To charge the fund with these expenses is to charge the United States, and it begs the question to say that the United States in this respect is subordinate to the Leary claim. It is not subordinate unless Leary's costs ought to come out of the Government's pocket, even though limited to particular money there. The Government cannot be made to pay or to take subject to the deduction, because Leary, even though a *bona fide* purchaser, had no contract for it, and because to charge the fund apart from contract is merely a round-about way of saying that the owner of the fund must pay charges of a kind that the United States never pays; (see *National Bank* v. *Whitney*, 103 U. S. 103, 104; *United States* v. *Barker*, 2 Wheat. 395;) and charges for protecting the fund not for but against the United States.

Decree affirmed.

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

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* McCAULL-DINSMORE COMPANY.

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

No. 628. Argued April 23, 1920.—Decided May 17, 1920.

Under the Cummins Amendment of March 4, 1915, which provides that the carrier shall be liable for the full actual loss, damage or injury, notwithstanding any limitation of liability, limitation of amount of recovery, or representation or agreement as to value in the receipt, bill of lading, etc., and which declares any such limitation

unlawful and void, a shipper, in case of loss, is entitled to damages on the basis of value at the place of destination at the time when the property should have been delivered if that is greater than the value at place and time of shipment, notwithstanding his Uniform Bill of Lading provided for computing damages on the latter basis. P. 99.

260 Fed. Rep. 835, affirmed.

THE case is stated in the opinion.

Mr. O. W. Dynes, with whom *Mr. H. H. Field*, *Mr. F. W. Root* and *Mr. Burton Hanson* were on the briefs, for petitioner.

Mr. J. O. P. Wheelwright, for respondent, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the loss of grain belonging to the plaintiff and delivered on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Nebraska. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The petitioner has paid $1,200.48, being the amount of the loss so computed, but the value of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was $1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The District Court gave judgment for the plaintiff, 252 Fed. Rep. 664, and the judgment was affirmed by the Circuit Court of Appeals. 260 Fed. Rep. 835.

The Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, provides that the carriers affected by the act shall issue a bill of lading and shall be liable to the lawful holder of it "for any loss, damage, or injury to such property . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed" and further that the carrier "shall be liable . . . for the full actual loss, damage, or injury . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law. 33 I. C. C. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves.

We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the

question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose but to apply specifically to this very case.

Judgment affirmed.

THE CHIEF JUSTICE dissents for the reasons stated by the Interstate Commerce Commission.

WESTERN UNION TELEGRAPH COMPANY *v.* BROWN, EXECUTOR OF LANGE, ET AL.

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

No. 159. Argued January 20, 21, 1920.—Decided May 17, 1920.

One who, in repudiation of a contract which binds him to make a certain payment, sends a telegram to stop a draft previously dispatched to meet the obligation, can not recover the amount from the telegraph company because of its negligent failure to deliver the telegram in time. P. 113.

P and C agreed to sell and deliver, and H and L to buy, take and receive certain shares of mining stock, "upon the following terms and conditions:" The price stated was to be paid part down and the remainder in equal payments on stated future dates; upon the making of the first payment the shares, endorsed in blank, were to be deposited with a bank under an escrow agreement for delivery to H and L when the last payment was made; the bank was constituted the agent of P and C to receive the payments, and, in event of default by H and L, was authorized by the terms of the deposit to deliver all the shares to P and C, whereupon all payments theretofore made should be forfeited to them, and "all rights of each of the parties should forever cease and terminate." *Held*, not an option terminable at the will of the vendees by failure to meet deferred payments, but an absolute agreement on their part to buy, the provision for forfeiture of past payments and termination of the agreement in case of their default being intended for the protection of the vendors, and exercisable at the vendors' election. P. 110. *Stewart* v. *Griffith*, 217 U. S. 323.

The provision in such contract that upon non-payment of stipulated sums the rights of each of the parties shall cease and determine is the equivalent of a provision that in case of such default the contract shall be "null and void." P. 112.

248 Fed. Rep. 656, reversed.

THE case is stated in the opinion.

Mr. Beverly L. Hodghead and *Mr. Rush Taggart*, with whom *Mr. Francis R. Stark* was on the briefs, for petitioner.

The following were cited as holding that such contracts are absolute agreements to buy as well as to sell and not mere options, and that the forfeiture provision is for the benefit of the vendor. James, Option Contracts, § 109; *Stewart* v. *Griffith*, 217 U. S. 323; *Wilcoxson* v. *Stitt*, 65 California, 596; *Central Oil Co.* v. *Southern Refining Co.*, 154 California, 165; *Weaver* v. *Griffith*, 210 Pa. St. 13; *Vickers* v. *Electrozone Co.*, 66 N. J. L. 9; *Hamburger* v. *Thomas*, 118 S. W. Rep. 770; *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 234; *Jones* v. *Hert*, 192 Alabama, 111; *McMillen* v. *Strange*, 159 Wisconsin, 271; *Meagher* v. *Hoyle*, 173 Massachusetts, 573; *Dana* v. *St. Paul Investment Co.*, 42 Minnesota, 196; *Shenner* v. *Pritchard*, 104 Wisconsin, 291.

Mr. Samuel Poorman, Jr., for respondents:

No absolute sale was made. *Ramsey* v. *West*, 31 Mo. App. 676; *Beckwith-Anderson Land Co.* v. *Allison*, 26 Cal. App. 473; *Verstine* v. *Yeaney*, 210 Pa. St. 109; *Pittsburg Brick Co.* v. *Bailey*, 76 Kansas, 42; *McConathy* v. *Lanham*, 116 Kentucky, 735; *Williamson* v. *Hill*, 154 Massachusetts, 117; *Gordon* v. *Swan*, 43 California, 564. The sale and purchase were declared to be "upon . . . conditions;" and one of those was that upon default by plaintiffs in paying any instalment "all rights of each of said parties hereunder shall forever cease and determine." The intention here was that, upon default, there should be effected automatically a wiping out of all rights of either party. In precise phrase the contract defined the only rights existing in case of default and the very steps to be then taken by the depositary in escrow, and expressly declared the non-existence of any other rights whatsoever.

A forfeiture is not favored by the law; and a forfeiture

that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor. But where the forfeiture is in a manner compensated for by having the effect of wiping out all rights and liabilities under the contract, there is less reason for viewing it askance. The vendor will always seek to frame the contract in terms giving himself the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. *Glock* v. *Howard Co.*, 123 California, 1. Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of each of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson* v. *Stitt*, 65 California, 596 (city realty); but is one where the investment was of the same hazardous nature as in *Gordon* v. *Swan*, *supra* (a mine), and in *Williamson* v. *Hill*, *supra* (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional instalment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability. Distinguishing: *Cape May Real Estate Co.* v. *Henderson*, 231 Pa. St. 82; *Wilcoxson* v. *Stitt*, 65 California, 596; *Stewart* v. *Griffith*, 217 U. S. 323.

Mr. Justice Day delivered the opinion of the court.

This is an action by Brown, executor of Lange, and Hastings to recover damages from the Western Union

Telegraph Company for failure to deliver a message sent by Hastings and Lange to the Lyon County Bank, Yerington, Nevada. A judgment was recovered against the Telegraph Company in the District Court, which was affirmed in the Circuit Court of Appeals for the Ninth Circuit. 248 Fed. Rep. 656. The case is here upon writ of certiorari.

Upon stipulation the case was tried in the District Court without a jury, and the court made findings from which it appears: On March 16, 1907, W. C. Pitt and W. T. Campbell entered into a contract with Hastings and Lange for the sale of 625,000 shares of the capital stock of the Kennedy Consolidated Gold Mining Company. In this contract it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take, and receive from them 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First. The total price to be paid for the shares of stock to be $75,000 in gold coin of the United States payable $7,500 on the execution of the agreement; $11,250 on or before the first day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon payment of the first-named sum, Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nevada, certificates of stock indorsed in blank representing in the aggregate 625,000 shares of the capital stock of the Mining Company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments

under the agreement, and it was further agreed that in event of default by Hastings and Lange the bank should be authorized under the terms of such deposit in escrow, to deliver all the shares of stock, so deposited with it, to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate. Hastings and Lange paid to Pitt and Campbell the initial sum of $7,500, and Pitt and Campbell deposited in escrow with the Lyon County Bank certificates of stock representing 625,000 shares of the stock of the Mining Company properly indorsed, and the bank received said certificates in escrow and held the same in accordance with the contract. After the execution of the contract Hastings and Lange arranged with the bank to treat drafts that they might send it in partial payment as gold coin, and to pay the amount of such drafts in gold coin to Pitt and Campbell under said contract. That, for the purpose of making the payment, mentioned in the contract, which became due on or before May 1, 1907, Hastings and Lange on April 27, 1907, sent by mail from Oakland, California, to the Lyon County Bank, at Yerington, Nevada, a draft for the sum of $11,250 United States gold coin, payable to the order of the bank; that the draft was received by the bank at Yerington, Nevada, on April 30, 1907, some time between 8:30 A. M., the time the bank opened for business, and 9 o'clock A. M., of that day; that on April 29, 1907, before the message, hereinafter mentioned, was delivered to the Telegraph Company, Hastings and Lange were informed and believed that the stock of the Mining Company was of little or no value, and, upon obtaining such information, they determined to make no further payments on their contract with Pitt and Campbell, and to abandon their rights in and to said stock, and to withdraw from the transaction with Pitt and Campbell. It is further found

that on the evening of April 29, 1907, plaintiffs called at the office of the defendant in Oakland, California, and requested the agent in charge to telegraph the Lyon County Bank at Yerington, Nevada, as follows:

"Oakland, April 29, 1907.

Lyon County Bank,
Yerington, Nevada.

Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

Hastings and Lange.'

Hastings and Lange stated to the agent of the Telegraph Company that it was necessary that the message be delivered to the bank before banking hours on the following morning, that is, before it opened for business on the 30th day of April, 1907, and desired to know of the agent in what manner they could be absolutely assured that the message would be so delivered, stating to the agent that they had a contract for the purchase of certain shares of stock of a mining company, and that payment under the contract was required to be made by them on or before May 1, 1907, to Pitt and Campbell through the bank, and that in default thereof the contract to purchase the stock would by its terms be forfeited, and the rights of the parties thereto would cease and terminate; that for the purpose of making the payment they had mailed to the bank a certain bank draft in the sum of $11,250; that in the ordinary course of the mail between the city of Oakland, California, and the town of Yerington, Nevada, the same would be delivered to the bank on the following morning, that is to say, during the forenoon of April 30, 1907; that since mailing the draft they had learned facts touching the value of the stock which had determined them to make no further payments and to forfeit the contract and all money by them paid thereunder; that they were seeking

by the message to intercept payment by the bank on account of the contract to said Pitt and Campbell, and that unless such message were transmitted, and delivered immediately to the bank before banking hours on April 30, 1907, it would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event the amount would be wholly lost to them as they did not intend to continue under their contract, having learned that the stock was of little or no value. It was further found that thereupon the agent represented that the Telegraph Company would insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay the sum of $1.45, which sum was in excess of the Company's regular charge. Plaintiffs accepted the proposal, and paid the sum to the agent, and, in the presence of the plaintiffs, the agent thereupon wrote upon the message, immediately below the date thereof, the words: "Deliver immediately," and accepted the message for immediate transmission to the town of Yerington for immediate delivery to the bank and agreed to immediately transmit and immediately deliver it to the bank for the plaintiffs, and assured the plaintiffs of such immediate transmission and immediate delivery thereof; that the sum of $1.45 was in excess of the defendant's regular charge and usual toll, the usual charge for an unrepeated message being 98¢, and for a repeated message the sum of $1.47. The message was written upon a blank form of the Telegraph Company, which is set forth in the findings.

It is further found that neither Hastings nor Lange read the printed matter on the blank, nor was either of them cognizant of the terms and conditions written thereon. The message was not repeated in the manner provided in the stipulations on the blank. That the regular course of communication by telegraph between Oakland, California, and Yerington, Nevada, was by the lines of the Western Union Telegraph Company to Wabuska, Nevada, which

was the terminus of the Telegraph Company's lines for Yerington messages and that in order to transmit telegrams beyond Wabuska it was necessary that they be transmitted from that point over the telephone line of the Yerington Electric Company to Yerington; that each of the companies received all messages offered it by the other company for further transmission, subject to the stipulations on telegraphic blanks, each company having and charging its separate toll. That the offices of the Electric Company and the Telegraph Company were both maintained in the Southern Pacific Railroad Company station at Wabuska, and that the telephone instrument of the Electric Company was within a few feet of the telegraphic instruments of the Telegraph Company; that at the time the Southern Pacific Railroad Company employed an agent at Wabuska to attend to its railway business, and that by an arrangement between the Railroad Company and the Telegraph Company said agent was employed to attend to the telegraph business of the Telegraph Company at Wabuska; that by agreement between the Railroad Company and the Electric Company the agent of the Railroad Company was at the same time employed by the Electric Company to handle the telephone business of the Electric Company; that there was a regular stage line open between Yerington and Wabuska in April and May, 1907; that the distance between Yerington and Wabuska was approximately eleven miles, and could be traversed in the stage in about one and one-half hours.

It is found that the Telegraph Company did not promptly, upon the receipt of the message on the evening of April 29, 1907, transmit it to the town of Wabuska, Nevada; that the defendant did not promptly deliver the message to the Electric Company for further transmission over its telephone line to Yerington, Nevada, but on the contrary defendant wholly failed and neglected

to transmit the message to Wabuska until May 2, 1907, and wholly failed and neglected to deliver it to the Electric Company until May 2, 1907; that the delay in the transmission of the message occurred wholly on the lines of the Telegraph Company, and was caused by that company, and did not occur on the lines of the telephone of the Yerington Electric Company.

It is further found that if the Telegraph Company had proceeded with reasonable promptness to transmit and deliver the message to the bank, the same would have reached Yerington before the bank had received the draft mailed to it as aforesaid, and it would not have placed the amount represented thereby to the credit of Pitt and Campbell, or either of them, or paid any amount thereon; that by reason of the gross negligence of the Telegraph Company the message was not delivered to the bank until May 2, 1907; that on April 30, between the hours of 8:30 and 9 A. M., the bank had received the draft and thereafter on that day had paid over the amount thereof in gold coin to Pitt and Campbell pursuant to the terms of the contract between the plaintiffs and Pitt and Campbell on account of the payment to be made on or before May 1, 1907, and had given credit to Hastings and Lange for the amount of said payment, all of which was done without any knowledge of said message or the determination of Hastings and Lange to recall said draft; that Hastings and Lange did not make any further payments on the purchase price of said shares of stock, but abandoned the contract with Pitt and Campbell and forfeited and lost all moneys paid thereon.

It was found that the 625,000 shares of stock of the Kennedy Consolidated Gold Mining Company have been at all times, and since and including April 29, 1907, practically valueless.

The Circuit Court of Appeals held: (1) That the contract was an option terminable by the buyers' failure to

make the payments required; (2) The oral agreement for the transmission of the message was a binding agreement upon the Western Union Telegraph Company; (3) That under the circumstances the Telegraph Company was guilty of gross negligence in failing to transmit and deliver the message. The court thereupon affirmed the judgment of the District Court for the amount of the payment, adding interest.

In our view of the case it is unnecessary to consider the correctness of the decision of the Circuit Court of Appeals as to the binding obligation of the oral contract made with the agent of the Telegraph Company, or the question of negligence of the Company in the transmission and delivery of the message. The right of Hastings and Lange to recover was based upon the theory that the contract was an option terminable by the act of the buyer in failing to make the payment on the contract, which payment, it is found, would not have been made had the message been promptly delivered. An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.

What then is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made, the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and in event of default in payment the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase, terminable at the will of the purchaser upon failure

to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement which put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

In our opinion *Stewart* v. *Griffith*, 217 U. S. 323, is controlling upon this point. In that case there was a sale of land and the purchaser by the terms of the agreement paid $500 as part of the purchase price. It was provided that in case of non-payment of the balance of the first half of the purchase price on November 7, 1903, the $500 paid on the contract was to be forfeited and the contract of sale and conveyance was to be null and void and of no effect. The contention was that the defendant was free to withdraw from the contract if he chose to lose the $500. But this court held, after considering the terms of the contract, that the $500 was part of the purchase price to be paid; that the land was described as being sold, and that in view of such stipulations, the purchaser had bound himself to take the land. As to the provision for the forfeiture of the $500, and the stipulation that the contract should become null and void upon non-payment of the remainder of the purchase price, this court said: "The condition plainly is for the benefit of

the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at this choice. *Insurance Co.* v. *Norton*, 96 U. S. 234; *Oakes* v. *Manufacturers' Insurance Co.*, 135 Massachusetts, 248, 249; *Titus* v. *Glen Falls Ins. Co.*, 81 N. Y. 410, 419."

The condition in the contract in *Stewart* v. *Griffith* that non-payment should render the contract null and void is the equivalent of the stipulation in the present agreement, much relied upon by the respondents, that upon non-payment of the stipulated sums the rights of each of said parties should cease and determine. We think the attempted distinction between *Stewart* v. *Griffith* and the instant case is untenable.

The Circuit Court of Appeals reinforced its conclusion that the contract was an option by stating that it was usual to sell mining property under privileges of purchase, and when investigation showed that the property was not valuable, to terminate such options by forfeiting the sums paid therefor, and declining to make future payments. It is true that undeveloped mining property is often sold under option agreements. (See 3rd Lindley on Mines, § 859.) But there is nothing to show that this contract was dependent upon the development of the mining property. The written agreement contains a positive undertaking to sell upon the one part, and upon the other part to buy, shares of the mining stock. Whether the shares sold constituted all the shares of the company does not appear. Nor is the relative proportion of those sold to the whole amount of the stock anywhere shown. The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated, does not convert it into an option ter-

minable by the purchasers at their will. *Stewart* v. *Griffith, supra.*

As the recovery of the amount paid, with interest, as adjudged in the Circuit Court of Appeals, is founded upon its conclusion that the contract was an option, and the damages the amount paid and forfeited by the failure to stop the payment of the draft, and as we are not able to accept that view of the contract, it follows that the judgment of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

Reversed.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* ALASKA STEAMSHIP COMPANY ET AL.

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

No. 541. Argued December 16, 17, 1919.—Decided May 17, 1920.

This court will determine only matters actually in controversy essential to the decision of the particular case before it. P. 115.

In a suit in which the Interstate Commerce Commission was temporarily enjoined from requiring interstate and water carriers to use certain forms of bills of lading in domestic and export transportation, upon the ground that the Commission lacked power to prescribe them, *held*, that, since the Transportation Act of Feby. 28, 1920, passed pending the interlocutory appeal, contained provisions which would necessitate changes in both forms of bills, the case had become moot, and the court could not pass upon the Commission's authority, but would reverse the order of injunction, no longer needed to protect the complainants against the order of the Commission involved in the suit, without prejudice to the right to assail any such order adopted after the new legislation, and without costs to either party. *Id.*

259 Fed. Rep. 713, reversed.

THE case is stated in the opinion.

The Solicitor General and *Mr. Charles W. Needham*, with whom *Mr. P. J. Farrell* was on the briefs, for appellants.

Mr. Roscoe H. Hupper and *Mr. Theodore W. Reath*, with whom *Mr. Edgar H. Boles*, *Mr. George F. Brownell*, *Mr. Blewett Lee*, *Mr. Thaddeus H. Swank* and *Mr. F. H. Wood* were on the briefs, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

A petition was filed in the United States District Court for the Southern District of New York by numerous interstate carriers and carriers by water against the United States and the Interstate Commerce Commission to set aside an order of the Interstate Commerce Commission dated March 14, 1919, requiring the carriers to use two certain modified bills of lading, one pertaining to domestic and the other to export transportation. The cause came on for hearing upon application for a temporary injunction and upon a motion to dismiss the petition. The hearing was had before three judges, a Circuit Judge and two District Judges. A majority concurred in holding that the Interstate Commerce Commission had no authority to prescribe the terms of carriers' bills of lading, and that in any event there was no power to prescribe an inland bill of lading depriving the carriers of the benefits of certain statutes of the United States limiting the liability of vessel-owners. (259 Fed. Rep. 713.) One of the District Judges dissented, holding that the Commission had the power to prescribe bills of lading, and that the particular bills of lading in question were within the authority of the Commission. An order was entered refusing to dismiss the petition, and an injunction *pendente lite* was granted. From this order an appeal was taken directly to this court under the statute of 1913. (38 Stat. 220.)

It appears that the matters in controversy as to the authority of the Commission and the character of the bills of lading were subjects of much inquiry before the Commission, where hearings were had, and an elaborate report upon the proposed changes in carriers' bills of lading resulted in the adoption by the Commission of the two bills of lading. 52 I. C. C. 671.

Pending this appeal Congress passed on February 28, 1920, the act known as the "Transportation Act of 1920," which terminated the federal control of railroads, and amended in various particulars previous acts to regulate interstate commerce. In view of this act of Congress this court on March 22, 1920, entered an order requesting counsel to file briefs concerning the effect of the act upon this cause. Briefs have been filed, and we now come to consider the altered situation arising from the new legislation, and what effect should be given to it in the disposition of this case.

The thing sought to be accomplished by the prosecution of this suit was an annulment of the order of the Commission, and an injunction restraining the putting into effect and operation of such order, which prescribed the two forms of bills of lading. The temporary injunction granted was against putting into effect the Commission's order prescribing the forms of the bills of lading.

The Transportation Act of 1920, passed pending this appeal, makes it evident (and it is in fact conceded in the brief filed by appellants) that changes will be required in both forms of bills of lading in order that they may conform to the requirements of the statute. We need not now discuss the details of these changes. It is sufficient to say that the act requires them as to both classes of bills. We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellants' brief it is insisted that the power of the Commission to prescribe bills of lading is still existent,

and has not been modified by the provisions of the new law. But that is only one of the questions in the case. It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314; *United States* v. *Hamburg-American Line*, 239 U. S. 466, 475, 476, and previous cases of this court therein cited.

In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot. *Berry* v. *Davis*, 242 U. S. 468.

In our view the proper course is to reverse the order, and remand the cause to the court below with directions to dismiss the petition, without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescrib-

ing bills of lading after the enactment of the new legislation. *United States* v. *Hamburg-American Line, supra; Berry* v. *Davis, supra.*

And it is so ordered.

SPILLER *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

SPILLER *v.* CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

SPILLER *v.* CHICAGO & ALTON RAILROAD COMPANY.

SPILLER *v.* MISSOURI PACIFIC RAILWAY COMPANY.

SPILLER *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

SPILLER *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

SPILLER *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

SPILLER *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

SPILLER *v.* MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

ERROR AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 137–145. Argued January 15, 1920.—Decided May 17, 1920.

In cases of a class which may ultimately reach this court by writ of error under Jud. Code, §§ 128 and 241, this court has jurisdiction to review by certiorari judgments of the Circuit Court of Appeals

which are not final in the sense of concluding the litigation, such jurisdiction arising under § 262 when the jurisdictional amount prescribed by § 241 is in controversy and under § 240 when it is not. P. 120.

This jurisdiction will be exercised in proper cases to avoid protraction of the litigation. P. 121.

The courts cannot refuse to enforce a reparation order upon the ground that the evidence before the Interstate Commerce Commission was insufficient to sustain it when substantial documentary evidence that was before the Commission is not produced at the trial. P. 125.

The Act to Regulate Commerce allows the Commission wide latitude in the investigation of claims for reparation, and its finding and order may not be rejected as evidence because of errors in its procedure not amounting to a denial of a fair hearing, so long as the essential facts found are based on substantial evidence. P. 126.

In a proceeding in which the Commission awarded reparation for excessive freight charges on many shipments of cattle consigned to commission companies by many shippers over many railroads, a witness who had gathered the details of the shipments in some cases from shippers but mainly from the commission companies, presented them at the hearings and further testified that the shippers rarely kept books, relying on the commission companies to do so, and that the practice of the latter was to pay the freight, sell the cattle and remit the proceeds to their owners minus the freight paid and other charges; the evidence was received without objection and summaries showing the details of the shipments, rate paid, overcharge claimed, etc., were submitted to the carriers and "O.K.'d" after comparison with their books. *Held*, that this evidence, including the admissions that might be implied from the carriers' approval of the summaries, was sufficient to justify the Commission in finding that the shipments were made as claimed and the overcharges paid ultimately by the shippers. P. 127.

A decision by the Commission that a witness before it is qualified as an expert must be accepted by the courts unless clearly unfounded. P. 130.

An order of the Commission is not to be rejected because based in part on hearsay evidence, if the evidence was received without objection and was substantially corroborated by other evidence original and admissible against the parties affected. *Id.*

In view of the character of its functions and the fact that its reparation orders are at most *prima facie* evidence, the Commission should not

be narrowly constrained as to the evidence it may receive in the conduct of reparation hearings. P. 131.

If only part of the claims for which reparation was awarded were sustained by evidence, objection should be directed to the others and not to the order as a whole. *Id.*

In a hearing for reparation, payment of a published rate afterwards decided to have been excessive is evidence that the party who paid the freight sustained damage to the extent of the excess. P. 132. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

In a reparation hearing, assignments of claims to the secretary of a cattle raisers' association were offered and their filing waived, and there was evidence that they had been made for nominal considerations because the association was prosecuting the claims for their owners. *Held*, that formal proof of the handwriting of the assignors was unnecessary. P. 133.

An assignment of the legal title only will confer on the assignee the right to claim an award of reparation and enable him to sue upon it in his own name, but for the benefit of the equitable owner. P. 134.

A claim for damages sustained through the exaction of unreasonable freight charges is assignable at law, if no statute prevents; and there is nothing in the letter or spirit of the Commerce Act inconsistent with such assignability. P. 135.

The ruling of the Commission declaring that an assignment to a stranger to the transportation records will not be recognized is erroneous as a construction of the act, and, treated as an administrative regulation, did not limit the Commission's jurisdiction to recognize such assignments. P. 136.

246 Fed. Rep. 1; 249 *id.* 677, reversed.

THE case is stated in the opinion.

Mr. Buckner F. Deatherage, with whom *Mr. Samuel H. Cowan*, *Mr. I. H. Burney* and *Mr. Goodwin Creason* were on the briefs, for plaintiff in error and petitioner.

Mr. T. J. Norton, with whom *Mr. Gardiner Lathrop*, *Mr. C. S. Burg* and *Mr. James L. Coleman* were on the brief, for defendants in error and respondents.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error commenced an action against defendants in error jointly in the District Court of the United States for the Western District of Missouri under § 16 of the Act to Regulate Commerce as amended (Act of February 4, 1887, c. 104, 24 Stat. 379, 384; June 29, 1906, c. 3591, 34 Stat. 584, 590; June 18, 1910, c. 309, 36 Stat. 539, 554), to recover certain amounts awarded to him against them respectively in a reparation order made by the Interstate Commerce Commission January 12, 1914. His petition contained also a count setting up a conspiracy between defendants for the restraint of interstate commerce, and claiming treble damages under § 7 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 210; but this was abandoned at the trial. Defendants having filed separate answers, a jury was waived by stipulation, and a test case tried before the court—all defendants participating—with the result that a decision was rendered in favor of plaintiff, pursuant to which a combined judgment was entered, amounting in effect to as many judgments as there were defendants, each for the amount of the Commission's award against the particular defendant with interest and attorneys' fees. Defendants sued out separate writs of error from the Circuit Court of Appeals, where, by stipulation, the cases were heard together upon a single record. That court reversed the judgments, ordered the cause remanded to the District Court with directions to grant a new trial (246 Fed. Rep. 1), and refused an application for a rehearing (249 Fed. Rep. 677). Writs of error were prayed for and allowed for the review of the judgments of reversal in this court; and afterwards but in due season a petition for the allowance of a writ of certiorari was filed, the consideration of which was postponed to the hearing under the writs of error.

The jurisdiction of the District Court having been in-

voked not because of diversity of citizenship but because the suit was one arising under laws of the United States other than those particularly mentioned in § 128, Judicial Code, as amended (Act of January 28, 1915, c. 22, § 2, 38 Stat. 803), it follows that the judgments were not made "final" by the section referred to, and, if final in the sense of concluding the litigation, would be reviewable in this court by writ of error pursuant to § 241, Judicial Code, in each case where the matter in controversy exceeds one thousand dollars besides costs. In the cases of the Chicago & Alton and the Missouri Pacific Companies, the respective judgments with interest up to the issuance of the writs of error from this court were materially less than one thousand dollars; in each of the other cases substantially in excess of that amount; the aggregate of the judgments being more than $150,000. For want of a sufficient amount in controversy the two smaller judgments would not be reviewable here by writ of error even were they final in effect; but all the writs of error must be dismissed because the judgments call for further proceedings in the trial court; it being elementary that this writ will lie to review final judgments only. *McLish* v. *Roff*, 141 U. S. 661, 665; *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Heike* v. *United States*, 217 U. S. 423, 429.

However, upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments; the transcript of the record and proceedings returned in obedience to the writs of error to stand as the return to the writ of certiorari. This writ is allowable by virtue of § 240, Judicial Code, (derived from § 6 of the Act of March 3, 1891, c. 517, 26 Stat. 826, 828) in the case of the two smaller judgments, because the decision of the Circuit Court of Appeals is made final by the combined effect of §§ 128 and 241; and in the case of

the larger judgments it is allowable under § 262 of the Code (§ 716, Rev. Stats.), in aid of the ultimate jurisdiction of this court to review those cases by writs of error. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *In re Chetwood*, 165 U. S. 443, 462; *Whitney* v. *Dick*, 202 U. S. 132, 135; *McClellan* v. *Carland*, 217 U. S. 268, 277, *et seq.*; *United States* v. *Beatty*, 232 U. S. 463, 467; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749; 236 U. S. 412, 417.

Coming to the merits: The ground upon which the Circuit Court of Appeals reversed the judgments, and the ground principally relied upon to sustain its decision, was the refusal by the trial court of a motion made by defendants to hold: (a) That upon all the evidence plaintiff was not entitled to recover against any or all of the defendants; and (b) that there was not sufficient evidence before the Commission to sustain its order of reparation. The latter is the substantial question actually presented.

The course of proceedings at the trial, as appears from the bill of exceptions, was as follows: Plaintiff introduced the report of the Interstate Commerce Commission (unreported opinion No. A-583 in case No. 732, *Cattle Raisers' Association of Texas* v. *Missouri, Kansas & Texas Ry. Co.*, dated January 12, 1914), and the order of reparation made pursuant to it and upon which the action was based. Defendants having admitted the service of the order, and that the money awarded had not been paid, plaintiff rested. The report makes an award in favor of Spiller, plaintiff in error, as assignee of a large number of claims for reparation by reason of excessive rates charged by the respective carriers on interstate shipments of cattle from points of origin in Texas, Oklahoma, New Mexico, Colorado, and Kansas, to destinations at Kansas City, St. Louis, Chicago, St. Joseph, and New Orleans, on various dates between August 29, 1906, and November 17, 1908; and a further award to named shippers in the case of certain unassigned claims pertaining to similar shipments; the

several claims, assigned and unassigned, with distinguishing marks, being set forth in Appendix A, showing the delivering carriers against which the claims were allowed and, in each case, the consignor, points of origin and destination, number of cars shipped, weight, rate paid, the lower rate sanctioned by the Commission, amount of refund required, and the interest thereon. The report contains appropriate findings adequate to support the award, among them the following: That the persons named in Appendix A as consignors shipped from the points of origin to the points of destination specified, by the line of road named as the "delivering road," the number of cars and of the aggregate net weight stated; that the shippers paid to the delivering carriers freight upon the shipments at certain rates named; that in each instance this rate was unreasonable and excessive, and a reasonable rate to have been charged would have been the lower rate specified as having been subsequently established by the Commission, and that therefore the delivering carriers collected from the shippers unreasonable charges on account of the shipments in amounts named in the column headed "Amount of Refund"; that the shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm; that the freight was paid in the first instance by the "consignor" (evidently a misprint for "consignee") to the delivering carrier, and subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance, so that in all cases the owner and shipper of the cattle finally paid the transportation charges; and that by the unreasonable exactions of the carriers the shippers were damaged in the amounts stated in the appropriate column of Appendix A, since they received for the cattle less by those amounts than they would have received had the rate found reasonable been charged; that in the case of

some of the claims the shippers made assignments to H. E. Crowley, then being secretary of the Cattle Raisers' Association, in a form set forth in the report; that subsequently Crowley ceased to be such secretary, and was succeeded by Spiller, the plaintiff, to whom Crowley assigned all claims previously assigned to him; and that other specified claims were assigned by the shippers to Spiller after he became secretary, the form of assignment being the same as that previously employed.

Defendants, endeavoring to show the insufficiency of the evidence upon which the findings and order of the Commission were based, introduced a transcript of the stenographer's notes of the testimony taken upon the hearing of the reparation claims; following this by introducing a sample page taken from one of the exhibits introduced before the Commission as illustrative of the form of exhibits there introduced. After other evidence not necessary to be mentioned, and a request for judgment in favor of defendants, and for certain rulings on points of law that would have produced that result, all of which were refused, the case was closed.

It appears that in February, 1904, the Cattle Raisers' Association of Texas, in behalf of its members and of others interested, petitioned the Interstate Commerce Commission under § 13 of the Commerce Act, alleging the rates in force in the territory in question to be unjust and unreasonable, they having been advanced some time before to the extent (in most cases) of 3 cents per hundred pounds. On August 16, 1905, the Commission held (*Cattle Raisers' Association of Texas* v. *Missouri, Kansas & Texas Ry. Co.*, 11 I. C. C. 296, 352) that the then existing rates were unjust and unreasonable by the amount of the advance. At this time the Commission was not empowered to fix rates for the future. This power having been conferred by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 589, which, by Joint Resolution of June 30, 1906, 34 Stat. 838,

took effect sixty days after its approval by the President, or on August 28, 1906, the Cattle Raisers' Association immediately thereafter applied for and obtained a reopening of the matter, to the end that reasonable rates might be established; and on April 14, 1908, the Commission decided that the former rates should be restored, but that reparation would not be allowed upon claims accruing prior to August 29, 1906 (date of the application). 13 I. C. C. 418, 435. The reduced rates finally were put into effect November 17, 1908.

The reparation claims in controversy appear to have been filed in due season by the Cattle Raisers' Association in behalf of its members and other shippers interested, and in the names of the alleged owners of the cattle shipped.

The transcript of the testimony taken by the Commission, as introduced in evidence in the District Court, forms the basis of the decision of the Circuit Court of Appeals that the reparation order was unsupported by evidence. But the transcript shows that important documentary evidence was introduced, and furnished the principal foundation for the findings made. This documentary evidence (except the single sheet offered for purposes of illustration) was not introduced in the District Court, in order, as stated by counsel, to "avoid introducing a number of papers that would almost fill a farm wagon." But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

That this is a matter of substance will appear from a review of the course of the proceeding as disclosed by the stenographer's transcript. The evidence was taken by Mr. Commissioner Prouty at Chicago; there being three sessions, the first on September 19 and 20, 1912, the second on January 24 and the third on October 17 in the following year. They were held in the presence of counsel for the

Cattle Raisers' Association, who appeared for the claimants, and counsel for the several carriers interested. If we were called upon to review the proceeding as upon a writ of error or appeal it might be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of the judicial review is not so extensive. Section 13 of the Act to Regulate Commerce (Act of February 4, 1887, c. 104, 24 Stat. 379, 383; amended June 18, 1910, c. 309, 36 Stat. 539, 550) requires the Commission on receipt of a claim for reparation to proceed on notice to the carrier to "investigate the matters complained of in such manner and by such means as it shall deem proper"; and by § 16 (34 Stat. 590; 36 Stat. 554), if, after such hearing, the Commission shall determine that any party complainant is entitled to an award of damages, the Commission is to make an order of reparation accordingly, and in a suit based thereon "the findings and order of the commission shall be prima facie evidence of the facts therein stated." The same section contemplates that numerous parties may unite in a claim for reparation, and that numerous carriers may be joined as defendants; and similarly that in a suit brought upon such award there may be a joinder of parties plaintiff and defendant. And, by § 17 (24 Stat. 385; 25 Stat. 861), "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

In the present case, the hearing was informal, but not to the extent of sacrificing essential rights of parties; and it cannot be characterized as arbitrary or unfair. Many carriers were interested, and they were represented by counsel. Thousands of carload shipments were in question, but the points in real controversy were few, and there was a natural desire on all sides to expedite the hearing. In the main, counsel for the carriers coöperated in facilitating the investigation. It was not in dispute that all shipments under inquiry were made during a period when the tariff rates were under investigation, and that afterwards those rates were determined by the Commission to have been excessive. It appeared that itemized claims for reparation had been made out in duplicate (one copy of each being filed), in the names of the parties alleged to have made shipments of cattle as owners during the period in question, that these were based in most cases upon data furnished by the commission houses at the several points of destination, as taken from their books, in other cases by the shippers themselves, and that they were computed by applying the excess charges, as determined, to the actual weights of the shipments where known, in other cases to the minimum carload weights. There was evidence that few of the cattle shippers kept books, they relying upon the commission companies to do this, and that such companies were the consignees of the cattle, and made it a practice on receiving a shipment to pay the freight, sell the cattle, and remit the proceeds to the owner after deducting the freight paid and other charges. During the hearing, there was drawn off from the claims as made up and filed a summary for each carrier, purporting to show the consignor, consignee, originating road, point of origin, destination, date of delivery, number of cars moved, rate paid, rate established by the Commission, and the overcharge claimed. These were submitted to the several carriers for investigation by their accounting officers, and

some months later were reported back to Commissioner Prouty by their counsel with the results of such investigation, which in a majority of instances verified the statements said to have been deduced from the records of the commission houses. In some cases, in addition to check-marks, "O. K." and other marks indicating that the items had been found correct, waybill references, car numbers, initials, etc., had been inserted; and where it had been found impossible to locate a shipment there were comments tending to add support to the verification of those that were located. No reparation was awarded by the Commission except with respect to such shipments as were acknowledged in the reports of the defendants to have moved as stated. These reports were introduced in evidence before Commissioner Prouty, but, as already shown, were not in evidence before the District Court. What we have said as to their contents is gathered from the stenographer's transcript; what else may have appeared upon their face, in the nature of admissions, is left to be inferred. Counsel for some of the carriers undertook to qualify the effect of admissions contained in them, as by saying that the checking meant no more than that a particular car moved as stated, and that the carrier collected the amount of freight specified; that it was not intended to admit that remittance was made to the person named as claimant; that the statements were subject to confirmation by the books of the commission merchants, or the like. But the Commission was justified in according to the reports of the checking an evidential effect, not limited by the qualifying statements, treating the latter as merely argumentative. It might regard the fact that the shipments could be and were identified from the records of the carriers, in the manner described, as evidence that the details respecting the shippers of the cattle and the particulars of the shipments were true; might take the movement and delivery of the freight thus

acknowledged as evidence that the delivering carrier collected the freight charges according to the published tariffs, which of course included the overcharges; and might take this, in connection with the evidence as to the course of business, as showing that the shippers whose names were mentioned in the statements sustained damages to the extent of the excessive charge as determined by the Commission. The minutes show that until near the conclusion of the hearing it was the intention to appoint an examiner to investigate the books of the commission merchants at the various points of destination in order to verify the details of the several shipments, and that this purpose was abandoned in view of the admissions made by the carriers. Perhaps it ought to have been carried out; but the court was not justified in treating the report of the Commission as a nullity for this reason, if there was substantial evidence of the essential facts without such verification. We think that what we have detailed of the course of the hearing, taken in connection with what we know and what may be presumed as to the contents of the unproduced documentary evidence, shows there was substantial evidence that the owners specified in the claims had been subjected to the excessive charges with respect to the shipments acknowledged by the carriers; and, as already remarked, the award of reparation was confined to these shipments.

The opinion of the Circuit Court of Appeals severely criticizes the evidence on which these conclusions were based, characterizing it as hearsay. It is not to be disputed that much of the evidence—including essential parts of it—is properly so characterized. The only witness sworn was Mr. Williams, assistant secretary of the Cattle Raisers' Association, who had gathered the data upon which the claims were based, mostly from commission merchants, in some instances from the cattle shippers. He had prepared the claims, had spent much

time and pains in investigating them, and in the course of his duties had visited several of the points of destination and examined the books and records of the commission merchants to ascertain the method in which their business was conducted and records kept. It was he who testified as to the customary course of business of cattle shippers and commission merchants. He had been connected with the Cattle Raisers' Association for about eight years, and might be presumed to have some general familiarity with the business in addition to that gained in the special study he had made of it while investigating the claims. His explanation of the method of business and the details of the claims was accepted, and accepted without objection, very much as the testimony of an expert witness might have been accepted. Whether he had shown such special knowledge as to qualify him to testify as an expert was for the Interstate Commerce Commission to determine; and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded, which cannot be said in this case. *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 353.

The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the Commission. Counsel did in some instances assert that there was a failure of proof and suggest that the proceeding ought to be dismissed. But the objections came too late, and were too general in character, to be equivalent to an objection to the reception of the evidence because hearsay. Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible. *Diaz* v. *United States*, 223 U. S. 442, 450; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Damon* v. *Carrol*, 163 Massachusetts, 404, 408. And it is clear that the verification of the details of the

claims by the carriers after full investigation by their auditing departments constituted primary evidence against them, and went far towards showing that the facts as disclosed by the hearsay evidence might be depended upon.

We are not here called upon to consider whether the Commission may receive and act upon hearsay evidence seasonably objected to as hearsay; but we do hold that in this case, where such evidence was introduced without objection and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the Commission is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because the hearsay evidence was considered with the rest.

In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, it was said: "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93, the court recognized that "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties." And the fact that a reparation order has at most only the effect of *prima facie* evidence (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 434, 439; *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473, 482), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for not binding down the

Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted.

In this case the Commission did not act upon evidence of which the carriers were not cognizant and to which they had no opportunity to reply, as in the case supposed in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 93. All the carriers participated in the hearing, and had full opportunity to object, to cross examine, and to introduce evidence on their own part.

It is objected that the evidence failed to show who owned the cattle shipped or who paid the freight. This cannot be sustained. True, it appeared that the cattle were not in all instances billed in the name of the owner, but sometimes in the name of a caretaker, his name being inserted in the bill as evidence of his right to free transportation. But it is probable that in the latter cases there was a want of correspondence between the claims as presented and the carriers' books, and that for want of checking by the carriers they were omitted from the award. The evidence upon the whole was sufficient to sustain a finding, so far as the claims were allowed, that the parties in whose behalf they were allowed were consignors of the shipments and presumably owners of the cattle shipped.

If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void *in toto*. This was not erroneous if to any substantial extent the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these.

The principal defense before the Commission was that the payment of a published rate afterwards decided to have been excessive was not evidence that the party who paid

the freight sustained damage to the extent of the excess. The Circuit Court of Appeals sustained this contention at the first hearing, 246 Fed. Rep. 1, 23. But it has since been ruled otherwise by this court, *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534; and, in view of this, upon the rehearing the Circuit Court of Appeals withdrew this part of its former opinion, 249 Fed. Rep. 677.

That court held, further, that upon the undisputed evidence the legal title to the claims for reparation never vested in Spiller, and hence that the Commission was wholly without authority to order reparation to be made to him. The minutes show that of the claims in favor of Spiller a number had been assigned to Crowley when he was secretary of the Cattle Raisers' Association, and afterwards assigned by him to Spiller when Crowley retired and Spiller succeeded him; that other claims were assigned by the consignors to Spiller direct; and that still others had not been assigned. The assignments were produced before Commissioner Prouty, and an offer made to file them, but as we interpret the minutes this was waived, a copy of one of the assignments (they were said to be alike in form) being inserted in the stenographer's notes instead. There was evidence that the assignments were made for nominal considerations because the Cattle Raisers' Association was prosecuting the claims for the benefit of the owners thereof. In the schedule of the claims as submitted to the Commission those assigned were suitably identified, and the Commission awarded reparation to Spiller upon these, and in other cases made the order in favor of the parties named as owners. There was substantial evidence to support the finding that the claims had been assigned. Formal proof of the handwriting of the assignors by subscribing witnesses or otherwise was not necessary in so summary a hearing, in the absence of objection or contradiction. What was shown as

to the relation of the shippers to the Association and the possession of the instruments of assignment by the representative of the Association who was prosecuting the claims gave a reasonable assurance of the genuineness of the instruments.

The Circuit Court of Appeals held further, however, that, supposing there was sufficient evidence to support the finding that the claims had been legally assigned to Spiller, it showed that the purpose of the assignment was not such as to vest the legal title to the claims in him so as authorize the Commission to make the award of damages in his name. To this we cannot assent. The assignments were absolute in form, and plainly their effect—supposing the claims to be assignable—was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

We have said enough to show that the reversal of the judgments of the District Court cannot be sustained on the grounds upon which the Circuit Court of Appeals based it. It is insisted, however, that, failing this, the same result ought to have been reached upon the ground that the provisions of the Commerce Act do not permit an assignment of a claim for reparation to a third party and hence the Interstate Commerce Commission was without jurisdiction to award reparation to Spiller. This is based upon the language of §§ 8 and 9, which remain in their original form, of § 13, as amended June 18, 1910, c. 309, 36 Stat. 550, and of § 16 as amended June 29, 1906, 34 Stat. 584. Section 8 (24 Stat. 382) makes the common carrier, for anything done contrary to the prohibition of the act, "liable to the person or

persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act." Section 9 entitles any person claiming to be damaged either to make complaint to the Commission or to "bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable." Section 13 contains nothing that need be quoted. Section 16 as amended (34 Stat. 590) provides that where an award of damages is made by the Commission and the carrier does not comply with the order, "the complainant, or any person for whose benefit such order was made" may bring suit. Stress is laid upon the absence of language expressly extending the remedy to the representatives or assigns of the person aggrieved; but we attribute no controlling significance to this. The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier must receive a reasonably liberal and not a narrow interpretation. A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature (*Comegys* v. *Vasse*, 1 Pet. 193, 213; *Erwin* v. *United States*, 97 U. S. 392, 395–396), and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary. We find nothing in the letter or spirit of the act inconsistent with such assignability. We are referred to certain expressions in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, and *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533–534; but they do not bear upon the present question, and are not inconsistent with the view that reparation claims are assignable.

The Interstate Commerce Commission, by Conference Ruling No. 362 (June 4, 1912), declared: "In awarding reparation the Commission will recognize an assignment

by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records." See *Robinson Co.* v. *American Express Co.*, 38 I. C. C. 733, 735. So far as this involves a construction of the act, we are unable to accept it, for reasons that have been indicated. Treating it as an administrative regulation, it of course constituted no limitation upon the jurisdiction of the Commission, even were it consistent with a correct construction of the act, which we hold it was not. In any event, the Commission had power to disregard the regulation, as in effect it did by recognizing the assignments in this case.

Other points discussed in the argument require no special comment.

It results that the judgments of the Circuit Court of Appeals must be reversed, and those of the District Court affirmed.

Writs of error dismissed.

Writs of certiorari allowed.

Judgments of Circuit Court of Appeals reversed, and judgments of District Court affirmed.

MECCANO, LIMITED, *v.* JOHN WANAMAKER, NEW YORK.

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

No. 187. Argued January 26, 27, 1920.—Decided May 17, 1920.

A decree of the Circuit Court of Appeals in a suit for infringement of patent and copyright and for unfair competition, is reviewable by this court on certiorari, as if on appeal. P. 140. Jud. Code, §§ 128, 240.

An order of the Circuit Court of Appeals reversing an order of the District Court awarding a preliminary injunction will not be reversed by this court unless clearly erroneous. P. 141.

Upon appeal from an order granting a preliminary injunction, it is proper for the Circuit Court of Appeals to consider a change of circumstances resulting from the reversal of a decree in another circuit upon which the District Court relied. *Id.*

Upon an appeal under Jud. Code, § 129, from an order granting a preliminary injunction against the defendant, it would be erroneous for the Circuit Court of Appeals to grant a final decree for the plaintiff upon proof by affidavit of a recent decree in another circuit claimed to work an estoppel in plaintiff's favor; for defendant must have opportunity to set up and establish its defenses. *Id.*

A conflict of views claimed to exist between the Circuit Court of Appeals in this case and a Circuit Court of Appeals of another circuit in a suit over the same subject and, as claimed, between the same parties in interest, *held* not to justify this court in deciding the merits on interlocutory appeal. P. 142.

250 Fed. Rep. 450, affirmed.

THE case is stated in the opinion.

Mr. Reeve Lewis, with whom *Mr. C. A. L. Massie*, *Mr. W. B. Kerkam* and *Mr. Ralph L. Scott* were on the brief, for petitioner.

Mr. H. A. Toulmin, with whom *Mr. H. A. Toulmin, Jr.*, was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Proceeding against Wagner and others in the United States District Court, Southern District of Ohio, Meccano, Limited, obtained a decree (July 8, 1916) affirming the validity, and restraining infringement, of its patent for mechanical toys, also restraining unfair competition in making and selling such toys and the further infringement of its copyright upon trade catalogue and illus-

trated manual relating thereto. 234 Fed. Rep. 912. An appeal was taken to the Circuit Court of Appeals, Sixth Circuit. The same corporation instituted the present suit in the United States District Court, Southern District of New York (December 9, 1916) seeking like relief against John Wanamaker, a customer of Wagner.

The trial court granted a preliminary injunction, asked upon the bill, supporting affidavits and exhibits—January 12, 1917. It expressed general agreement with the conclusions announced in the Ohio cause and said: "It seems quite apparent that the patent is infringed and that diagrams and directions as to construction have been borrowed by defendant from complainant's copyrighted catalogues, and that the system of construction adopted by the defendant is a direct imitation of complainant's system." An appeal followed; pending which the Circuit Court of Appeals, Sixth Circuit (November, 1917) reversed the Ohio District Court's decree so far as it sustained the patent, approved it otherwise, and remanded the cause for further proceedings. 246 Fed. Rep. 603.

January 25, 1918, after argument but before determination of appeal from the preliminary order, petitioner moved for final decision on the merits, claiming that the decree of the Circuit Court of Appeals, Sixth Circuit "is final and conclusive as to the case at bar, under the principles enunciated by the Supreme Court." Being opposed, the motion was denied—March 24, 1918. The court said of it:

"This was a motion for a 'decision on the merits of this cause' by this court under the following circumstances. A suit was brought in the District Court for the Southern District of New York for an injunction for infringement of a copyright, and of a patent, and for unfair competition in the manufacture of a mechanical toy in absolute imitation of the plaintiff's. The plaintiff applied for and got

an injunction *pendente lite*, from which the defendant appealed. That appeal is still pending undetermined in this court. Meanwhile the plaintiff had in the District Court required the defendant to answer certain interrogatories by which it appeared that the defendant procured from one Wagner, the toys which it sold in alleged unfair competition and in violation of the patent, and also the 'manuals' which went with the toys and explained their uses, which are alleged to infringe the copyright. The interrogatories further showed that Wagner had agreed to hold the defendant harmless for any sales of the toys and manuals, and that in pursuance of that undertaking he had taken a share in the defense of this suit. While it did not appear exactly what that share was, it may be assumed for the purposes of the motion only, that Wagner has assumed the chief conduct of the case and that the defendant remains only formally represented.

"The plaintiff sued Wagner in Ohio upon the three same causes of equity and obtained a decree upon all. Later an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and the decree was affirmed except as to the patent, which was declared invalid and which the plaintiff has now withdrawn from this suit. No final decree has been entered and the Ohio cause now stands for an accounting in the district court. This motion is upon the record in the Ohio suit which is made a part of the moving papers and it presupposes that this court may pass a final decree for the plaintiff upon the appeal from the injunction *pendente lite* upon the assumption that that record is a complete estoppel against the defendant here and leaves open no issues for determination between the parties."

"We pass the question of practice whether this court under the doctrine of *Mast, Foos & Co.* v. *Stover*, 177 U. S. 488, may enter a decree for the plaintiff upon such

an appeal as that now pending. *Mast, Foos & Co.* v. *Stover, supra,* was a case where the bill was dismissed and no case has so far held that the plaintiff could obtain an affirmative decree. As we think the motion must be denied upon the merits, we leave open the question whether the plaintiff may in any event so terminate the litigation. . . . It is apparent that some of the issues are different from those litigated in Ohio; they involve not only the defendant's rights to sell Wagner's toys and manuals, but any others which it may procure elsewhere. . . . At best the rule in *Mast, Foos & Co.* v. *Stover, supra,* is limited to those cases in which the court can see that the whole issues can be disposed of at once without injustice to the parties. Whatever may be the result here, it is apparent that the case involves more than can be so decided."

April 15, 1918, the court below reversed the challenged preliminary order. After stating that the trial court very naturally followed the Ohio District Court, it referred to the partial reversal of the decree there announced and expressed entire agreement with the Circuit Court of Appeals, Sixth Circuit, in holding the patent invalid. And, having considered the evidence relating to copyright and unfair competition, it found no adequate ground for an injunction. 250 Fed. Rep. 450. The cause comes here by certiorari. See *Ex parte Wagner,* 249 U. S. 465.

Decrees by Circuit Courts of Appeals are declared final by § 128, Judicial Code, in cases like the present one. We, therefore, had authority to bring this cause up by certiorari and may treat it as if here on appeal. Section 240, Judicial Code; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 287; *Denver* v. *New York Trust Co.,* 229 U. S. 123, 136. The power of Circuit Courts of Appeals to review preliminary orders granting injunctions arises from § 129, Judicial Code, which has been often considered. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518;

Mast, Foos & Co. v. *Stover Manufacturing Co.*, 177 U. S. 485, 494; *Harriman* v. *Northern Securities Co., supra; United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214; *Denver* v. *New York Trust Co., supra.* This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.

The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623; *Texas Traction Co.* v. *Barron G. Collier, Inc.*, 195 Fed. Rep. 65, 66; *Southern Express Co.* v. *Long*, 202 Fed. Rep. 462; *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.*, 253 Fed. Rep. 638. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record.

Pending the New York appeal the situation underwent a radical change—the Circuit Court of Appeals, Sixth Circuit, reversed the decree upholding petitioner's patent. Evidently the trial court had granted the preliminary injunction in entire reliance upon that decree and after its reversal the court below properly took notice of and considered the changed circumstances. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 505, 506.

Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that

no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by *ex parte* affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. *Eagle Glass & Manufacturing Co.* v. *Rowe*, 245 U. S. 275, 281.

Petitioner's motion to enter a disclaimer must be denied.

If the two Circuit Courts of Appeals have expressed conflicting views we cannot now declare which is right or undertake finally to decide the several issues involved upon their merits. The matter for review here is the action of the courts below upon the preliminary order for injunction and we may go no further. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 301, 311; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267.

The judgment of the Circuit Court of Appeals is affirmed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Affirmed.

O'CONNELL ET AL. *v.* UNITED STATES.

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

No. 221. Argued April 23, 26, 1920.—Decided May 17, 1920.

A standing rule of a District Court extended the term for the purpose of making and filing bills of exceptions and another provided that the time allowed by the rules might be extended by order made before its expiration but that no such extension or extensions should exceed thirty days in all, without the consent of the adverse party.

Held, that the court lost its power to receive and settle a bill of exceptions when the term as extended by rule had expired and when a further period of less than thirty days, allowed by order made before such expiration, had also expired; notwithstanding further attempted extensions, each ordered before expiration of its predecessor. P. 145.

Amendment of assignments of error may be allowed on motion, in proper cases. P. 147.

The constitutionality of the Selective Service and Espionage Acts and the criminality of conspiracies to obstruct recruiting and enlistment by persuasion were settled by decisions of this court announced since the writ of error herein was sued out. *Id.*

In a trial on two counts the verdict, written apparently on a printed form, declared the defendants "guilty on the — count of the Indictment, and — on the — count of the Indictment." No objection was made until after the case came to this court. *Held*, that all parties evidently understood it as a general verdict and that the informality did not make it fatally defective or the sentence, on both counts, invalid. P. 148.

That part of § 6 of the Selective Service Act providing "any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations," applies to persons who are not officers or charged with the duty of carrying the act into effect. *Id.*

Affirmed.

THE case is stated in the opinion. The second count charged that the defendants conspired to make and caused to be made false statements and certificates as to their liability and as to the liability of certain other persons, named or unknown, for military service under the Selective Service Law and regulations, and to aid and abet such persons, they being of draft age and liability, to evade the act and regulations, and particularly to aid and counsel them to refuse and fail to present themselves for the physical examinations, and for military service when called, etc., with overt acts.

Mr. Gilbert E. Roe, with whom *Mr. Joseph L. Tepper*, *Mr. Seth Shepard, Jr.*, *Mr. David Jay Smith*, *Mr. Herman B. Smith* and *Mr. T. C. West* were on the briefs, for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiffs in error were tried under an indictment with two counts. The first charges a conspiracy to violate the Espionage Act,—§ 3, Act June 15, 1917, c. 30, 40 Stat. 217, 219—by obstructing the recruiting and enlistment service; the second a conspiracy to violate the Selective Service Law—§ 6, Act May 18, 1917, c. 15, 40 Stat. 76, 80.

A demurrer, challenging the constitutionality of both acts and the sufficiency of each count, was overruled.

The trial continued from September 12 to 25, 1917, and resulted in the following verdict: "We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman the defendants at the bar, guilty on the — count of the Indictment, and — on the — count of the Indictment. Thomas H. Haskins, Foreman." No objection was made to this verdict when returned, nor at any time prior to May 31, 1919, long after the record came here, when permission was asked to amend the assignments of error.

Motions for new trial and in arrest of judgment were overruled. The former attacked the verdict as contrary to law and the evidence but said nothing concerning its form. The latter recited "And now after verdict against the said defendants and before sentence, come the said defendants in their own proper persons and by Daniel O'Connell their attorney and move the court here to arrest judgment herein and not pronounce the same,"

and specified the following grounds: (1) The indictment fails to set forth facts sufficient to constitute an offense; (2) The first count is repugnant to itself for reasons set forth in the demurrer; (3) The second count is based on the Act of May 18, 1917, inapplicable to the defendants because they were not engaged in carrying out its terms; (4) The first count does not adequately inform defendants concerning nature of charge against them; (5) Both the Acts of May 18 and June 15, 1917, are in conflict with the Constitution and are invalid.

September 29 O'Connell was sentenced to the penitentiary for five years on the first count and for two years on the second, the terms to run consecutively. The other plaintiffs in error were sentenced to varying concurrent terms under both counts, none being in excess of three years. On the same day a writ of error from this court was allowed.

The record contains a bill of exceptions, with an elaborate explanatory certificate signed by the District Judge.

The trial took place during July term, 1917; the next term as appointed by statute began November 15. On September 29, thirty days were granted for preparation and presentation of a bill of exceptions. October 23 an order undertook to extend the time to November 15; on November 12 a like order specified November 27; on November 26 an order specified December 15; on December 14 a further order undertook to extend it to December 24, when a still further extension was ordered to December 31. On the latter date a proposed bill was presented. January 9, 1918, the United States attorney procured an order granting time in which to prepare amendments to the proposed bill which were thereafter presented.

Rule 9 of the District Court provided: "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each

term of this court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered." Rule 61 provided: When an act to be done in any pending suit relates to the preparation of bills of exceptions or amendments thereto, "the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party."

After expiration of the three months specified by Rule 9, plaintiffs in error having in open court requested further extension, the United States attorney announced that he would not consent but would ask the court to refuse to settle any bill thereafter proposed. In April, 1918, he moved that settlement of the proposed bill be refused and that it be stricken from the files. The court expressed the opinion that the bill was too late unless the United States attorney had waived objection thereto, and on that point said: "I am very strongly of the view that, owing to the attitude of the United States attorney, distinctly stated theretofore, which was all that could be done under the circumstances, this was not such a waiver." But, in order that the matter might be brought here for final determination, the facts were set out and the certificate signed.

Under the statute the trial term expired November 15; but, for the purpose of filing the bill of exceptions, a general rule extended it to December 4—three months from the first Tuesday in September. The last order of court within the extended term designated December 15 as the final day for action.

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a

formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties . . . After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298.

We think the power of the trial court over the cause expired not later than the 15th of December, 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not, therefore, consider the bill copied in the record. *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Davis* v. *Patrick*, 122 U. S. 138; *Waldron* v. *Waldron*, 156 U. S. 361; *Jennings* v. *Philadelphia, Baltimore & Washington Ry. Co.*, 218 U. S. 255, 257. And the same is true of certain notes of proceedings taken during trial which we directed to be brought here, without prejudice, by order of June 9, 1919.

The motion to amend original assignments of error is granted. Having regard to the record properly before us only four of the assignments require special notice: (1) Unconstitutionality of the Selective Service and the Espionage Acts; (2) That the first count is bad because it only charges a conspiracy to obstruct the recruiting and enlistment service by inducement and persuasion; (3) The verdict was fatally defective and the judgment invalid; (4) The second count is bad. It charges a conspiracy to make false certificates concerning liability for military service and to aid in evading the act without alleging that the conspirators were officers or persons charged with the duty of carrying it into effect.

The constitutionality of the two acts is settled by opin-

ions of this court announced since the writ of error was sued out. *Goldman* v. *United States*, 245 U. S. 474; *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204. Also the criminality of a conspiracy to obstruct recruiting and enlistment by persuasion has been determined. *Schenck* v. *United States*, *supra*.

Apparently a printed form was used in preparing the jury's verdict, defendants' names and the word "guilty" being inserted. When presented no objection was made to its form or wording, neither the motion for new trial nor in arrest of judgment indicated any such objection, and plaintiffs in error mentioned none when called upon to show cause why sentence should not be imposed. We think the intention to find a general verdict of guilty upon both counts is sufficiently plain. Evidently all parties so understood at the time. See *Statler* v. *United States*, 157 U. S. 277, 279; *Ballew* v. *United States*, 160 U. S. 187, 197.

The second count charges a conspiracy to violate § 6 of the Selective Service Act. Its provisions include: "Any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations." Other words of the section relate to officers and persons charged with the duty of carrying the act into effect, but the quoted ones are broad enough to include non-official persons and, when considered in connection with the general purpose in view, there can be no reasonable doubt that plaintiffs in error were within their meaning. See *Fraina* v. *United States*, 255 Fed. Rep. 28, 33.

We find no adequate cause for interfering with the judgment of the court below and it is

Affirmed.

KNICKERBOCKER ICE COMPANY *v.* STEWART.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 543. Argued December 16, 1919.—Decided May 17, 1920.

The Constitution, Art. III, § 2, Art. I, § 8, itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. P. 160.

It took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or work material injury to, characteristic features of that law, or to interfere with its proper harmony and uniformity in its international and interstate relations. *Id.*

To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within the control of the Federal Government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere. *Id.*

There is a distinction between the situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more. P. 161.

That clause of the provision granting otherwise exclusive admiralty and maritime jurisdiction to the federal courts (Judiciary Act, 1789, § 9; Jud. Code, §§ 24, 256), which saves to suitors "in all cases, the right of a common-law remedy, where the common law is competent to give it," refers to remedies for enforcement of the federal maritime law, and does not create substantive rights or assent to their creation by the States. Pp. 159, 161.

The usual function of a saving clause is to preserve something from immediate interference—not to create. P. 162.

The legislature does not alter the law by expressing an erroneous opinion of it. *Id.*

Read with the explanatory report in the Senate and with the light of attendant circumstances, the Act of October 6, 1917, c. 97, 40 Stat. 395, which purports to amend Jud. Code, §§ 24 and 256, by adding to the saving clause "and to claimants the rights and remedies under the workmen's compensation law of any State," is to be construed

as intending to obviate the objections pointed out in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and as seeking to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. Pp. 161, *et seq.*

The attempted amendment is unconstitutional, as being a delegation of the legislative power of Congress and as defeating the purpose of the Constitution respecting the harmony and uniformity of the maritime law. P. 164. *The Hamilton*, 207 U. S. 398, distinguished. P. 166. 226 N. Y. 302, reversed.

THE case is stated in the opinion.

Mr. Frank R. Savidge, with whom *Mr. Frederick M. Thompson* was on the briefs, for plaintiff in error:

Congress has power to amend or create the maritime law which shall prevail throughout the country (*Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14), but that is the limit of its power. It cannot delegate this power to the States, nor authorize the enactment of laws that will destroy the uniformity of the maritime law. *The Lottawanna*, 21 Wall. 558; *Sudden & Christenson* v. *Industrial Accident Comm.*, 188 Pac. Rep. 803.

From what was said in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, it follows that if the new and revolutionary principle of compensation, involving the creation of a liability without fault, hitherto unknown in any system of law, is to be extended to maritime employments, this must be done by a law enacted by Congress establishing a uniform system throughout the country.

And, as stated in the opinion, "the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

The New York workmen's compensation law, as applied to maritime employments, is also unconstitutional in that an essential part of the law bars rights of action in

admiralty, which cannot be barred by legislation of the States. Employers, upon complying with the law, are given complete immunity from suits to recover for disabilities sustained by their workmen in the course of the employment. The exclusiveness of the law is a most vital feature. *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514.

The whole scheme of the law fails in maritime employments. Compensation is only given by the law if other remedies are barred. If they cannot be barred in admiralty, an anomalous situation exists. The law would be not only enforced but enlarged far beyond the point that any state legislature has attempted to carry the compensation principle. It is not the intent, nor is it the effect of the New York law to give compensation in cases where other liability exists. To hold that the law is constitutional in maritime cases, amends the New York law. It is impossible to enforce it in maritime matters as it stands.

Another view is that expressed in *The Howell*, 257 Fed. Rep. 578, that the remedy is not interfered with, but the underlying cause of action is eliminated, and the remedy becomes inoperative. In view of the great weight of authority the other way, we do not believe that this court will adopt that view.

But one or the other position must eventually be taken. Either the State of New York, and all other States, must be allowed to make this inroad upon the maritime law, or their compensation acts must be held not to apply to maritime employments and to that extent to be invalid and unconstitutional.

That a middle course should be adopted by a construction which would amend the New York law by allowing compensation where the law itself does not give it, namely, in cases where other remedies are not barred, is unthinkable.

Mr. E. Clarence Aiken, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the brief, for defendant in error:

The Constitution is in effect a mere form or skeleton of government, or a body not instinct with life until made so by congressional legislation. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721. That this is true of the admiralty jurisdiction appears from the manner in which it has expanded in this country from what it was in England before and at the time of the Revolution, and from the opinions of this court touching the power of Congress over it. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344; *The Thomas Jefferson*, 10 Wheat. 428; *The Orleans* v. *Phœbus*, 11 Pet. 175; *The Genesee Chief*, 12 How. 443; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (dissenting opinion); *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Martin* v. *Hunter's Lessee*, 1 Wheat. 326; *United States* v. *Bevans*, 3 Wheat. 336.

That Congress has authority to define and limit jurisdiction in admiralty cases would seem to follow from its power with reference to other cases. Art. III, § 2, cl. 1, says that judicial power shall extend to controversies between citizens of different States, but Congress can confine the actual exercise by prescribing a jurisdictional amount. *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *United States* v. *Sayward*, 160 U. S. 493.

Even before the amendment to the section of the Judicial Code, this court in the *Jensen Case* pointed out the difficulty, if not impossibility, of defining "with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied." It then refers to enforcement of liens upon vessels for repairs and the right given by state statutes to recover in death cases.

To this may be added the cases cited in the *Minnesota Rate Cases*, 230 U. S. 352, at p. 403 *et seq.*, involving state regulation of pilotage, harbor, bay and river improvements, bridges, wharfage charges and vessel quarantine. It also appears in earlier cases that States have, with the permission of Congress, exclusive jurisdiction over crimes committed on navigable waters within their boundaries, *United States* v. *Bevans*, 3 Wheat. 336; *People* v. *Welch*, 141 N. Y. 266; complete power to protect fisheries, *Manchester* v. *Massachusetts*, 139 U. S. 240, oyster beds, *McCready* v. *Virginia*, 94 U. S. 391, and sponges, *The Abby Dodge*, 223 U. S. 166, in public waters of the United States. And since the decision in the *Minnesota Rate Cases* this court has sustained the power of a State to compel a railroad doing business as an interstate carrier by land and by water to pay its employees semi-monthly. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685.

So as to harbor improvements, *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse* v. *Glover*, 119 U. S. 543, 548; *Leovy* v. *United States*, 177 U. S. 621, 625; *Cummings* v. *Chicago*, 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; wharfage charges, *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 702; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 295.

So of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond Ferry Co.* v. *Hudson County*, 234 U. S. 317, 331; or upon vessels plying between two ports located within the same State, *Wilmington Transportation Co.* v. *California Railroad Commission*, 236 U. S. 151, 156. See *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

It has been held by this court that the exception

"saving to suitors, in all cases, the right of common-law remedy, where the common law is competent to give it," did not mean necessarily a common-law action but that the remedy might be any means employed to enforce the rights or redress the injury. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644.

Rights of action as well as remedies have been created by the different States involving maritime torts which the admiralty law has adopted, and enforcement thereof has been had either in admiralty or the state courts, *e. g.*, a right of action for death. *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1; *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Sherlock* v. *Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.

It appears to be settled, therefore, that the State may create a right and remedy in addition to a common-law or admiralty remedy, which may be pursued in the courts of the State. The State of New York has created a right and remedy by means of workmen's compensation, which were not known to the common law or the law of admiralty and cannot be enforced in either of those courts.

We suggest that if Congress had the power to save the right to proceed at common law under the Federal Government, it had also the right to allow procedure under some other form of remedy. That did not take away the jurisdiction of the admiralty courts or impair their jurisdiction, but allowed another remedy to be used in case one was not efficacious. We can see no difference between the power of Congress to save a common-law remedy and one for compensation.

All that was necessary to decide in the *Lottawanna Case* was whether there was an implied lien for necessaries furnished to a vessel in the home port, where no such lien was recognized by the municipal law of the State, and as to whether on that issue the case of *The General Smith*, 4 Wheat. 438, should be overruled. While paragraphs may

be picked out to support the contention for a law operating uniformly in the whole country, there are other expressions which recognize the undoubted power of Congress to introduce such changes as are likely to be needed.

However, with reference to the uniformity of admiralty and maritime law, there is really no question here. Congress is not attempting to disturb it. Whenever a case is brought in an admiralty court, the admiralty law will be enforced, the same in one State as in another; but wherever there is another remedy by way of workmen's compensation or a common-law remedy, such remedies will be asserted and enforced in their respective jurisdictions according to the law there prevailing. So far as the common-law remedy is concerned, it cannot be claimed that that is the same the country over.

We may assume that there is more nearly a uniformity under the compensation laws which have now been passed by forty-two States than there would be under the common-law procedure.

Mr. Mark Ash, by leave of court, filed a brief as *amicus curiæ.*

Mr. Warren H. Pillsbury, by leave of court, filed a brief as *amicus curiæ.*

Mr. Justice McReynolds delivered the opinion of the court.

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson River and drowned—August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York; the Industrial Commission granted an award against the Company for her and the minor children; and both Ap-

pellate Division and the Court of Appeals approved it. 226 N. Y. 302. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work—*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205—had been extinguished by "An Act To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State," approved October 6, 1917, c. 97, 40 Stat. 395.

The provision of § 9, Judiciary Act, 1789 (c. 20, 1 Stat. 76), granting to United States District Courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . , saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," was carried into the Revised Statutes—§§ 563 and 711—and thence into the Judicial Code—clause 3, §§ 24 and 256. The saving clause remained unchanged until the statute of October 6, 1917, added "*and to claimants the rights and remedies under the workmen's compensation law of any State.*" [1]

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[1] Judiciary Act, September 24, 1789, c. 20, 1 Stat. 73, 76, 77:

Sec. 9. That the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; . . .

Rev. Stats. Sec. 563. The district courts shall have jurisdiction as follows: . . .

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and

In *Southern Pacific Co.* v. *Jensen* (May, 1917), 244 U. S. 205, we declared that under § 2, Article III, of the Constitution ("The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction") and § 8, Article I (Congress may make necessary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our

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on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.

Rev. Stats. Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

The Judicial Code—

Sec. 24. The district courts shall have original jurisdiction as follows: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; . . .

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it.

Act October 6, 1917, c. 97, 40 Stat. 395.

That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdic-

national law applicable to the matters within admiralty and maritime jurisdiction"; also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In *Chelentis* v. *Luckenbach S. S. Co.* (June, 1918), 247 U. S. 372, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such substitution would distinctly and definitely

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tion; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State."

change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In *Southern Pacific Co.* v. *Jensen*, we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.'" "Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In *Union Fish Co.* v. *Erickson*, 248 U. S. 308, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled: "The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of

California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made." See also *The Blackheath*, 195 U. S. 361, 365.

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot

be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman* v. *New York City*, 179 U. S. 552, 557, *et seq.*

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, Article VI, clause 2; *Second Employers' Liability Cases*, 223 U. S. 1, 55. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell*, 257 Fed. Rep. 578, and *Rhode* v. *Grant Smith Porter Co.*, 259 Fed. Rep. 304, illustrate some of the uncertainties. In the

first, the District Court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that State are exclusive and *pro tanto* supersede the maritime law. In the second, the District Court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights, obligations and liabilities of the respective parties must be measured by the maritime law and these cannot be barred, enlarged or taken away by state legislation. Other difficulties hang upon the unexplained words "workmen's compensation law of *any* state."

Moreover, the act only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount federal law—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Statutes, § 372.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record (65th Cong., pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee, copied below,[1]

[1] 65th Cong., 1st sess. Senate Report No. 139. Amending the Judicial Code. October 2, 1917.—Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following Report. [To accompany S. 2916.]

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants

probably indicates the general legislative purpose. And, with this and accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co.* v. *Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities

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the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Jensen* that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any State. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill if enacted will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson* v. *Industrial Accident Commission*, 188 Pac. Rep. 803.

Congress cannot transfer its legislative power to the States—by nature this is non-delegable. *In re Rahrer*, 140 U. S. 545, 560; *Field* v. *Clark*, 143 U. S. 649, 692; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214.

In *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.

S. 311, notwithstanding the contention that it violated the Constitution—Article I, § 8, clause 3—this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one State into another when intended for use contrary to the latter's laws. Among other things, it was there stated that "the argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress," i. e., Congress itself forbade shipments of a designated character. And further: "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest," i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less. "We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." See *Delamater* v. *South Dakota*, 205 U. S. 93, 97.

Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In *The Hamilton*, 207 U. S. 398, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a State to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Southern Pacific Co.* v. *Jensen*, *supra*. The doctrine of *The Hamilton* may not be extended to such a situation.

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

Reversed and remanded.

MR. JUSTICE HOLMES, dissenting.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, the question was whether there was anything in the Constitution or laws of the United States to prevent a State from imposing upon an employer a limited but absolute liability for the death of an employee upon a gang-plank between a vessel and a wharf, which the State unques-

149. HOLMES, PITNEY, BRANDEIS and CLARKE, JJ., dissenting.

tionably could have imposed had the death occurred on the wharf. A majority of the Court held the State's attempt invalid, and thereupon, by an Act of October 6, 1917, c. 97, 40 Stat. 395, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087. Those sections in similar terms declared the jurisdiction of the District Court and the exclusive jurisdiction of the Courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation law of any State." I thought that claimants had those rights before. I think that they do now both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction," Const. Art. III, § 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced and cannot have been elicited by logic alone from the mediæval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the

several States—a not unfamiliar form of law. *Gibbons* v. *Ogden*, 9 Wheat. 1, 207; *Hobart* v. *Drogan*, 10 Pet. 108, 119; *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318; *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 84, 85; *Franklin* v. *United States*, 216 U. S. 559; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303. An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore if it were necessary, the words "rights and remedies under the workmen's compensation law of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See *United States* v. *Paul*, 6 Pet. 141. Taking the act as so limited it is to be read as if it set out at length certain rules for New York, certain others more or less different for California, and so on. So construed the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument so far as I now remember, are duties, imposts and excises, naturalization and bankruptcy, in Article I, § 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the Fourteenth Amendment seems to me extravagant. Indeed it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common-law remedy adopted the common law of the several States within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530–534. *Knapp, Stout & Co. Company* v. *McCaffrey*, 177 U. S. 638, 645, 646. *Rounds* v. *Cloverport Foundry & Machine*

Co., 237 U. S. 303, 307. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs. See *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9.

I thought that *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it. But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common-law practice, &c., in the District Courts to "conform, as near as may be, to the practice," &c., "existing at the time" in the State Courts. Rev. Stats., § 914. This was held by the unanimous Court to be binding in *Amy* v. *Watertown, No. 1*, 130 U. S. 301. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 207, 208; *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318. I have mentioned the scope given to the saving of a common-law remedy and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of

want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Constitution, "The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction" prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act—if not in its present form, at least in the form in which it stood on October 6, 1917. I am of opinion that the New York law at the time of the trial should be applied and that the judgment should be affirmed.

MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this opinion.

CALHOUN *v.* MASSIE.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 294. Argued March 11, 1920.—Decided May 17, 1920.

An agreement that the fee of an attorney for successfully prosecuting a claim against the United States shall be a lien upon any warrant that may be issued in payment of the claim is void under Rev. Stats., § 3477. P. 175.

Section 4 of the Omnibus Claims Act of March 4, 1915, c. 140, 38 Stat. 962, in its limitation of the amount that may be paid to or received by an attorney on account of services rendered or advances made in connection with any claim for which the act made appropriation, does not refer merely to the specific funds received from the Government, but makes payment or receipt in excess of the limitation unlawful whatever the source. *Id.*

This broader prohibition is within the power of Congress as applied

to a contract made and substantially performed by the attorney, before Congress and in the Court of Claims, before the act was passed but respecting a claim as to which no right of recovery existed under any act of Congress when the contract was made and which depended for its recognition on the action of Congress in making an appropriation. P. 175.

In such a case, the attorney's contract being to secure the appropriation, the passage of the appropriation is a condition precedent to his client's liability to him, and, Congress having power to condition such appropriations and having been accustomed so to limit attorney's fees, such a limitation may be taken to have been within the contemplation of the parties and impliedly assented to by the attorney in making his contract. P. 176.

Where an attorney for a claimant receives the full amount allowed him out of the specific fund appropriated under an act which limits his fee to that amount any contract to the contrary notwithstanding, he takes under the act and can not repudiate its provisions, and any verbal reservation of his rights under the contract is futile. P. 177.

123 Virginia, 673, affirmed.

THE case is stated in the opinion.

Mr. Charles F. Consaul, with whom *Mr. J. C. Brooke* was on the briefs, for petitioner.

Mr. James R. Caskie, with whom *Mr. Fred Harper* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Omnibus Claims Act (March 4, 1915, c. 140, 38 Stat. 962), made appropriations for the payment of 1,115 claims arising out of the Civil War which had, from time to time during the preceding twenty-eight years, been referred by resolution of the House or of the Senate to the Court of Claims for investigation, either under the Bowman Act (March 3, 1883, c. 116, 22 Stat. 485), or under the Tucker Act (March 3, 1887, c. 359, 24 Stat.

505), or under § 151 of the Judicial Code. Among the claims which that court reported favorably was one of Bland Massie, which had been referred to it by resolution of the House on February 3, 1911.[1] By section 1 of the Omnibus Claims Act (p. 989), the Secretary of the Treasury was directed to pay Massie $1,900. Section 4 of the act (p. 996), provided as follows:

"That no part of the amount of any item appropriated in this bill in excess of twenty percentum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty percentum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Massie had executed on April 18, 1911, an agreement as follows:

"Fee Agreement. This Agreement, witnesseth: that I, Bland Massie, of Tyro, Nelson County, Virginia, have employed C. C. Calhoun, of Washington, D. C., as my attorney to prosecute my claim against the Government of the United States for property taken by the Federal forces during the late Civil War, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay him, his heirs or legal representatives as a fee a sum equal to 50 per cent. of the amount which may

[1] 63d Cong., 2d sess., House Report No. 97; Senate Report No. 357; 63d Cong., 1st sess., House Doc. 64.

be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim."

Calhoun prosecuted Massie's claim before the Court of Claims and secured the allowance of a motion to transmit its report to Congress, which thereafter made the appropriation above stated. On May 5, 1915, the Government paid the $1,900 by means of two Treasury warrants, one for $380 (twenty per cent. thereof) made payable to Calhoun, the other for $1,520 (eighty per cent. thereof) made payable to Massie. Calhoun demanded of Massie a further sum of $570, equal to thirty per cent. of the claim. Payment was refused; and he brought this suit in a state court of Virginia to recover the amount, claiming that the warrant for twenty per cent. had been accepted by him without waiving or releasing his right under the contract to the balance. A declaration setting forth in substance the above facts was demurred to on the ground that recovery was prohibited by § 4 of the act under which the appropriation was made. The demurrer was sustained and judgment entered thereon was affirmed by the Supreme Court of Appeals of the State of Virginia (123 Virginia, 673). The case comes here on writ of certiorari (249 U. S. 596), Calhoun having contended in both lower courts, as here, that § 4 deprives him of liberty and property guaranteed by the Fifth Amendment to the Federal Constitution and hence is void.

For nearly three-quarters of a century Congress has undertaken to control in some measure the conditions under which claims against the Government may be prosecuted. Its purpose has been in part to protect just claimants from extortion or improvident bargains and in part to protect the Treasury from frauds and imposition. See *United States* v. *Van Leuven*, 62 Fed. Rep. 52, 56. While recognizing the common need for the services of agents and attorneys in the presentation of such claims and that parties would often be denied the opportunity

of securing such services if contingent fees were prohibited, *Taylor* v. *Bemiss*, 110 U. S. 42, 45, Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment, from time to time, of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services [1] Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled (*Marshall* v. *Baltimore & Ohio R. R. Co.*, 16 How. 314, 336; *United*

[1] Assignment of claims against the United States: Acts of July 29, 1846, c. 66, 9 Stat. 41; February 26, 1853, c. 81, § 1, 10 Stat. 170; Rev. Stats., § 3477. Repayment of moneys collected by direct tax: March 2, 1891, c. 496, § 3, 26 Stat. 822. Indian Depredation Claims: Act of March 3, 1891, c. 538, § 9, 26 Stat. 851, 854. Pensions: Rev. Stats., § 4785 (Act of July 8, 1870, c. 225, § 7, 16 Stat. 193, 194, as amended by Act of July 4, 1884, c. 181, § 4, 23 Stat. 98, 99); Rev. Stats., § 5485 (Act of March 3, 1873, c. 234, §§ 31, 32, 17 Stat. 566, 575); Rev. Stats., § 4711 (Act of March 3, 1873, c. 234, § 17, 17 Stat. 566, 572); Act of January 25, 1879, c. 23, § 4, 20 Stat. 265; Acts of June 27, 1890, c. 634, § 4, 26 Stat. 182, 183; March 3, 1891, c. 542, 26 Stat. 948, 979; March 3, 1891, c. 548, 26 Stat. 1081, 1082; August 5, 1892, c. 379, § 2, 27 Stat. 348, 349; February 28, 1903, c. 858, § 3, 32 Stat. 920, 921; April 19, 1908, c. 147, § 3, 35 Stat. 64; May 28, 1908, c. 208, 35 Stat. 418, 419; September 8, 1916, c. 470, § 4, 39 Stat. 844, 845; Act of July 16, 1918, c. 153, § 2, 40 Stat. 903, 904. Pay and bounty of colored soldiers: Act of March 3, 1879, c. 182, § 2, 20 Stat. 377, 402. Arrears of pay or allowances in connection with services in the Civil War: Act of December 22, 1911, c. 6, 37 Stat. 47, 49. Mississippi Choctaws: Act of May 31, 1900, c. 598, 31 Stat. 221, 237. Services for Indians: Rev. Stats., § 2104; Act of June 30, 1913, c. 4, § 17, 38 Stat. 77, 95; Act of August 1, 1914, c. 222, § 17, 38 Stat. 582, 599. Claims under War Risk Insurance Act: Act of June 12, 1917, c. 26, § 8, 40 Stat. 102, 104.

States v. *Hall*, 98 U. S. 343, 354, 355; *Ball* v. *Halsell*, 161 U. S. 72, 82, 84).

The provision in the contract sued on purporting to give a lien upon any warrant issued was void under § 3477 of the Revised Statutes, *Nutt* v. *Knut*, 200 U. S. 12, 20. It is urged that the act here in question should be construed as limiting only the proportion of the specific funds received from the Government which may be applied to payment of attorneys' fees; but the second paragraph of the law leaves no room for construction. It provides that: "It shall be unlawful for any . . . attorney . . . to . . . receive any sum which in the *aggregate* exceeds twenty per centum " of the claim. Calhoun contends, however, that if the act is construed as limiting the amount recoverable from a claimant upon his personal obligation, it is void as applied to contracts in existence at the time of its passage; at least where, as here, the services contemplated had then been substantially performed.

That an act limiting the compensation of attorneys in the prosecution of claims against the Government is valid also as to contracts which had been entered into before its passage was expressly held in *Ball* v. *Halsell*, *supra*. The act there in question was passed seventeen years after the date of the contract, and the attorney had performed important services before its enactment. Here, it is said, substantially all the services required of Calhoun had been performed when the act was passed. The difference in the percentage of services performed cannot here affect the legal result. An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results. *Lottery Case*, 188 U. S. 321, 357; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United*

States, 227 U. S. 308, 323; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146. The sovereign right of the Government is not less because the property affected happens to be a contract. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 484; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372. Here, unlike *New York Central & Hudson River R. R. Co.* v. *Gray*, 239 U. S. 583, 587, a performance of a substitute for the obligation undertaken and later prohibited by the statute is impossible, because the act forbids the collection or receipt of any compensation in excess of twenty per cent.

In the case at bar there are special reasons why the contract cannot prevail over the statute enacted later. At the time when the contract was entered into there was no legislation general or special which conferred upon Massie any right of recovery even if he should establish to the satisfaction of Congress that his claim was equitable. A statute making an appropriation to pay the claim was thus a condition precedent to liability on the part of Massie to Calhoun; and the thing contracted for was Calhoun's aid in securing its enactment. The aid was to be given by representing Massie before the Court of Claims. But both of the parties knew that, although Calhoun might have success before the Court of Claims, Congress would still be free to refuse both to recognize the claim as an equitable one and to make an appropriation for its payment. They also knew that if it concluded to grant relief, Congress was free to do so upon such conditions as it deemed proper. Compare *Ball* v. *Halsell*, *supra*, pp. 82, 84; *Kendall* v. *United States*, 7 Wall. 113, 117. In view of the past action of Congress limiting attorneys' fees, referred to above, it was at least conceivable when the contract was made that Congress might, as it proved,[1] be unwilling to enact any legislation without assuring itself that the benefits thereof would not inure

[1] See 51 Cong. Rec., p. 324; 52 Cong. Rec., pp. 5289, 5316.

largely to others than those named in the act. Assent by Calhoun to the insertion in the act of a condition such as this, which he might reasonably have contemplated would be required to ensure its passage, was, therefore, implied in the contract to aid in securing the legislation. Compare *The Kronprinzessin Cecilie*, 244 U. S. 12, 22-23.

Furthermore, Calhoun accepted and received from the Treasury a warrant for twenty per cent. of the sum appropriated. The money was paid and it was received under the act which provided that it was unlawful to collect any sum in excess of twenty per cent. "any contract to the contrary notwithstanding." Calhoun cannot take under the act and repudiate its provisions. Compare *Shepard* v. *Barron*, 194 U. S. 553, 567; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79. The allegation in the declaration that he accepted the twenty per cent. "without waiving or releasing any of his rights under the aforesaid contract" was doubtless intended as a statement that the amount collected from the Government was not accepted as a full settlement of his rights against the defendant under the contract. But it was a protestation totally at variance with his conduct. The payment to him by the Treasury of the twenty per cent. could be made only under the act. It must be held to have been accepted according to the terms of the act. Any reservation which he may have made in words was futile. *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, 218, 219.

Affirmed.

MR. JUSTICE McREYNOLDS, with whom concurred MR. JUSTICE McKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY, dissenting.

In 1911 Calhoun made a lawful agreement with Massie to prosecute the latter's claim against the United States

for property taken during the Civil War (*Taylor* v. *Bemiss*, 110 U. S. 42); and Massie expressly bound himself to pay, as a fee for such services, "a sum equal to 50 per cent. of the amount which may be collected, . . . said fee to be a lien on any warrant," etc.

Calhoun performed his full part in strict accordance with the contract. As a result of his proper efforts, Congress finally approved the claim and appropriated $1,900 to pay it (Act March 4, 1915, c. 140, 38 Stat. 962, 989).

But the same act, § 4 (p. 996), provided that not more than twenty per cent. of the amount appropriated should be paid, or delivered to, or received by, any attorney for services, etc. Also "It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Capital Trust Co. v. *Calhoun*, 250 U. S. 208, affirms the power of Congress to exempt the appropriated fund from any demand for counsel fees.

In that case Calhoun, relying upon a contract like the one presently before us, recovered a judgment in the state court for the difference between twenty per cent. received from the Treasury and fifty per cent. of the appropriation. The matter came here and we expressly declared (p. 216): "If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt* v. *Knut*, 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation

in the act appropriating the money to 20% as the amount to be paid to an agent or attorney would have no application or be involved." In effect, the court now holds that statement was obviously erroneous; and that Calhoun would have committed a misdemeanor if he had accepted a fee exceeding the twenty per cent!

As to certain "special reasons why the contract cannot prevail over the statute enacted later."

(1) It is said that when he executed the contract of employment, Calhoun impliedly assented to the insertion in any future appropriation act of a condition like the one under consideration; therefore, he cannot recover. This assumes, first, a construction of the act in direct conflict with the meaning heretofore attributed to it and, second, that so construed it is within the power of Congress. If these two assumptions are correct, of course there is no right to recover. This special reason can only serve to mislead.

(2) It is further said that as Calhoun received twenty per cent. of the amount appropriated by an act which declared unlawful the collection of anything more, he thereby in effect estopped himself from making a personal demand against his client. But this again assumes a construction of the act contrary to what we have declared, and further assumes that so construed it is valid. If these assumptions are correct no further discussion is needed. This special reason lacks substance and can serve no good purpose.

The meaning of Section 4.

Considering the definite statement concerning the true meaning of this section made twelve months ago in *Capital Trust Co.* v. *Calhoun,* 250 U. S. 208, and quoted above, it would seem at least unusual now to announce a wholly different view accompanied by the mere assertion that there is "no room for construction." No mention

is made of what was then said in very plain terms. Of course this has been accepted as authoritative both by lawyers and courts. The result is necessarily injurious both to the court and the public.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408, this was said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." As that statement has been repeated several times it would seem worthy of some consideration now.

I presume nobody doubts that Congress has power to prescribe reasonable rules concerning champerty, maintenance or kindred matters in United States courts, and to regulate assignments of claims against the Government. But, under the adopted construction, § 4 (Act of March 4, 1915), destroys an entirely lawful contract made long before its passage, deprives counsel of his right to enforce the personal liability of his client to pay for services already performed, and renders criminal the acceptance by him of more than an arbitrarily specified amount.

Marshall v. *Baltimore & Ohio R. R. Co.*, 16 How. 314, 316; *United States* v. *Hall*, 98 U. S. 343, 354, 355; *Ball* v. *Halsell*, 161 U. S. 72, 84, are referred to as authority for such oppressive legislation. They give it no support.

Marshall v. *Baltimore & Ohio R. R. Co.*, was an attempt to collect compensation for lobbying; and the holding was that a contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a State, and the other party promises to pay a large sum of money in case the law should pass. The case appears unimportant in connection with this controversy.

In *United States* v. *Hall* the court ruled, Congress has power to declare that embezzlement or fraudulent con-

version to his own use by a guardian of pension money received on behalf of his ward from the Government is an offense against the United States. This case might be relevant if Calhoun were seeking to reach the fund appropriated by Congress; but he is not.

In *Ball* v. *Halsell*, an attorney sought to recover under a written agreement, concerning which this court said (p. 82): "The instrument was an unilateral contract, not signed by the attorney, nor containing any agreement on his part, and—so long, at least, as it had not been carried into execution—might be revoked by the principal; or might be disregarded by him in making a settlement with the United States; or might be treated by him as absolutely null and void in any contest between him and the attorney. . . . By the very terms of the contract, the attorney was to be paid only out of money recovered and received by him from the United States." The case is wholly unlike the one now before us. Mr. Justice Gray took pains to explain the difference between it and *Davis* v. *Commonwealth*, 164 Massachusetts, 241, where the Massachusetts court ruled that an agent of the State employed to prosecute a claim against the United States could recover compensation notwithstanding the act of Congress appropriating money to meet the claim provided that no part of such sum should be paid by the State to any attorney under previous contract.

Davis v. *Commonwealth* and the language by Mr. Justice Gray in *Ball* v. *Halsell* wherein he pointed out the clear distinction between the two cases, ought not to be lightly disregarded.

It is certainly a very serious thing to decide that Congress, by its arbitrary fiat, may wholly deprive counsel of the right to enforce payment of compensation for long continued efforts theretofore lawfully put forth, and prevent him, indeed, from accepting anything therefor. If a limit may be set at twenty per cent. any payment may

be proscribed. We should follow *Capital Trust Co.* v. *Calhoun*, and reverse the judgment below.

The Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power. It declares, no person shall be deprived of life, liberty or property, without due process of law; and this inhibition protects every man in his right to engage in honest and useful work for compensation. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Adams* v. *Tanner*, 244 U. S. 590.

MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY concur in this dissent.

NEWMAN, ADMINISTRATRIX OF ERSKINE, ET AL. *v.* MOYERS ET AL., PARTNERS, TRADING AS MOYERS & CONSAUL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 85. Argued March 11, 1920.—Decided May 17, 1920.

Section 4 of the Omnibus Claims Act of March 4, 1915, c. 140, 38 Stat. 962, limiting the amount of fees collectible by attorneys in respect of the claims therein appropriated for, is valid. P. 185. *Calhoun* v. *Massie*, *ante*, 170.

A suit by attorneys against their client and Treasury officials to enforce a contract for fees made unlawful by an act of Congress is an attempt to use the court for an illegal purpose and should be dismissed by the court, *sua sponte* if necessary, and it is immaterial whether the Treasury officials or the Government have any interest entitling them to appeal. Pp. 184–185.

In a suit by attorneys against their client and Treasury officials to enforce a contract for fees made unlawful by an act of Congress, wherein the client failed to prosecute her appeal to this court from a decree against her, *held*, that this court might open the record and reverse the decree or dismiss the appeal for want of prosecution, leaving the court below free to take appropriate action to prevent itself from being used as an instrument of illegality. P. 185.

47 App. D. C. 102, reversed in part; appeal of Newman, administratrix, dismissed for want of prosecution.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom *The Solicitor General* and *Mr. A. F. Myers* were on the brief, for appellants.

Mr. Charles F. Consaul, with whom *Ida M. Moyers* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the Omnibus Claims Act of March 4, 1915, c. 140, 38 Stat. 962, 963, discussed in *Calhoun* v. *Massie*, decided this day, *ante*, 170, Ursula Ragland Erskine became entitled to receive from the Secretary of the Treasury the sum of $1,836.66. Long before that date she and the firm of Moyers and Consaul, attorneys, had entered into a contract for the prosecution of her claim against the Government. The contract provided that the attorneys should receive an amount equal to fifty per cent. of the sum collected. Its terms and the services rendered were, in substance, identical with those set forth in *Calhoun* v. *Massie*. In reliance upon § 4 of the above act, Mrs. Erskine refused to pay or assent to the payment to the attorneys of an amount greater than twenty per cent. of the appropriation; and the Treasury officials were proposing to issue a warrant for twenty per cent. thereof to

the attorneys and another for the balance to her. Moyers and Consaul insisted that the provision of the act limiting fees of attorneys to twenty per cent. was invalid; and they brought this suit in the Supreme Court of the District of Columbia against Mrs. Erskine, the Secretary of the Treasury and the Treasurer of the United States to recover the full fifty per cent. As in *McGowan* v. *Parish*, 237 U. S. 285, the plaintiffs prayed that they be declared entitled to recover from Mrs. Erskine the amount claimed; that the issuance to and the collection by her of any amount from the Government be enjoined; and that either the whole amount be paid into the Registry of the court, or that a receiver be appointed who should collect from the Government the whole amount and pay therefrom to plaintiffs an amount equal to fifty per cent. of the collection. Mrs. Erskine died soon after the filing of the bill, whereupon Sue Erskine Newman, the administratrix of her estate, was made defendant.

The Secretary of the Treasury and the Treasurer moved to dismiss the bill of complaint, among other reasons, on the ground that collection of more than twenty per cent. was prohibited by § 4, and that the limitation thereby imposed was a valid exercise of congressional power. Sue Erskine Newman, as administratrix, moved to dismiss on the same ground, among others. The motions were overruled; and the court entered a decree directing payment of the money into court, ordering that plaintiff recover from the administratrix an amount equal to fifty per cent. of the collection from the Government, and directing that this sum be paid out of the funds to be so paid into court. From the decree for plaintiffs entered by the Supreme Court of the District of Columbia, all the defendants appealed to the Court of Appeals of the District of Columbia; and when the latter affirmed the decree of the lower court, all the defendants joined in the appeal to this court. The Honor-

able Carter Glass, upon becoming Secretary of the Treasury, was substituted for the Honorable William G. McAdoo; and the further substitution of the Honorable David F. Houston was made when he became Secretary of the Treasury. The appellees now move to dismiss the appeals of the Secretary of the Treasury and the Treasurer of the United States on the ground that neither they nor the Government have any pecuniary or other interest in the suit. They also move to dismiss the appeal of the administratrix on the ground that she did not formally enter her appearance in this court nor take any part in the proceedings here.

The merits of the former motion we have no occasion to consider, for the following reason: Section 4 of the act limited the compensation which the attorneys may collect or receive to twenty per cent. The act is valid. *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208; *Calhoun* v. *Massie*, *supra*. The plaintiffs were seeking the aid of the courts to recover monies which an act of Congress prohibited them from collecting or receiving. If the bill had not alleged that this act was invalid it would have been the duty of the lower court to dismiss the bill even if none of the defendants had raised any objection to the maintenance of the suit. *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 267; *Lee* v. *Johnson*, 116 U. S. 48, 52; *Coppell* v. *Hall*, 7 Wall. 542, 558. The Secretary of the Treasury and the Treasurer of the United States did make such objection. The overruling of it in the courts below was error. The judgment must be reversed and the cause remanded with directions to dismiss the bill as to them.

The fact that the administratrix did not persist in her appeal should not result in affirmance of the judgment as to her. In *Montalet* v. *Murray*, 3 Cranch, 249, Mr. Chief Justice Marshall "stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and

dismiss the writ of error; or may open the record, and pray for an affirmance." This practice is still in force under Rules 9 and 16 of this court. *Todd* v. *Daniel*, 16 Pet. 511; *Hurley* v. *Jones*, 97 U. S. 318; *The "S. S. Osborne,"* 105 U. S. 447, 450–1. It is applicable to one of several joint appellants who fails to perfect his appeal. *Yates* v. *Jones National Bank*, 206 U. S. 158, 166, 181.

If the appellee had asked for an affirmance it is clear that it must have been denied because of the illegal purpose of the suit. But the court might go further. Since of its own motion it might dismiss this appeal (*Hilton* v. *Dickinson*, 108 U. S. 165, 168), and since on dismissing it a mandate to the lower court might issue (*United States* v. *Gomez*, 23 How. 326, 330), this court might also of its own motion entertain the alternative to dismissal spoken of by Mr. Chief Justice Marshall,—i. e., open the record. If it did so and perceived that the court was being used to attain an illegal result there would be power to reverse the decree and remand the cause with instructions to dismiss the bill. But in the present case such a course is not necessary. The appellees have asked not for an affirmance, but for a dismissal, of the appeal of the administratrix. A dismissal for want of prosecution will remit the case to the lower court in the same condition as before the appeal was taken; and the lower court will then be free to take appropriate action to prevent itself from being used as an instrument in illegality. *United States* v. *De Pacheco*, 20 How. 261; *United States* v. *Gomez*, 23 How. 326, 339–340.

Decree reversed as to appellants Houston and Burke and cause remanded with directions to dismiss the bill as to them.

Appeal of Newman, Adm'x, dismissed for want of prosecution, and case remanded for further proceedings in conformity with this opinion.

Counsel for Parties.

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

APPEAL FROM THE COURT OF CLAIMS.

No. 240. Argued March 12, 15, 1920.—Decided May 17, 1920.

Petitioner averred that it granted the Government's request for permission to purchase from another certain torpedoes containing a device in which the petitioner claimed patent rights, upon a royalty the amount of which was "to be later settled," and that the Government purchased; but it also alleged that negotiations to settle the amount to be paid failed and that petitioner never consented to the use of the patented invention without payment of an amount of royalty which the Government refused to pay. *Held*, that no express or implied contract to pay any royalty, cognizable by the Court of Claims under Jud. Code, § 145, could be derived from the facts stated. P. 189.

To maintain an infringement suit against the United States under the Act of June 25, 1910, the claimant must have at least such an interest in the patent as independently of that act would support a suit against a defendant other than the United States. P. 191.

A grant by a prospective patentee of the "sole and exclusive license" to use the invention for the full term of patents to be procured, on designated articles, only when sold to the United States, the grantee undertaking to pay a royalty on each such article fitted with the invention and the grantor at its own cost to procure patent and to defend "the license to use . . . hereby granted" against infringers, is a mere license and will not sustain a suit for infringement. P. 192.

53 Ct. Clms. 47, affirmed.

THE case is stated in the opinion.

Mr. Arthur C. Fraser, with whom *Mr. Frank H. Platt* was on the brief, for appellant.

Mr. Assistant Attorney General Davis, and *Mr. Daniel L. Morris*, Special Assistant to the Attorney General, with whom *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this suit compensation is sought from the Government for the use which it made of a patented "superheater," in connection with Whitehead torpedoes.

A "superheater" is a device in which fuel is burned in the compressed air which drives the motor by which a torpedo is propelled through the water, so that the air is heated to such a degree that its energy is greatly increased, with the result that the range of the use of the torpedo is much extended.

The Court of Claims interpreted the petition as containing a claim that the defendant had contracted to pay appellant for fifty "superheaters" at $500 each, and also as claiming that it had infringed rights of the appellant in certain United States Patents by the purchase of 360 "superheaters" from Whitehead & Company, a British corporation, and by itself manufacturing one hundred such "superheaters." Concluding as to the first claim that the petition did not state a cause of action in contract, and, as to the second, that it did not show title to the patents involved sufficient to support infringement, a demurrer to the petition was sustained and the suit dismissed.

The main contention in this court is that a cause of action in contract is stated with respect to all of the 510 "superheaters," but in the alternative, though faintly, it is claimed that the allegations also make out a case of infringement.

The appellant alleges that it was the owner of two United States Patents issued in 1902, covering the "superheater" device and that in 1905 it entered into a written contract with the Armstrong Company, a British corporation, for the use of improvements in "superheaters" owned by that company and at the time protected in

Great Britain by a provisional specification for a patent. A copy of this contract, attached to the petition, after reciting that the Armstrong Company proposes to apply for a patent in the United States upon the improvements in "superheaters" which it owns, and that it is desirous of granting to the appellant the exclusive license to use such invention "in connection with the Bliss-Leavitt torpedo" manufactured by appellant, proceeds to grant to appellant the "sole and exclusive license" to use such inventions for the full term of the letters patent thereafter to be procured for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company and "Whitehead torpedoes sold only to the United States Government."

The contract provides for the payment by the appellant of a royalty of $25 for each torpedo fitted with the Armstrong inventions under penalty of cancellation, and that the Armstrong Company shall pay all costs and expenses of procuring the contemplated patents and of protecting them against infringement.

The petition alleges that eight United States patents on the "superheater" device were procured by the Armstrong Company, variously dated from August 7, 1906, to November 14, 1911, but no assignment of rights under them was made to appellant other than such as it derives from the contract of 1905, which, it avers, has been fully recognized and its terms complied with, by both of the parties to it.

The reference in the amended petition to the two patents owned by the appellant are so meager and so vague that we conclude that liability in contract or for infringement must be derived, if at all, from the allegations applicable to the contract of 1905.

As to the contract.

The allegations are: that prior to 1907 Armstrong & Co. licensed Whitehead & Co., a British corporation, to

"use and exercise" its superheater inventions patented in Great Britain and in the United States but subject to the rights of appellant under its contract of 1905; that in June, 1907, the appellant granted a request by the defendant for permission to purchase from Whitehead & Co. not more than one hundred torpedoes containing the "superheater" invention, the amount of royalty "to be later settled"; that subsequently 50 torpedoes so equipped were purchased and were brought into the United States subsequent to June 1, 1908; but that no royalty was ever paid to appellant for the use of the "superheaters" upon them.

If the petition had stopped here, there might be substance in the claim that as to these fifty torpedoes a contract for royalty on the basis of *quantum meruit* should be implied. But the petition goes on and alleges: that in November, 1907, before the alleged purchase of the 50 torpedoes, in a treaty between the parties as to the amount of royalty to be paid, a demand by the petitioner of $500 for each "superheater" installed in a Whitehead torpedo was refused by the Government; that in December, 1910, and again in March, 1912, long after the alleged purchase, the prior discussion as to royalty was renewed, but without agreement; and finally it is averred "that petitioner, by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or of said patented improvements thereon or any of them by defendant without payment of said royalty of $500 each."

It is too clear for discussion that these allegations, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but that they distinctly and in terms negative the making of any such contract as is necessary to give the Court of Claims jurisdiction under the applicable section of the

Judicial Code, § 145, and the decisions of this court. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Manufacturing Co.*, 156 U. S. 552; *Russell* v. *United States*, 182 U. S. 516; *Bigby* v. *United States*, 188 U. S. 400; *Harley* v. *United States*, 198 U. S. 229, 304; *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 309; *Farnham* v. *United States*, 240 U. S. 537, 540.

Treating for peace with one claiming patent rights for which it paid a royalty of $25, falls far short of a "convention between the parties—a coming together of the minds" to pay $500, or any other amount, for the use of the device.

As to the claim for infringement.

The contract of 1905, relied upon, in terms granted to the appellant the "sole and exclusive license" to use the Armstrong inventions for the terms of the patents thereafter to be procured in Great Britain and in the United States "for the purpose of propelling Bliss-Leavitt torpedoes" (with which we are not concerned) "wherever sold by the Bliss Company and Whitehead torpedoes sold only to the United States Government."

Authority to maintain a suit for infringement against the United States can be derived only from the Act of Congress of June 25, 1910, c. 423, 36 Stat. 851, which provides that the "owner" of an infringed patent may recover reasonable compensation in the Court of Claims, and reserves to the United States "all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise."

Giving to this statute, as we do, the liberal interpretation placed upon it in *Crozier* v. *Krupp*, 224 U. S. 290, and in *Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28, the "owner" who may maintain an infringement suit against the Government must have at least such an interest in the patent as without the

statute would support such a suit against a defendant other than the United States.

It has long been settled that a licensee may not maintain a suit for infringement, *Gayler* v. *Wilder*, 10 How. 477; *Littlefield* v. *Perry*, 21 Wall. 205; *Paper-Bag Cases*, 105 U. S. 766; *Pope Manufacturing Co.* v. *Gormully and Jeffery Manufacturing Co.* (No. 3), 144 U. S. 248; and that to entitle an assignee or grantee to maintain such a suit under warrant of Rev. Stats., § 4919, such assignee or grantee must have an assignment, grant or conveyance, either of the whole patent, of an undivided part of it, or of an exclusive right under it "within and throughout a specified part of the United States." Any assignment or transfer short of one of these is a mere license giving the licensee no interest in the patent sufficient to sue at law in his own name for infringement or in equity without joining the owner of the patent. *Waterman* v. *Mackenzie*, 138 U. S. 252, 255; *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224.

While the legal effect of the terms used, and not the name applied to the instrument containing them, will determine whether a transfer is an assignment or a license, nevertheless the language used is often, as in this case, of great significance in determining what that legal effect shall be.

The right granted the appellant by the contract of 1905 is termed in it a "license"; the appellant contracts, as licensees usually do, to pay a royalty for each torpedo fitted with the devices to be patented; the contract does not purport to grant an interest in the patent or any exclusive territorial rights, but only, with respect to the Whitehead torpedo, rights as to a single prospective purchaser—the Government of the United States; and the Armstrong Company contracts at its own cost "to take all necessary proceedings for protecting and defending the license to use . . . hereby granted " against

infringers. Palpably this is a mere license, not sufficient to sustain a suit for infringement.

Several minor questions, including some of practice, are argued in the brief for appellant, but the opinion of the Court of Claims deals with them thoroughly and satisfactorily and its judgment is

Affirmed.

PIEDMONT POWER & LIGHT COMPANY *v.* TOWN OF GRAHAM ET AL.

PASCHALL ET AL. *v.* TOWN OF GRAHAM ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Nos. 684, 685. Motion to dismiss or affirm or place on the summary docket submitted April 19, 1920.—Decided May 17, 1920.

The proposition that a municipality, having granted to a company the right to use the streets for distributing electricity, would impair the rights of the grantee and deprive it of property without due process if it granted a like right to a rival company, is frivolous if the first grant is plainly non-exclusive; and an appeal from the District Court based on such claim must be dismissed for want of jurisdiction. P. 194.

Appeals dismissed.

THE cases are stated in the opinion.

Mr. Clyde R. Hoey, Mr. Charles W. Tillett, Mr. William P. Bynum, Mr. James S. Cook, Mr. Jacob A. Long and *Mr. Sidney S. Alderman,* for appellees, on the briefs in support of the motion.

Mr. James H. Bridgers, for appellants, on the briefs in opposition to the motion.

Memorandum opinion by direction of the court, by MR. JUSTICE CLARKE.

These are appeals direct from decrees of the District Court sustaining motions to dismiss complaints for the reason that they did not state facts sufficient to constitute a valid cause of action in equity. The cases involve the same facts differently stated by different complainants. The asserted warrant for the appeals is that action taken by the officials of the Town of Graham, North Carolina, if allowed to become effective, would result in violation of appellants' contract with that town and in depriving them of their property without due process of law, in violation of the Constitution of the United States.

Since the bill in No. 684 contains all of the elements of strength which the bill in No. 685 contains and lacks some of its elements of weakness, the disposition of the former will rule the latter.

In No. 684 the appellant, a corporation, averring that it is the owner of a franchise to use the streets of the Town of Graham for the distribution of electric current, prays that the officials of the town be restrained from certifying as lawfully passed an ordinance granting a like franchise to the defendant, the Mutual Power & Light Company, and that the company be enjoined from using the streets for such purpose.

The grant to the appellant is set out in full in the bill and plainly it is not one of exclusive rights in the streets. The attempt to derive an exclusive grant from the declaration, in the paragraph of the ordinance relating to the trimming of trees, that "said Town of Graham hereby warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes," etc., is fatuous and futile. Grants of rights and privileges by a State or municipality are strictly construed and whatever is not unequivocally granted is withheld,—nothing passes

by implication. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 34; *Blair* v. *Chicago*, 201 U. S. 400, 471; *Mitchell* v. *Dakota Central Telephone Co.*, 246 U. S. 396, 412. The grant to appellant not being an exclusive one, the contention that competition in business, likely to result from a similar grant to another company, would be a violation of appellant's contract, or a taking of its property in violation of the Constitution of the United States is so plainly frivolous that the motion to dismiss for want of jurisdiction, filed in each case, must be sustained. *David Kaufman Sons Co.* v. *Smith*, 216 U. S. 610; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580; *Sugarman* v. *United States*, 249 U. S. 182.

Dismissed.

UNITED STATES *v.* MACMILLAN ET AL.

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

No. 167. Submitted January 23, 1920.—Decided June 1, 1920.

The exceptional legislation under which the salary of the clerk of the District Court for the Northern District of Illinois was for a time appropriated for by Congress, leaving, however, the expenses of his office to be defrayed as in other cases out of the fees and emoluments did not operate to convert such fees and emoluments when collected into public moneys of the United States. P. 201.

Moneys received by a clerk of a District Court as interest upon average daily balances of bank deposits made up of fees and emoluments earned by the clerk, or made of moneys deposited with him by litigants to meet future costs, etc., under rule of court, are not public moneys of the United States, nor emoluments for which he must account to the Government. Pp. 201 *et seq.*, 204.

251 Fed. Rep. 55, affirmed.

THE case is stated in the opinion.

The Solicitor General and *Mr. A. F. Myers* for the United States:

The clerk of the District Court for the Northern District of Illinois during the period involved was a salaried officer, expressly prohibited from receiving any additional pay, allowance, or compensation. Act of July 31, 1894, 28 Stat. 204. As such he was clearly subject to the provisions of Rev. Stats., § 1765. *Hoyt* v. *United States*, 10 How. 108; *Lewis* v. *United States*, 244 U. S. 134; *United States* v. *King*, 147 U. S. 676.

The moneys included in defendant's semi-annual returns, on which interest was collected and retained, were received in his official capacity. He thereupon became obligated to account for all such fees and emoluments over and above the necessary expenses of his office. The interest followed the principal, of which the United States was the sole owner, after deduction of the necessary expenses. *United States* v. *McMillan*, 165 U. S. 504; *United States* v. *Abeel*, 174 Fed. Rep. 12; *United States* v. *Mason*, 211 Fed. Rep. 233; 219 Fed. Rep. 547; *Alexander* v. *United States*, 43 Ct. Clms. 389, 395. The ground of decision in *United States* v. *Hill*, 120 U. S. 169, was that since various clerks, with the acquiescence of the judges and of the executive branch of the government, had uniformly omitted from their returns fees received in naturalization cases, such long standing practice amounted to a contemporaneous construction of the statute requiring such returns. The statute was amended by expressly providing that the word "emolument" shall include such fees. Act of June 28, 1902, 32 Stat. 475. In *United States* v. *Mason*, 218 U. S. 517, the court was careful to observe (p. 530) that the case was not one where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return

to exist. While there is no federal decision holding interest on the principal to be an emolument, the term would seem to be broad enough to include it, particularly in view of the statutory definition in the Act of 1902, *supra*. The opinion of the Comptroller (23 Comp. Dec. 732) cited by the court below, was based upon the opinion of the District Court in the present case, and is not an independent opinion. In *Vansant* v. *State*, 96 Maryland, 110, it was expressly held that a clerk should account for interest on moneys deposited by him as emoluments. To like effect are: *Hughes* v. *People*, 82 Illinois, 78; *Hunt* v. *State*, 124 Indiana, 306; *Rhea* v. *Brewster*, 130 Iowa, 729.

The United States, as obligee of the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants subject to disbursement. The moneys continued to be the property of the litigants in the possession of the clerk until they were used for the payment of court costs, or were subsequently returned. If these deposits remain unclaimed by the persons entitled thereto for five years they become subject to an order of court to cause them to be deposited in the Treasury of the United States. Rev. Stats., §§ 995, 996, as amended; *In re Moneys*, 170 Fed. Rep. 470; *United States* v. *Abeel*, 174 U. S. 12. It is immaterial that the interest accruing on these funds does not belong to the United States. The requirement of the statute is not simply that clerks shall account for all moneys belonging to the Government, but that they shall also account for "all other amounts received for services in any way connected with the clerk's office," Act of 1902, *supra*, and "for any other moneys received by them in their official capacity, whether on behalf of the United States or otherwise." Act of June 30, 1906, 34 Stat. 754. This is not a suit to establish, as between the depositors and the United States, the ownership of the interest, but a suit on the

official bond of the clerk which requires him to account for all moneys coming into his hands as required by law. It is therefore sufficient to allege that the interest is and was no part of any sum earned by the clerk. *Cf. United States* v. *Davis*, 243 U. S. 570. Since the clerk was not the owner of the interest, *Rhea* v. *Brewster*, 130 Iowa, 729, and since it came into his hands in his official capacity, the United States could maintain this suit, *Howard* v. *United States*, 184 U. S. 676; *United States* v. *Abeel*, 174 Fed. Rep. 12; without mentioning the beneficiaries. *Mobile & Montgomery R. R. Co.* v. *Jurey*, 111 U. S. 584, 593; *Webb* v. *Southern Ry. Co.*, 235 Fed. Rep. 578, 585; *Southern Ry. Co.* v. *Blunt*, 165 Fed. Rep. 258, 261; *Long* v. *Kansas City &c. Ry. Co.*, 170 Alabama, 635, 642.

As to the District Court's suggestion that the clerk as insurer of private funds deposited with him is entitled to retain the interest as compensation, see *Rhea* v. *Brewster*, *supra; State* v. *McFetridge*, 84 Wisconsin, 473; *Eshelby* v. *Board of Education*, 66 Ohio St. 71; *Garley* v. *People*, 28 Colorado, 227; *Nash* v. *Faulkner*, 107 N. Y. 477.

Mr. George T. Buckingham, Mr. Marquis Eaton and *Mr. Charles Troup* for defendants in error.

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

The relation of the United States to moneys alleged to have been collected by a clerk of a district court of the United States as fees or emoluments of his office and the scope of his duty to account semi-annually for the same to the Attorney General so as to fix, if any there was, the surplus due to the United States after paying the expenses of the clerk's office and the clerk's salary as fixed by law, is the general subject here arising for consideration. § 833, Rev. Stats.; Act of June 28, 1902, 32 Stat. 475, 476; § 839, Rev. Stats.; § 844, Rev. Stats.

The controversy originated by a suit commenced by the United States against the defendant in error as clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, and the surety on his official bond to recover $3,861.05. The right to the relief was based upon averments that during the period from December 27, 1905, to January 27, 1910, the clerk had collected the sum named as interest on the average daily balances of his bank accounts resulting from the deposit by him of the fees and emoluments of his office and of moneys placed by litigants with him to meet payments for costs or otherwise which they might lawfully be required to make during the course of the litigation.

It was further alleged that although the interest thus received constituted a fee or emolument of the office of the clerk, or money held in trust by him for the United States, for the receipt of which he was bound by law semi-annually to account, he had failed to do so and was therefore liable.

By plea the defendants admitted the collection by the clerk of the amount sued for as interest on the average daily balances of his bank accounts made up as alleged of moneys derived from fees and emoluments and deposits by litigants under the rules or orders of court. The plea averred that, as required by law, the clerk had made his semi-annual accountings in which, although he did not charge himself with the interest allowed him on his bank balances as stated, he had charged himself with every item constituting a fee or emolument of his office from whatever source due, and after debiting the charge thus made with the proper proportion of his salary and the expenses of his office, had turned the balance, if any there was, into the Treasury of the United States. There was annexed to the plea a copy of the rules of court relating to the placing by litigants of money with the clerk, and the plea alleged that whenever, out of such money, any

charge whether for a fee or emolument or otherwise became due, it was at once paid, so that the amount of that deposit always solely represented money belonging to and held for the account of the depositing litigant to meet payments due by him which might thereafter arise.

To this plea the United States demurred as stating no defense and, after hearing, its demurrer was overruled. In consequence of an election by the United States to plead no further, the case was submitted for judgment on the petition and plea.

At that time the court had under advisement eight other cases involving the questions arising in this, five being suits by the United States against the clerks of other United States courts and three, in addition to this, being against the clerk who is defendant here, covering interest collected for different periods. The court disposed of the nine cases in one opinion. It held that as there was no contention as to a default by the clerk concerning any money deposited with him by litigants, that subject would be put out of view. Carefully considering the pleadings, it held that the claim of the United States to the interest rested upon one or the other of two propositions: (1) that the money deposited by the clerk and upon which the interest was allowed was public moneys of the United States and therefore the interest belonged to the United States; (2) that without reference to whether the deposits were public moneys, the interest paid was an emolument for which the clerk was bound to account. Elaborately considering these questions the court decided both against the United States.

Reviewing on error one of the cases against this defendant which was decided, as we have seen, by the trial court along with this, the Circuit Court of Appeals affirmed the trial court in a brief *per curiam* opinion in which it approved the analysis of the case as made by the trial court and concurred in holding decisive the cases in this

court which the trial court relied upon. Subsequently when the case now before us came to be heard the ruling in the case just stated was applied to this and the judgment was therefore also affirmed.

In argument here it is suggested by the United States that as the defendant clerk was by exceptional legislation an officer whose salary was specifically appropriated for (Acts of July 31, 1894, 28 Stat. 162, 204; March 2, 1895, 28 Stat. 764, 806; August 24, 1912, 37 Stat. 417, 465), therefore the principles passed upon below are not necessarily decisive. But aside from the disregard of the admissions resulting from the pleadings which the suggestion involves and the entire absence of even an intimation that such a contention was raised in either of the courts below, we put the belated suggestion out of view, since as it is not disputed that the defendant clerk was under obligation to meet the expenses of his office from the fees and emoluments thereof and to pay over to the United States only the surplus resulting, we think the distinction assumed to arise from the proposition stated makes no difference in the application of the principles which the court below held to be conclusive and the soundness of which we are now therefore required to pass upon.

As we agree with the lower court that the two propositions decided by the trial court embraced the whole case, we are thus brought, first, to determine whether the fees and emoluments collected by the clerk and deposited by him in bank and upon which interest was allowed him were public moneys of the United States, thus entitling the United States to the interest as an increment of its ownership. That it was not is so completely foreclosed as to cause it to be only necessary to consider the previous ruling on the subject.

In *United States* v. *Mason*, 218 U. S. 517, the court was called upon to determine the validity of the action of a

circuit court of the United States in quashing three indictments against the clerk of a circuit court of the United States for the "embezzlement of certain moneys of the United States," which moneys were a portion of the surplus of fees and emoluments of his office over and above the compensation and allowances authorized by law to be retained by him. The indictments were based, and the sole reliance to sustain them and thus reverse the court below was rested, upon §§ 5490 and 5497, Revised Statutes, with the amendments made by the Act of February 3, 1879, c. 42, 20 Stat. 280, each of which sections exclusively dealt with embezzlement of "public moneys." Whether, therefore, the particular moneys which were there in question, being derived from fees and emoluments of the clerk, were public moneys required necessarily to be decided. Reviewing historically the legislation covering clerks of courts of the United States which had been previously recapitulated in *United States* v. *Hill,* 120 U. S. 169, it was pointed out, first, that originally clerks of courts were not salaried, but were remunerated by the right to collect and retain established fees and emoluments and that under such legislation the sums collected by the clerks were in no sense public moneys of the United States, but were moneys of the clerks held by them in their personal capacity in payment for their official services.

Coming to state the evolution in the situation by which in time it came to pass that a limit was placed on the amount of compensation which a clerk should annually receive and consequently making it his duty to account for his fees and emoluments and to turn over to the United States the surplus, if any, remaining after the payment of his compensation and the expenses of his office, the court observed (pp. 523–4):

"The plain object of this statute was to limit the amount which the clerk was to retain and to require an accounting, an audit of expenses, and a payment of the surplus. Other-

wise the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when he was to make his return, depended upon the amount of the fees, the amount of the expenses and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees there would be nothing to pay. The amount payable was to be determined when the return was made."

Testing the possible application of the statutes dealing with the embezzlement of public moneys to the rights and duties of a clerk to collect the fees and emoluments of his office and to make use of them as authorized by law, it was pointed out that such application could not be made because of the incompatibility between the powers and duties of the clerk, on the one hand, and the provisions of the statutes relied upon, on the other. This incongruity was aptly illustrated by the statement which follows dealing with the duties of the clerk and the impossibility of applying to them the prohibitions of one of the statutes in question (p. 525):

"They lay outside of the prohibition of § 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting and to pay over the surplus if the fees exceeded the total amount allowed him."

Again marking the broad line which lay between public money and the clerk's fees and emoluments and his right to collect and disburse the same, the court declared (p. 529):

"There has thus been established a distinct system with

respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them."

And once more emphasizing the distinction it was said (p. 531):

"The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

Indeed the decisive principles which were thus announced in the *Mason Case* were but a reiteration and application of the general doctrine on the subject annouced in *United States* v. *Hill,* 123 U. S. 681, where it was in express terms pointed out that "The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law."

Conclusively disposing as these cases do of the contention of the Government as to public moneys of the United States, it leaves only for consideration the question of whether the interest on the sum of the fees and emoluments deposited by the clerk in bank was in and of itself an emolument for which he was liable to account. But that

question is virtually also foreclosed in view of what was held in the *Mason Case*, since the individual character of the bank deposit as there defined and the right to make it necessarily causes the increment of such deposit, that is, the interest, to partake of the character of the principal. And besides, aside from the ruling in the *Mason Case*, it had been previously held that a sum collected by a clerk for a service not pertaining to his office or provided for in the schedule of fees allowed him for official services was not a fee or emolument in the sense of the statute (*United States* v. *Hill*, 120 U. S. 169).

Although at the outset we eliminated from consideration liability for interest on money of litigants deposited with the clerk under the rules of court because not embraced in the claim of money or property of the United States upon which all the Government contentions here rest, in leaving the case we observe that the question of the liability of the clerk to pay interest to litigants on money deposited by them is in a large degree covered by the rules of court annexed to the plea, which permit in the cases specified an application of a litigant to the court to direct the allowance of such interest and to provide for its payment by the clerk when the request is granted.

In conclusion we direct attention, as was done in the *Mason Case* and as did the trial court in this case, to the incompatibility which would result, on the one hand, from enforcing an absolute obligation on the part of the clerk to account for all the fees and emoluments of the clerk's office whether collected or not as well as his duty to defray the expenses of his office out of such revenue, and the upholding, on the other hand, of the conflicting theory that the fees and emoluments were public moneys and the power of the clerk to deal with them accordingly limited.

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.

FORT SMITH & WESTERN RAILROAD COMPANY ET AL. *v.* MILLS, RECEIVER OF FORT SMITH & WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 42. Argued December 13, 1917.—Decided June 1, 1920.

The Act of September 3, 5, 1916, known as the Adamson Law, although by its general terms purporting to apply to all railroads and railroad employees subject to the Act to Regulate Commerce, was not intended to govern the exceptional case of an insolvent railroad operating at a loss under an agreement with its men, which they desired to keep, allowing them less wages than the act prescribed. *Wilson* v. *New*, 243 U. S. 332, considered.
Reversed.

THE case is stated in the opinion.

Mr. A. C. Dustin, with whom *Mr. James B. McDonough* was on the brief, for appellants.

Mr. Assistant Attorney General Frierson, with whom *Mr. Alex. Koplin* and *Mr. S. Milton Simpson* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill of equity brought by the Fort Smith and Western Railroad Company and the trustee of a mortgage given to secure bonds of that road, to enjoin the receiver of the road from conforming to the Act of September 3, 5, 1916, c. 436, 39 Stat. 721, in respect of hours of service and wages, and to enjoin the District Attorney of the United States from proceeding to enforce the act. The bill alleges

that the physical property is worth over $7,000,000, but that no dividends ever have been paid upon the stock, that no interest has been paid upon the bonds since October 1, 1907, and that there is a yearly deficit in the earnings of the road. The receiver was appointed in proceedings to foreclose the mortgage. The bill further alleges that the railroad now (1917) is being carried on under an agreement with the men which the men desire to keep, but that the receiver, yielding to the threats of the District Attorney to prosecute him unless he does so, purposes to substitute the much more onerous terms of the act. It is set up that the act if construed to apply to this case is void under the Fifth Amendment to the Constitution. The bill was dismissed by the District Court, on motion, for want of equity, and the plaintiffs appealed.

The act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a general railroad strike. It fixed eight hours as a day's work and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the Act to Regulate Commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since but the rights of the parties require a decision of the case.

In *Wilson* v. *New*, 243 U. S. 332, it was decided that the act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was

held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroads to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

But the bill in *Wilson* v. *New* raised only the general objections to the act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See *Brooks-Scanlan Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396. It was not decided that there might not be circumstances to which the act could not be applied consistently with the Fifth Amendment, or that the act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to this act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it. We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

But that is the present case. An insolvent road had succeeded in making satisfactory terms with its men,

enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill and must assume that the men were not merely negatively refraining from demands under the act but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed import an exception in a case like this.

Decree reversed.

MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER, MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS agree with this decision limiting the effect of the Adamson Law as stated, but adhere to the views concerning the constitutionality of the act expressed by them in *Wilson* v. *New*.

UNITED STATES EX REL. JOHNSON ET AL. *v.* PAYNE, SECRETARY OF THE INTERIOR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 291. Argued April 29, 1920.—Decided June 1, 1920.

In completing the rolls of members of the Five Civilized Tribes pursuant to the Act of April 26, 1906, c. 1876, § 2, 34 Stat. 137, the Secretary of the Interior had jurisdiction, on March 4, 1907, to revoke without notice his approval of a report of the Commissioner to the Five Civilized Tribes in favor of applicants for enrollment;

and such applicants cannot secure their enrollment through mandamus upon the suggestion that the revocation was due to mistake. Cf. *Garfield* v. *Goldsby*, 211 U. S. 249.

48 App. D. C. 169, affirmed.

THE case is stated in the opinion.

Mr. Charles H. Merillat, with whom *Mr. W. C. Franklin* was on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of mandamus to require the Secretary of the Interior to place the names of the petitioners upon the rolls of the members of the Creek Nation. The petition was dismissed by the Supreme Court of the District of Columbia and the judgment was affirmed by the Court of Appeals. We are not called upon to consider the antecedent facts of the petitioners' case as all that is material can be stated in a few words. Rights as a member of the Nation depend upon the approved rolls. March 4, 1907, was fixed by statute as the time when the rolls were to be completed by the Secretary of the Interior and his previously existing jurisdiction to approve enrollment then ceased. Act of April 26, 1906, c. 1876, § 2, 34 Stat. 137, 138. Before that date the petitioners had on file an application for enrollment, hearings had been had before the proper tribunal, a favorable report had been made to the Secretary and the Secretary had written a letter to the Commissioner to the Five Civilized Tribes, saying, "Your decision is hereby affirmed." But on the last day, March 4, 1907, the Secretary addressed another communication to the same official rescinding the former letter to

him, and reversing his decision. It was ordered that if the petitioners' names were on the rolls they should be stricken off. The Secretary gave no reasons for his action but it is suggested that he acted under mistakes of law and fact, and it is argued that when the first letter was written the petitioners' rights were fixed.

The last is the only point in the case and with regard to that it is argued that this reversal of the first decision without a hearing was a denial of due process of law. It is not denied that the Secretary might have declined to affirm the decision below in the first instance, and that having been his power, the only question is when it came to an end. While the case was before him he was free to change his mind, and he might do so none the less that he had stated an opinion in favor of one side or the other. He did not lose his power to do the conclusive act, ordering and approving an enrollment, *Garfield* v. *Goldsby*, 211 U. S. 249, until the act was done. *New Orleans* v. *Paine*, 147 U. S. 261, 266. *Kirk* v. *Olson*, 245 U. S. 225, 228. The petitioners' names never were on the rolls. The Secretary was the final judge whether they should be, and they cannot be ordered to be put on now, upon a suggestion that the Secretary made a mistake or that he came very near to giving the petitioners the rights they claim.

Judgment affirmed.

FIDELITY TITLE & TRUST COMPANY, ANCILLARY ADMINISTRATOR OF PANCOAST, *v.* DUBOIS ELECTRIC COMPANY.

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

No. 300. Argued March 25, 26, 1920.—Decided June 1, 1920.

In reversing a judgment on a verdict in an action at law for damages, the Circuit Court of Appeals should order a new trial, but where it fails to do so this court, on certiorari, may inquire whether that court was wrong on the merits and, finding it so, may affirm the judgment of the District Court. P. 213.

A man is not free to introduce a danger into public places, even if he be under no contract with the persons subjected to the risk. P. 214.

One who creates and arranges for the continuation of dangerous conditions of which he alone knows, cannot escape responsibility for a resulting injury by stepping out of their control a few days before the injury occurs. P. 215.

A, having been furnished with a banner by B, and having, at B's request, undertaken to hang it across a public street and later take it down, assuming full control, suspended it between opposite buildings by a cable one end of which A negligently attached to a weakly constructed chimney; several days later, A retaining control, the banner dragged the chimney over in a storm and C was injured by a falling brick in the street below. *Held*, that A was liable to C. P. 213.

An amendment to a declaration which leaves the original cause of action unchanged is not objectionable because made after the running of the statute of limitations. P. 216.

253 Fed. Rep. 987, reversed.

THE case is stated in the opinion.

Mr. Charles Alvin Jones, with whom *Mr. Allen J. Hastings*, *Mr. James R. Sterrett* and *Mr. M. W. Acheson, Jr.*, were on the brief, for petitioner.

Mr. W. C. Miller, with whom *Mr. H. B. Hartswick* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action begun by Pancoast, to recover for personal injuries, and continued after his death by the petitioner as ancillary administrator. At a former trial the plaintiff had a verdict but it was set aside and a new trial ordered by the Circuit Court of Appeals. 238 Fed. Rep. 129, 132. 151 C. C. A. 205. At the new trial the plaintiff again got a verdict and judgment, but the Circuit Court of Appeals set them aside, this time simply reversing the judgment without ordering a new trial. 253 Fed. Rep. 987. An opportunity was allowed to that Court to correct the error and as it was not corrected the present writ of certiorari was granted. 249 U. S. 606, 597. Of course if the judgment of the Circuit Court of Appeals was right on the merits a new trial should have been ordered. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364. *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 189. But as it has been necessary to direct the record to be certified up, it is necessary also to consider the merits of the case and to determine whether the Circuit Court of Appeals was right with regard to them.

Nothing turns upon the form of the pleadings. The evidence for the plaintiff was in conflict with that for the defendant upon important points, but we shall state the case as the jury might have found it to be if they believed the plaintiff's evidence, as the verdict shows they did.—A member of a political party requested the defendant to suspend a political banner, which he furnished, across one of the principal streets in the borough of Dubois, between the Commercial Hotel and the Deposit National Bank. He asked the defendant to put it up, take it down after the election and attend to it for him, saying that he did not want to have anything to do with it. The defendant put up the banner, at first suspending it by a

rope, but the rope breaking, substituted for it a wire cable of the defendant's, and, the plaintiff says, did so without further orders. This cable was fastened on the hotel side by taking two turns round a chimney and clamping the end. The chimney stood thirty-one inches from the edge of the cornice over the street, was twenty-one inches square at the base, and had a tin flashing from the roof inserted between the courses of brick two or three courses above the roof. According to the plaintiff's evidence the cable was attached above the flashing. The lower corners of the banner were attached to the buildings on their respective sides. Five days after the banner was suspended the man who employed the defendant caused it to string electric lights along the wire, not otherwise interfering with the work. The same day in the afternoon, the weather being stormy, the banner dragged the chimney over and a brick struck Pancoast on the head, making a comminuted fracture of the skull. The defendant put up the banner a third time after this fall, again, the plaintiff says, without further direction, and when the election was over took it down.

If these were the facts, and, except with regard to the extent or the defendant's control, they could not be disputed, manifestly the verdict was warranted. It did not leave the defendant free from any duty to Pancoast and the other travellers in the street that they had no contract with it. An act of this kind that reasonable care would have shown to endanger life, might have made the actor guilty of manslaughter, if not, in an extreme case, of murder. *Rigmaidon's Case*, Lewin, 180. See *Nash* v. *United States*, 229 U. S. 373, 377. *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178. The same considerations apply to civil liability for personal injuries from similar causes that would have been avoided by reasonable care. See *Gray* v. *Boston Gas Light Co.*, 114 Massachusetts, 149. A man is not free to introduce a danger

into public places even if he be under no contract with the persons subjected to the risk.

It hardly is denied that there was evidence of negligence, but it was held by the Circuit Court of Appeals that the defendant's relation to the work ceased when the banner was hung, that it had no further control over it and was not liable for what happened thereafter. Of course it is true that when the presence or absence of danger depends upon the subsequent conduct of the person to whom control is surrendered, the previous possessor may be exonerated when the control is changed. *Curtin* v. *Somerset*, 140 Pa. St. 70. *Murphey* v. *Caralli*, 3 Hurlst. & Colt. 462. *Thornton* v. *Dow*, 60 Washington, 622. *Glynn* v. *Central R. R. Co.*, 175 Massachusetts, 510. *Clifford* v. *Atlantic Cotton Mills*, 146 Massachusetts, 47, 48. But how far this principle will be carried may be uncertain, *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R. R. Co.*, 196 U. S. 217, 223, and when as here the danger had been called fully into existence by the defendant it could not escape liability for the result of conditions that it alone knew, had created and had arranged to have continue, by stepping out of the control a few days before the event came to pass. *Harris* v. *James*, 45 L. J., Q. B. 545. *Todd* v. *Flight*, 9 C. B. N. S. 377. *Swords* v. *Edgar*, 59 N. Y. 28. *Godley* v. *Hagerty*, 20 Pa. St. 387. *Joyce* v. *Martin*, 15 R. I. 558. *Jackman* v. *Arlington Mills*, 137 Massachusetts, 277, 283. *Dalay* v. *Savage*, 145 Massachusetts, 38, 41. *Clifford* v. *Atlantic Cotton Mills*, 146 Massachusetts, 47, 49.

But it could not be said as matter of law that the defendant had stepped out of control. The facts in their legal aspect probably were somewhat hazy. Presumably the tenant of the hotel simply permitted what was done and had no other relation to it than such as might be imposed upon him by the law. Evidently the defendant handled the banner when it wanted to, and no one else

touched it. The defendant's employer if he told the truth not only did not intermeddle but might be found to have expressly required the defendant to take the responsibility. All the probabilities are that such control as there was remained with the defendant. The defendant got more than it was entitled to when the jury were instructed that even if the fall was due to negligence in putting up the banner, the defendant would not be liable unless by arrangement it had assumed a continuing duty to maintain the banner in a safe condition. The testimony on the two sides was contrasted and it was left to the jury to say which they would believe.

As we have implied, we regard it as too plain for discussion that the plaintiff's evidence if believed warranted a finding that the defendant undertook the care of the banner while it was up. An effort is made to establish an error in allowing an amendment to the declaration after the statute of limitations had run. The declaration originally alleged negligence in the use of the chimney and that the fall was due to the use of the chimney as alleged. The amendment alleged also that defendant maintained the banner. If any objection is open it is enough to say that the original declaration was sufficient and that the amendment plainly left the cause of action unchanged.

Judgment reversed.

Judgment of the District Court affirmed.

LeCRONE, RECEIVER OF THE ORINOCO COMPANY, LIMITED, *v.* McADOO, SECRETARY OF THE TREASURY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 304. Submitted April 26, 1920.—Decided June 1, 1920.

A writ of error to review a judgment of the Court of Appeals of the District of Columbia dismissing a petition for mandamus against the Secretary of the Treasury must be dismissed if, after respondent's resignation from office, his successor has not been substituted within twelve months. P. 218. Act of February 8, 1899, c. 121, 30 Stat. 822.

In default of such timely substitution, the petition cannot be retained to charge the respondent personally in damages (D. C. Code, § 1278), since damages are only incident to allowance of the writ. P. 219.

Writ of error to review 48 App. D. C. 181, dismissed.

THE case is stated in the opinion.

Mr. George N. Baxter for plaintiff in error.

The Solicitor General and *Mr. W. Marvin Smith* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to the Supreme Court of the District of Columbia for mandamus to direct the Secretary of the Treasury to pay the amount of two certificates issued to the petitioner by the Secretary of State. The petitioner is receiver of the Orinoco Company, Limited. That Company had claims for damages against the United States of Venezuela, which, with others, by agreement

between the two governments, the United States of America released upon receiving from the United States of Venezuela a certain sum in trust for the parties having the claims. By the Act of February 27, 1896, c. 34, 29 Stat. 32, moneys so received are to be paid into the Treasury and the Secretary of State is to "determine the amounts due claimants, respectively, . . . and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due." Each of such trust funds is declared to be "appropriated for the payment to the ascertained beneficiaries thereof of the certificates" provided for. The answer alleged that there were pending in the same Supreme Court two bills in equity, one by a private person and one by the Orinoco Company, Limited, asserting claims to the fund, that the respondent and petitioner both are parties to those proceedings, the petitioner having submitted to the jurisdiction, and that the petitioner should be limited to those proceedings and await the result of the decrees. The petitioner demurred. The demurrer was overruled and the petition was dismissed by the Supreme Court and its judgment was affirmed by the Court of Appeals.

The theory of the answer seems to be that the purpose of the act of Congress was to appropriate a fund to the claim and to transfer the claim to that fund, leaving the question of title open to litigation in the ordinary courts, as has been held in more or less similar cases. *Butler* v. *Goreley*, 146 U. S. 303, 309, 310. *S. C.* 147 Massachusetts, 8, 12. *United States* v. *Dalcour*, 203 U. S. 408, 422. *Robertson* v. *Gordon*, 226 U. S. 311, 317. See also *Bayard* v. *White*, 127 U. S. 246. It is thought that Congress hardly can have sought to confer judicial powers upon the Secretary of State. *United States* v. *Borcherling*, 185 U. S. 223, 234. And as the certificates are not gifts but are in recognition of outstanding claims, *Williams* v. *Heard*,

140 U. S. 529, reversing *s. c.* 146 Massachusetts, 545, judicial action is supposed to be necessary for the final determination of the right. But we cannot consider that question or the other arguments upon the merits of the case, because, Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, c. 121, 30 Stat. 822. It is said that the Code of the District of Columbia, § 1278, allows the petitioner to recover damages in the same proceeding and that the petition should be retained to charge Mr. McAdoo personally. But apart from other questions the damages are only incident to the allowance of the writ of mandamus, and as that cannot be allowed the whole proceeding is at an end. See *Pullman Co.* v. *Knott*, 243 U. S. 447, 451; *Pullman Co.* v. *Croom*, 231 U. S. 571, 577.

Writ of error dismissed.

CITY OF NEW YORK *v.* CONSOLIDATED GAS COMPANY OF NEW YORK ET AL.

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

No. 566. Argued April 22, 1920.—Decided June 1, 1920.

A city applied to intervene in a suit brought by a gas company to enjoin state officials from enforcing a rate alleged to be confiscatory. *Held*, that the application was addressed to the discretion of the District Court, and that an order denying it was not final for purpose of appeal. P. 221.

When the Circuit Court of Appeals erroneously assumes jurisdiction of a case in which the District Court's jurisdiction is based wholly on constitutional grounds, and makes a final order, this court has

jurisdiction to correct the error upon appeal under Jud. Code, § 241. P. 221.

The proper course for this court in such cases is to reverse the order of the Circuit Court of Appeals with directions to dismiss the appeal. *Id.*

Reversed.

THE case is stated in the opinion.

Mr. Vincent Victory, with whom *Mr. William P. Burr* and *Mr. John P. O'Brien* were on the brief, for appellant.

Mr. John A. Garver for appellees.

Mr. Wilbur W. Chambers, Mr. Charles D. Newton, Attorney General of the State of New York, and *Mr. Robert S. Conklin,* Deputy Attorney General of the State of New York, filed a separate brief on behalf of Newton, appellee.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York eighty-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory and hence violated constitutional rights of the company. The City of New York applied for leave to intervene as a party defendant in the action. The District Judge denied the petition for intervention, stating that the Public Service Commission, the Attorney General and the District Attorney properly represented private consumers; that the City had no interest in the litigation as a consumer; was not the governmental body which had fixed the rate, and was not charged with the duty of enforcing it. From the order denying the application to intervene the City of New York prosecuted an appeal to the Circuit Court of

Appeals, and the latter court affirmed the order of the District Court.

The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal. *Ex parte Cutting*, 94 U. S. 14, 22; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581. As the jurisdiction of the District Court was based upon constitutional grounds only, the case was not appealable to the Circuit Court of Appeals. But, an appeal having been taken and a final order made in the Circuit Court of Appeals, we have jurisdiction to review the question of jurisdiction of that court. (Judicial Code, § 241.) *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73.

The proper course is to reverse the judgment of the Circuit Court of Appeals, and remand the case to that court with directions to dismiss the appeal. *Four hundred and forty-three Cans of Egg Product* v. *United States*, 226 U. S. 172, 184; *Carolina Glass Company* v. *South Carolina*, 240 U. S. 305, 318.

So ordered.

HAWKE *v.* SMITH, SECRETARY OF STATE OF OHIO. (No. 1.)

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 582. Argued April 23, 1920.—Decided June 1, 1920.

Under the Constitution, Art. V, a proposed amendment can be ratified by two methods only,— by the legislatures of three-fourths of the States or by conventions in three-fourths of the States, the choice of method being left to Congress. P. 226.

The term "legislatures" as used here and elsewhere in the Constitu-

tion, means the deliberative, representative bodies that make the laws for the people of the respective States; the Constitution makes no provision for action upon such proposals by the people directly. P. 227.

The function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing such amendments, is a federal function, derived not from the people of that State but from the Constitution. P. 230.

The ratification of a proposed amendment to the Federal Constitution by the legislature of a State is not an act of legislation, in the proper sense of the word; it is but the expression of the assent of the State to the proposed amendment. P. 229. *Davis* v. *Hildebrant*, 241 U. S. 565, distinguished.

The action of the General Assembly of Ohio ratifying the proposed Eighteenth Amendment cannot be referred to the electors of the State, the provisions of the state constitution requiring such a referendum being inconsistent with the Constitution of the United States. P. 231.

100 Ohio St. 385, reversed.

THE case is stated in the opinion.

Mr. J. Frank Hanly, with whom *Mr. George S. Hawke*, *Mr. Arthur Hellen*, *Mr. Charles B. Smith*, *Mr. James Bingham* and *Mr. Remster A. Bingham* were on the brief, for plaintiff in error.

Mr. Lawrence Maxwell, with whom *Mr. John G. Price*, Attorney General of the State of Ohio, *Mr. Judson Harmon* and *Mr. B. W. Gearheart* were on the brief, for defendant in error:

The Constitution of the United States does not require that the States shall have any particular form of legislature. The people of the States have the power to abolish their general assemblies and to take into their own hands all matters of legislation. They have the power to provide that no legislation shall be enacted by the general assembly without being first submitted to the people for approval. And they have the power to do, as they have

in fact done, in all referendum States, namely, to provide that all, or any particular class, of legislative acts shall stand suspended for a specified time after adjournment of the general assembly, and if, during that time a referendum is duly ordered, that the legislation shall remain suspended and inoperative until the next general election and take effect or not according to the result of the popular vote thereon. They may also provide, as has been done in two of the States, that no legislature or convention shall act upon any proposed amendment to the Constitution of the United States, except a legislature or convention elected after such amendment is submitted. Constitution, Tennessee, 1870, Art. II, § 32; Florida, 1885, Art. XVI, § 19.

The Federal Constitution confers no power upon the state legislature. It gets all of its power from the people of the State. Such authority as the legislatures have to ratify amendments to the Federal Constitution is not mandatory but permissive. Congress merely proposes amendments and it is provided that if they shall be ratified by the "legislatures" of a sufficient number of the States, they become part of the Federal Constitution. Such amendments are submitted to the legislative or lawmaking power of each State whatever its form or constitution, as distinguished from its executive or judicial power. If a State should abolish its general assembly and resort to direct legislation in all instances, it would thereby, according to the opposing argument, deprive itself of the power to act upon proposed constitutional amendments. If more than one-fourth of the States should adopt that policy there would not then remain three-fourths of the several States capable of ratifying a federal amendment.

But if we assume, for the sake of discussion, that the general assembly of the State must have the final word in ratifying amendments to the Federal Constitution in cases where the State ratifies, it must be admitted that it

speaks, not for itself, but for the people of the State, and it follows that the people, in their state constitutions, may provide that the action of the general assembly shall be conditional upon popular rejection or approval at the polls.

In such a case the action of the general assembly, if approved by referendum, is a ratification by the "legislature." If rejected, there is no ratification by the legislature of that State. No expressed prohibition of such a form of state government is found in the Federal Constitution and none should be inferred. Citing: *Davis* v. *Hildebrant*, 94 Ohio St. 154; aff'd 241 U. S. 565; *Hawke* v. *Smith*, 100 Ohio St. 385; *State* v. *Howell*, 107 Washington, 167.

Mr. Wayne B. Wheeler and *Mr. James A. White*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice Day delivered the opinion of the court.

Plaintiff in error (plaintiff below) filed a petition for an injunction in the Court of Common Pleas of Franklin County, Ohio, seeking to enjoin the Secretary of State of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that State on the question of the ratification which the General Assembly had made of the proposed Eighteenth Amendment to the Federal Constitution. A demurrer to the petition was sustained in the Court of Common Pleas. Its judgment was affirmed by the Court of Appeals of Franklin County, which judgment was affirmed by the Supreme Court of Ohio, and the case was brought here.

A joint resolution proposing to the States this Amendment to the Constitution of the United States was adopted on the third day of December, 1917. The Amendment prohibits the manufacture, sale or transportation of

intoxicating liquors within, the importation thereof into, or the exporation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes. The several States were given concurrent power to enforce the Amendment by appropriate legislation. The resolution provided that the Amendment should be inoperative unless ratified as an Amendment of the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States. The Senate and House of Representatives of the State of Ohio adopted a resolution ratifying the proposed Amendment by the General Assembly of the State of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the Governor to the Secretary of State at Washington and to the presiding officer of each house of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the Governor of Ohio complied with the resolution. On January 29, 1919, the Secretary of State of the United States proclaimed the ratification of the Amendment, naming thirty-six States as having ratified the same, among them the State of Ohio.

The question for our consideration is: Whether the provision of the Ohio constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the General Assembly of proposed amendments to the Federal Constitution is in conflict with Article V of the Constitution of the United States. The Amendment of 1918 provides: "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States." Article V of the Federal Constitution provides: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments

to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 402. The States surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for

action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge* v. *Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article I, § 2, prescribes the qualifications of electors of congressmen as those "requisite for electors of the most numerous branch of the state legislature." Article I, § 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made

provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, § 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, § 2.

The constitution of Ohio in its present form, although

making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, § 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth* v. *Virginia*, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with Article I, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing

the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice Chase said: "There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 *et seq.* Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States.

But it is said this view runs counter to the decision of this court in *Davis* v. *Hildebrant,* 241 U. S. 565. But that case is inapposite. It dealt with Article I, § 4, of the Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each State shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a

view to representation in Congress was not unconstitutional. Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

It follows that the court erred in holding that the State had authority to require the submission of the ratification to a referendum under the state constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HAWKE *v.* SMITH, SECRETARY OF STATE OF OHIO. (No. 2.)

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 601. Argued April 23, 1920.—Decided June 1, 1920.

The ratification of the proposed Nineteenth Amendment by the legislature of Ohio cannot be referred to the electors of the State; the Ohio constitution in requiring such a referendum is inconsistent with the Constitution of the United States. *Hawke* v. *Smith*, No. 1, *ante*, 221.

100 Ohio St. 540, reversed.

THE case is stated in the opinion.

Mr. J. Frank Hanly, with whom *Mr. George S. Hawke*, *Mr. Arthur Hellen*, *Mr. Charles B. Smith*, *Mr. James Bingham* and *Mr. Remster A. Bingham* were on the brief, for plaintiff in error.

Mr. Lawrence Maxwell, with whom *Mr. John G. Price*, Attorney General of the State of Ohio, *Mr. Judson Harmon* and *Mr. B. W. Gearheart* were on the brief, for defendant in error.

Mr. Wayne B. Wheeler and *Mr. James A. White*, by leave of court, filed a brief as *amici curiæ*.

Mr. George Wharton Pepper, *Mr. Shippen Lewis* and *Mr. William Draper Lewis*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice Day delivered the opinion of the court.

This case presents the same question as that already decided in No. 582, *ante*, 221, the only difference being that the amendment involved is the proposed Nineteenth Amendment to the Constitution extending the right of suffrage to women. The Supreme Court of Ohio upon the authority of its decision in *Hawke* v. *Smith* (No. 582) *ante*, 221, held that the constitution of the State requiring such submission by a referendum to the people, did not violate Article V of the Federal Constitution, and for that reason rendered a like judgment as in No. 582.

For the reasons stated in our opinion in No. 582 the judgment of the Supreme Court of Ohio must be

Reversed.

GREEN ET AL. *v.* FRAZIER, GOVERNOR, ET AL.

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

No. 811. Argued April 19, 20, 1920.—Decided June 1, 1920.

When a state tax authorized by the legislature pursuant to the state constitution and upheld by the highest state court is called in question under the Fourteenth Amendment upon the ground that the purposes for which it is imposed are not of a public nature, every presumption must be indulged in its favor, and the united judgments of the people, legislature and court of the State that the purposes are public will be accepted unless clearly unfounded. P. 239. *Jones* v. *City of Portland*, 245 U. S. 217.

When a State sees fit, for the promotion of the public welfare, to enter into activities which in the past have been considered as entirely within the domain of private enterprise and to assist them by taxation, the wisdom of its legislation or the soundness of the economic policy involved cannot be considered by this court in passing upon the constitutionality of the taxation. P. 240.

Under the peculiar conditions existing in North Dakota, described in the opinion of its Supreme Court in this case, *held*, that legislation which provides for engaging the State in the businesses of manufacturing and marketing farm products, and of providing homes for the people, and which appropriates money, creates a state banking system and authorizes bond issues and taxation for carrying the scheme into effect, is not unconstitutional as respects taxpayers. P. 242.

176 N. W. Rep. 11, affirmed.

THE case is stated in the opinion.

Mr. Thomas C. Daggett for plaintiffs in error.

Mr. Frederic A. Pike for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is an action by taxpayers of the State of North Dakota against Lynn J. Frazier, Governor, John N.

Hagan, Commissioner of Agriculture and Labor, William Langer, Attorney General, and Obert Olson, State Treasurer, and the Industrial Commission of that State to enjoin the enforcement of certain state legislation. The defendants Lynn J. Frazier, as Governor, William Langer, as Attorney General, and John Hagan, as Commissioner of Agriculture and Labor, constitute the Industrial Commission, created by the Act of February 25, 1919, [Laws 1919, c. 151] of the Sixteenth Legislative Assembly of the State of North Dakota.

The laws involved were attacked on various grounds, state and federal. The Supreme Court of North Dakota sustained the constitutionality of the legislation. So far as the decision rests on state grounds it is conclusive, and we need not stop to inquire concerning it. *Davis* v. *Hildebrant*, 241 U. S. 565. The only ground of attack involving the validity of the legislation which requires our consideration concerns the alleged deprivation of rights secured to the plaintiffs by the Fourteenth Amendment to the Federal Constitution. It is contended that taxation under the laws in question has the effect of depriving plaintiffs of property without due process of law.

The legislation involved consists of a series of acts passed under the authority of the state constitution, which are: (1) An act creating an Industrial Commission of North Dakota [Laws, 1919, c. 151] which is authorized to conduct and manage on behalf of that State certain utilities, industries, enterprises and business projects, to be established by law. The act gives authority to the Commission to manage, operate, control and govern all utilities, enterprises and business projects, owned, undertaken, administered or operated by the State of North Dakota, except those carried on in penal, charitable or educational institutions. To that end certain powers and authority are given to the Commission, among others: the right of eminent domain; to fix the buying price of things bought,

and the selling price of things sold incidental to the utilities, industries, enterprises and business projects, and to fix rates and charges for services rendered, having in mind the accumulation of a fund with which to replace in the general funds of the State the amount received by the Commission under appropriations made by the act; to procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the State in such amounts and in such manner as may be provided by law. $200,000 of the funds of the State are appropriated to carry out the provisions of the act. (2) The Bank of North Dakota Act, [Laws 1919, c. 147] which establishes a bank under the name of "The Bank of North Dakota," operated by the State. The Industrial Commission is placed in control of the operation and management of the bank, and is given the right of eminent domain to acquire necessary property. Public funds are to be deposited in the bank, and the deposits are guaranteed by the State of North Dakota. Authority is given to transfer funds to other departments, institutions, utilities, industries, enterprises or business projects, and to make loans to counties, cities or political sub-divisions of the State, or to state or national banks on such terms as the Commission may provide. Loans to individuals, associations, and private corporations are authorized, when secured by duly recorded first mortgages on lands in the State of North Dakota. An appropriation of $100,000 is made immediately available to carry out the provisions of the act. (3) An act providing for the issuing of bonds of the State in the sum of $2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. [Laws 1919, c. 148.] The earnings of the bank are to be paid to the State Treasurer. Tax levies are authorized sufficient to pay the interest on the bonds annually. The bonds shall mature in periods of five years, and the Board of Equalization is authorized to levy a tax in an amount

equal to one-fifth of the amount of their principal. The State Treasurer is required to establish a bank bond payment fund into which shall be paid moneys received from taxation, from appropriations and from bank earnings. $10,000 is appropriated for the purpose of carrying the act into effect. (4) An act providing for the issuing of bonds in the sum of not exceeding $10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." [Laws 1919, c. 154.] These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. The faith and credit of the State of North Dakota are pledged for the payment of the bonds. Moneys derived from the sale of the bonds are to be placed by the Industrial Commission in the funds of the bank, and nothing in the act is to be construed to prevent the purchase of the bonds with any funds in the Bank of North Dakota. It is further provided that the State Board of Equalization shall, if it appears that the funds in the hands of the State Treasurer are insufficient to pay either principal or interest, accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. Provision is made for the repeated exercise of the powers granted by the act, for the purposes stated. An appropriation of $10,000 is made for carrying into effect the provisions of this act. (5) An act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system under the name of "North Dakota Mill and Elevator Association" to be operated by the State. [Laws 1919, c. 152.] The purpose is declared that the State shall engage in the business of manufacturing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery

and equipment, owned, controlled and operated by it under the name of the "North Dakota Mill and Elevator Association." The Industrial Commission is placed in control of the Association with full power, and it is authorized to acquire by purchase, lease or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell and exchange all kinds of raw and manufactured farm food products, and by-products, and to operate exchanges, bureaus, markets and agencies within and without the State, and in foreign countries. Provision is made for the bringing of a civil action against the State of North Dakota on account of causes of action arising out of the business. An appropriation is made out of state funds, together with the funds procured from the sale of state bonds, to be designated as the capital of the Association. (6) An act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding $5,000,000, to be known as "Bonds of North Dakota, Mill and Elevator Series," providing for a tax and making other provisions for the payment of the bonds, and appropriations for the payment of interest and principal thereof. [Laws 1919, c. 153.] The bonds are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association. The faith and credit of the State of North Dakota are pledged for the payment of the bonds, both principal and interest. These bonds may be purchased with funds in the Bank of North Dakota. Taxes are provided for sufficient to pay the bonds, principal and interest, taking into account the earnings of the Association. The sum of $10,000 is appropriated from the general funds of the State to carry the provisions of the act into effect. (7) The Home Building Act declares the purpose of the State to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it under the name of "The Home Building Associa-

tion of North Dakota"; and defines its duties and the extent of its powers. [Laws 1919, c. 150.] The Industrial Commission is placed in control of "The Home Building Association," and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at $5,000, and of farm homes at $10,000. A bond issue of $2,000,000, known as "Bonds of North Dakota Home Building Series," is provided for.

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation was adopted under the broad power of the State to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the State was unrestrained by any federal authority. That Amendment introduced a new limitation upon state power into the Federal Constitution. The States were forbidden to deprive persons of life, liberty and property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise. *Twining* v. *New Jersey*, 211 U. S. 78, 100.

The due process of law clause contains no specific limitation upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 155. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham speak-

ing for the court. Concluding the discussion of that subject (p. 158) the Justice said: "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government." Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the States is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In the present instance under the authority of the constitution and laws prevailing in North Dakota the people, the legislature, and the highest court of the State have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the State. With this united action of people,

legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, § 176, "Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." Cooley, Justice, in *People* v. *Salem*, 20 Michigan, 452. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389.

With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of pro-

viding banking facilities, and to enable the State to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the State of North Dakota, and particularly by the great agricultural industry of the State. It estimated from facts of which it was authorized to take judicial notice, that 90% of the wealth produced by the State was from agriculture; and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the State were largely dependent; that the State produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the State), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the State of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and de-

termine is whether this system of legislation is violative of the Federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in *Jones* v. *City of Portland*, 245 U. S. 217, in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly, that the judgment of the highest court of the State declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the Supreme Court of Maine justifying the legislation under the conditions prevailing in that State. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Savings & Loan Association* v. *Topeka*, 20 Wall. 655, 665. In many instances States and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court,

if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.

Affirmed.

SCOTT ET AL. *v.* FRAZIER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 508. Argued April 19, 20, 1920.—Decided June 1, 1920.

A suit by taxpayers to enjoin payment of public moneys and issuance of bonds by a State, in which jurisdiction is invoked solely because of alleged violation of their constitutional rights, cannot be entertained by the District Court if it is not alleged that the loss or injury to any complainant amounts to $3,000. P. 244.

258 Fed. Rep. 669, reversed.

THE case is stated in the opinion.

Mr. N. C. Young, Mr. Tracy R. Bangs and *Mr. C. J. Murphy* for appellants.

Mr. S. L. Nuchols and *Mr. W. S. Lauder*, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, was on the brief, for appellees.

Mr. Frederic A. Pike, with whom *Mr. William Lemke* was on the brief, for Frazier, Governor, Hagan, Commissioner of Agriculture and Labor, and the Industrial Commission of North Dakota, appellees.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

This suit so far as the merits are concerned is like No. 811, just decided, *ante*, 233. It was brought in the District Court of the United States for the district of North Dakota to enjoin the payment of public funds in the State Treasury and the issuing of state bonds under the constitution and laws of North Dakota. We have sufficiently stated the nature of this constitution and the laws involved in the opinion in No. 811.

The jurisdiction was invoked because of alleged violation of rights under the Fourteenth Amendment. The complainants were taxpayers of North Dakota who alleged that suit was brought on behalf of themselves and all other taxpayers of the State. There was no diversity of citizenship and jurisdiction was rested solely upon the alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits, the judge stating that he was of opinion that there was no jurisdiction and directing the dismissal on the merits to prevent delay and to permit the suit being brought here by a single appeal.

There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless* v. *St. Louis*, 180 U. S. 379; *Rogers* v. *Hennepin County*, 239 U. S. 621.

The District Court was right in its conclusion that there was no jurisdiction. The decree is reversed and the cause remanded to the District Court with directions to dismiss the bill for want of jurisdiction.

So ordered.

EVANS *v.* GORE, DEPUTY AND ACTING COLLECTOR OF INTERNAL REVENUE FOR THE WESTERN DISTRICT OF KENTUCKY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 654. Argued March 5, 1920.—Decided June 1, 1920.

The relation of its members to the principle involved cannot relieve this court of the duty to determine the taxability of the salary of a judge of another federal court, in a case duly presenting the question. P. 247.

The primary purpose of the Constitution in providing (Art. I, § 1, cl. 6) that the compensation of the judges "shall not be diminished during their continuance in office," was not to benefit the judges, but to attract fit men to the bench and insure that independence of action and judgment which is essential to the maintenance of the Constitution and the impartial administration of justice. Pp. 248, 253.

Such being its purpose, the limitation is to be construed, not as a private grant, but as a limitation imposed in the public interest—not restrictively, but in accord with its spirit and the principle on which it proceeds. P. 253.

Any diminution which by necessary operation and effect withholds or takes from the judge a part of that which has been promised by law for his services, must be regarded as within the limitation. P. 254.

The prohibition embraces and prevents diminution by taxation, and has been so construed in the actual practice of the Government. P. 255.

The purpose of the Sixteenth Amendment, as shown by its language and history and by recent decisions of this court, was not to extend the taxing power to new or excepted subjects, but merely to remove all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one source or another. P. 259.

A tax upon the net income of a United States District Judge, assessed under the Act of February 24, 1919, c. 18, 40 Stat. 1062, § 213, (passed since he took office) by including his official salary in the computation, operates to diminish his compensation, in violation

of the Constitution, and is invalid. P. 263. *Peck & Co.* v. *Lowe*, 247 U. S. 165; *United States Glue Co.* v. *Oak Creek*, *id.* 321, distinguished.

262 Fed. Rep. 550, reversed,

THE case is stated in the opinion.

Mr. William Marshall Bullitt and *Mr. Edmund F. Trabue*, with whom *Hon. Walter Evans, pro se*, *Mr. Frank P. Straus*, *Mr. Howard B. Lee* and *Mr. Helm Bruce* were on the briefs, for plaintiff in error.

Mr. Assistant Attorney General Frierson, with whom *The Attorney General* was on the brief, for defendant in error.

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

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States District Judge for the Western District of Kentucky, and holds that office under an appointment by the President made in 1899 with the advice and consent of the Senate. The tax which he calls in question was levied under the Act of February 24, 1919, c. 18, 40 Stat. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as District Judge was included in the computation. Had it been excluded he would not have been called on to pay any income tax for that year. The inclusion was in obedience to a provision in § 213 requiring the computation to embrace all gains, profits, income and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, [and others] . . . the compensation received as such." Whether he could be subjected to such a tax in

respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the District Court. 262 Fed. Rep. 550.

The Constitution establishes three great coördinate departments of the National Government,—the legislative, the executive, and the judicial,—and distributes among them the powers confided to that Government by the people. Each department is dealt with in a separate Article, the legislative in the first, the executive in the second and the judicial in the third. Our present concern is chiefly with the third Article. It defines the judicial power, vests it in one supreme court and such inferior courts as Congress may from time to time ordain and establish, and declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The plaintiff insists that the provision in § 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation and therefore is repugnant to the constitutional limitation just quoted.

Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general,—and also the salary of the President, as to which the Constitution (Art. II, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our

decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this.[1]

With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such

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[1] See House Report, No. 767, p. 29, 65th Cong., 2d sess.; Senate Report, No. 617, p. 6, 65th Cong., 3rd sess. And see Cong. Rec., vol. 56, p. 10370, where the Chairman of the House Committee, in asking the adoption of the provision, said: "I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing . . . Federal judges' or the President's salaries, . . . we can not settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested, and it can only be done by some one protesting his tax and taking an appeal to the Supreme Court." And again: "I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."

as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers,—the legislative, the executive, and the judicial,—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of

the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshall, whose rich experience as lawyer, legislator, and Chief Justice enabled him to speak as no one else could, tersely said (Debates Va. Conv., 1829–1831, pp. 616, 619):

"Advert, Sir, to the duties of a Judge. He has to pass between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the

greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

"It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.

"Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."

"Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all

can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington,[1] "the keystone of our political fabric," the Convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist, No. 79): "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* . . . The enlightened friends of good government in every State, have seen cause to lament the want of precise and explicit precautions in

[1] Sparks' Washington, vol. X, pp. 35–36.

the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges." The several commentators on the Constitution have adopted and reiterated this view,[1]—Judge Story adding: "Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery"; and Chancellor Kent observing: "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in

[1] 2 Story, § 1628; 1 Kent's Com. *294; 1 Wilson's Works, 410, 411; 2 Tucker, § 364; Miller, 340–343; 1 Carson's Supreme Court, 6.

accord with its spirit and the principle on which it proceeds.

Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 450, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that State. The tax was adjusted or proportioned to his compensation, and the state court sustained it. 7 Watts, 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress, said: "Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his compensation be prohibited,

it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector* v. *Day*, 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 601, 652, 653, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in *United States* v. *Railroad Co.*, 17 Wall. 322, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now

under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it "the power to embarrass and destroy"; may be applied to every object within its range "in such measure as Congress may determine"; enables that body "to select one calling and omit another, to tax one class of property and to forbear to tax another"; and may be applied in different ways to different objects so long as there is "geographical uniformity" in the duties, imposts and excises imposed. *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 443; *Austin* v. *The Aldermen*, 7 Wall. 694, 699; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, 548; *Knowlton* v. *Moore*, 178 U. S. 41, 92, 106; *Treat* v. *White*, 181 U. S. 264, 268–269; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158; *Billings* v. *United States*, 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24–26. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana and North Carolina made under like constitutional restrictions, *Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & Serg. 403, 415, *et seq.*;[1] *New Orleans* v. *Lea*, 14

[1] The tax condemned was levied under a provision, in a general revenue law, charging a tax of two per cent. "upon all salaries and

La. Ann. 197; 48 N. Car. Appendix; N. Car. Public Documents 1899, Doc. No. 8, p. 95; 131 N. Car. 692; *Purnell* v. *Page*, 133 N. Car. 125, and has strong sanction in the actual practice of the Government, to which we now advert.

No attempt was made to tax the compensation of federal judges prior to 1862. A statute of that year, c. 119, § 86, 12 Stat. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of three per cent. and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the judiciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701), based on the prohibition we are considering, and in the course of the letter said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in

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emoluments of office, created or held by or under the constitution or laws of this Commonwealth, and by or under any incorporation, institution, or company incorporated, by the said Commonwealth, where such salaries or emoluments exceed two hundred dollars." Act No. 232, § 2, Penn. Laws 1840, p. 613; Act No. 117, § 9, Penn. Laws 1841, p. 310.

the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void."

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar) and that officer rendered an opinion in substantial accord with Chief Justice Taney's protest, and also advised that the tax on the President's compensation was likewise invalid. 13 Ops. Atty. Gen. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded,—a part through administrative channels and a part through the action of the Court of Claims and ensuing appropriations by Congress. *Wayne* v. *United States*, 26 Ct. Clms. 274; c. 311, 27 Stat. 306. Thus the Secretary of the Treasury, the accounting officers, the Court of Claims and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of 1894, c. 349, § 27, *et seq.*, 28 Stat. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604–606. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar

that the salaries of the President and judges were exempt." The Income Tax Acts of 1913, 1916 and 1917 (c. 16, 38 Stat. 168; c. 463, 39 Stat. 758; c. 63, 40 Stat. 329) severally excepted the compensation of the judges then in office,—also that of the President for the then current term. In short, during a period of more than one hundred and twenty years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive and legislative officers. And so it is apparent that in the actual practice of the Government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the Sixteenth Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing power subjects theretofore excepted? The court below answered in the negative; and counsel for the Government say, "It is not, in view of recent decisions, contended that this Amendment rendered taxable as income anything which was not so taxable before." We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the prohibition, in Article III, § 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In *Knowlton* v. *Moore, supra,* p. 95, this court said: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the

conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning." This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

Let us turn then to the circumstances in which this Amendment was proposed and ratified and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several States according to their population, as ascertained by a census or enumeration (Art. I, § 2, cl. 3, and § 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; and the decision when announced disclosed that the same differences in opinion existing elsewhere were shared by the members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth

Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax but only the mode of exercising it. The message of the President [1] recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates [2] on the resolution by which it was proposed, and the public appeals [3]—corresponding to those in the Federalist—made to secure its ratification leave no doubt on this point. And that the proponents of the Amendment in drafting it lucidly and aptly expressed this as its object is shown by its words:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

True, Governor Hughes, of New York, in a message laying the Amendment before the legislature of that State for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose,[4] as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one

[1] Cong. Rec., vol. 44, p. 3344.

[2] Cong. Rec., vol. 44, pp. 1568–1570, 3377, 3900, 4067, 4105–4107, 4108–4121, 4389–4441.

[3] Cong. Rec., vol. 45, pp. 1694–1699, 2245–2247, 2539–2540.

[4] Cong. Rec., vol. 45, pp. 1694–1699, 2245–2247, 2539–2540.

source or another.[1] And we have so held in other cases.

In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, where the purpose and effect of the Amendment were first drawn in question, the Chief Justice reviewed at length the legislative and judicial action which prompted its adoption and then, referring to its text and speaking for a unanimous court, said, pp. 17–18:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock Case* and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source

[1] In passing the income tax law of 1919 Congress refused to treat interest received from bonds issued by a State or any of its counties or municipalities as within the taxing power, Cong. Rec., vol. 57, pp. 553, 774–777, 2988; c. 18, § 213, 40 Stat. 1065; and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a State and its political subdivisions are not taxable by the United States. Reg. 45, published 1920, pp. 47, 313; 31 Ops. Atty. Gen. 441.

the income may be derived, shall not be subject to the regulation of apportionment."

What was there said was reaffirmed and applied in *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 112–113, and *Peck & Co.* v. *Lowe*, 247 U. S. 165, 172; and in *Eisner* v. *Macomber*, 252 U. S. 189, decided at the present term, we again held, citing the prior cases, that the Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income."

After further consideration, we adhere to that view and accordingly hold that the Sixteenth Amendment does not authorize or support the tax in question.

Apart from his salary, a federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in *Peck & Co.* v. *Lowe*, 247 U. S. 165, 174–175, and *United States Glue Co.* v. *Oak Creek*, *ibid.* 321, 329. We think neither case tends to support that view. Each related to a business—one to exportation, the other to interstate commerce—which the taxing power—of Congress in one case, of a State in the other—was restrained from directly burdening; and the holding in both was

that an income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition and so must be adjudged invalid.

Judgment reversed.

MR. JUSTICE HOLMES, dissenting.

This is an action brought by the plaintiff in error against an acting Collector of Internal Revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income six thousand dollars, being the amount of his salary as a judge of the District Court of the United States. The Act of February 24, 1919, c. 18, § 210, 40 Stat. 1057, 1062, taxes the net income of every individual, and § 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to be computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are

contrary to Article III, § 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the validity of the above mentioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that if not so, it was made lawful by the Sixteenth Amendment. In the first place, I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist, (No. 79,) that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops, or to put it in the language of the clause, a point at which it could not be said that his com-

pensation was diminished by a charge. If he bought a house the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So if he bought bonds. Yet in such cases the advantages of his salary would be diminished. Even if the house or bonds were bought with other money the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no reason why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this Court seem to me to justify my conclusion. In *Peck & Co.* v. *Lowe*, 247 U. S. 165, a tax was levied by Congress upon the income of the plaintiff corporation. More than two-thirds of the income were derived from exports and the Constitution in terms prohibits any tax on articles exported from any State. By construction it had been held to create "a freedom from any tax which directly burdens the exportation," *Fairbank* v. *United States*, 181 U. S. 283, 293. The prohibition was unequivocal and express, not merely an inference as in the present case. Yet it was held unanimously that the tax was valid. "It is not laid on income from exportation . . . in a discriminative way, but just as it is laid on other income. . . . There is no

discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied . . . after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins." 247 U. S. 174, 175. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 329, the same principle was affirmed as to interstate commerce and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government from which parties were not exempted because they happened to be engaged in commerce among the States.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the scope of the original document, the Sixteenth Amendment justifies the tax, whatever would have been the law before it was applied. By that Amendment Congress is given power to "collect taxes on incomes, from whatever source derived." It is true that it goes on "without apportionment among the several States, and without regard to any census or enumeration," and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

MR. JUSTICE BRANDEIS concurs in this opinion.

WEIDHORN *v.* LEVY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WEIDHORN, BANKRUPT.

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

No. 203. Argued January 28, 29, 1920.—Decided June 1, 1920.

A referee in bankruptcy is not a separate court, nor endowed with any independent judicial authority, but merely an officer of the court of bankruptcy having no power except as conferred by the order of reference, read in the light of the act, and whose judicial functions are subject always to the review of the bankruptcy court. P. 271.

Under the Bankruptcy Act and the general orders in bankruptcy, a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e, and affecting property not in the custody or control of the court of bankruptcy. Pp. 270–274.

A decree of the District Court, vacating a decree made by the referee in such a suit and dismissing the bill, upon the ground that the referee exceeded his powers under the order of reference, is reviewable in the Circuit Court of Appeals by petition to revise under § 24b of the act. P. 269.

253 Fed. Rep. 28, reversed.

THE case is stated in the opinion.

Mr. William M. Blatt, with whom *Mr. Walter Hartstone* was on the brief, for petitioner.

Mr. Lee M. Friedman for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Upon his voluntary petition, filed in February, 1916, J. Herbert Weidhorn was adjudged a bankrupt, and the

District Court referred the case to a referee under General Order XII (1). Thereafter the trustee in bankruptcy addressed to and filed with the referee a bill in equity against the bankrupt's brother, Leo Weidhorn (the present petitioner) and the Boston Storage Warehouse Company, alleging that certain chattel mortgages, or bills of sale in the nature of mortgages, made by the bankrupt to Leo more than four months before the filing of the petition in bankruptcy, and under which, prior to the filing of the petition, possession of the chattels had passed to the mortgagee and the Storage Warehouse Company, were invalid because made in fraud of creditors, and seeking to set them aside under the Statute of Elizabeth and the Bankruptcy Act, § 70e, and recover the chattels or the proceeds thereof for the bankrupt estate. Defendant Leo Weidhorn promptly objected to the jurisdiction of the referee, and afterwards answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits, and entered a final decree in favor of the trustee. On review the District Court, considering the jurisdictional question only, vacated the decree and dismissed the bill upon the ground that the referee exceeded his powers under the order of reference. 243 Fed. Rep. 756. The trustee petitioned the Circuit Court of Appeals to revise the decree under § 24b; and that court, deeming that the District Court had erred in holding that the referee acted without jurisdiction, reversed its decree dismissing the bill and remanded the cause for further proceedings, including a review of the merits. 253 Fed. Rep. 28. A writ of certiorari brings the case here.

It is assigned for error that the Circuit Court of Appeals ought not to have entertained the petition to revise under § 24b; the contention being that since the decree complained of was made in a plenary suit the exclusive remedy was by appeal under § 24a. Had the District Court sustained the jurisdiction and passed upon the merits the

point would be well taken, as the court thereby would have determined a "controversy arising in bankruptcy proceedings." *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300. But since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under § 24b. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26; *Schweer* v. *Brown*, 195 U. S. 171, 172; *First National Bank* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 288, 291; *Matter of Loving*, 224 U. S. 183, 188; *Gibbons* v. *Goldsmith*, 222 Fed. Rep. 826, 828.

Did the referee exceed the authority and jurisdiction conferred upon him by the Bankruptcy Act and the general order of reference?

The following provisions of the act are pertinent: By § 1 (7) " 'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." By § 18g, "If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee." Section 22 provides that after a person has been adjudged a bankrupt the judge may make a reference to the referee either generally or specially with limited authority to act or to consider and report, and "may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." By § 36, "Referees shall take the same oath of office as that prescribed for judges of United States courts." And by § 38a, "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and

as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

In the general orders established by this court pursuant to the act, under XII (1) provision is made for an order referring a case to a referee; "And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee." 172 U. S. 657.

The question is, whether the present suit brought by the trustee in bankruptcy against petitioner was a "proceeding" within the meaning of this provision. We cannot concur in the view of the District Court that this question is governed by the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings," as these terms are employed in §§ 23, 24a, 24b, and 25a; there may be controversies arising in the course of bankruptcy proceedings that are so far connected with those proceedings as to be in effect a part of them and capable of summary disposition by the referee under the general order of reference, although because of their nature or because involving a distinct and separable issue they may be reviewable, under the sections cited, by appeal rather than by petition to revise. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 553.

Thus, if the property were in the custody of the bankruptcy court or its officer, any controversy raised by an

adverse claimant setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. *White* v. *Schloerb*, 178 U. S. 542, 546; *Mueller* v. *Nugent*, 184 U. S. 1, 13.

But in the present instance the controversy related to property not in the possession or control of the court or of the bankrupt or anyone representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (*Babbitt* v. *Dutcher*, 216 U. S. 102, 113), and such was the nature of the one that was instituted.

Under the Bankruptcy Act of 1898 as originally passed, an independent suit of this character could not be brought in the District Court in bankruptcy "unless by consent of the proposed defendant." Act of July 1, 1898, c. 541, § 23b, 30 Stat. 544, 552; *Bardes* v. *Hawarden Bank*, 178 U. S. 524. Whether under the Act of February 5, 1903, c. 487, 32 Stat. 797, 798, 800, amending §§ 23b and 70e, a suit for the recovery of property fraudulently transferred by the bankrupt could be brought in a court of bankruptcy without the consent of defendant was a question left undetermined in *Harris* v. *First National Bank*, 216 U. S. 382, 385, but answered in the negative in *Wood* v. *Wilbert's Sons Co.*, 226 U. S. 384, 389. By Act of June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, § 23b was further amended so as to confer jurisdiction upon the courts of bankruptcy without consent of the proposed defendant in suits for the recovery of property under § 70e. The present suit, being of this nature, might have been brought in the District Court; or

it might have been brought in a state court having concurrent jurisdiction under § 70e as amended.

We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or coördinate with those of the court or judge, but subordinate thereto; and he becomes "the court" only by virtue of the order of reference. In the General Orders the word "proceedings" occurs frequently, but never in a sense to include a plenary suit. On the other hand, "proceedings in equity" and "proceedings at law" are specially dealt with in General Order XXXVII.

The practice is not uniform; we have found no decision by a Circuit Court of Appeals upon the point; and the decisions of the district courts are conflicting. A referee's opinion in *In re Murphy* (1900), 3 Am. Bank. Rep. 499, 505, upholds his jurisdiction over a plenary proceeding by the trustee to set aside a preferential transfer of property to a creditor. In *In re Shults & Mark* (referee's opinion), 11 Am. Bank. Rep. 690, a special form of reference having been adopted by the district court, it was held that jurisdiction was conferred upon the referee over proceedings under § 60b to recover property preferentially transferred and under § 67e to recover property fraudulently transferred. In *In re Steuer* (D. C. Mass.), 104 Fed. Rep. 976, 980, a plenary suit to avoid a preference was heard before the referee without objection, and upon petition to review his action the district court, with some hesitation, directed that a decree issue "as if made originally by the judge, and

not simply as an affirmance of the decree of the referee." In *In re Scherber* (D. C. Mass.), 131 Fed. Rep. 121, 124, it was found unnecessary to determine whether the referee could proceed over objection to take jurisdiction of a plenary suit to recover a preference. Views adverse to the jurisdiction of the referee in an independent proceeding to avoid a transfer were expressed in *In re Walsh Brothers* (D. C. Ia.), 163 Fed. Rep. 352; *In re Carlile* (D. C. N. Car.), 199 Fed. Rep. 612, 615–616; *In re Ballou* (D. C. Ky.), 215 Fed. Rep. 810, 813, 814; and *In re Overholzer* (referee's opinion), 23 Am. Bank. Rep. 10.

The point appears to have been overlooked in *Studley* v. *Boylston National Bank*, 200 Fed. Rep. 249; 229 U. S. 523, 525, 526. Other cases cited throw no useful light upon the question.

Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the general orders in bankruptcy a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e, and affecting property not in the custody or control of the court of bankruptcy.

Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.

Syllabus.

UNITED STATES *v.* OMAHA TRIBE OF INDIANS.

OMAHA TRIBE OF INDIANS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 243, 244. Argued March 18, 1920.—Decided June 1, 1920.

Findings purely of fact or of mixed fact and law are not reviewable on appeal from the Court of Claims. Pp. 280, 281.

By the Treaty of March 16, 1854, Art. 7, 10 Stat. 1043, the United States agreed to protect the Omahas from the Sioux and other hostile tribes as long as the President might deem such protection necessary. In a suit under the jurisdictional Act of June 22, 1910, c. 313, 36 Stat. 580, *held*, that failure to provide necessary protection did not render the United States liable to pay for horses stolen and Omahas killed by the Sioux, in the absence of a finding that the protection was deemed by the President to be necessary. Pp. 280, 283.

The agreement of the United States, in the Treaty of March 6, 1865, 14 Stat. 667, to pay a certain sum to the Omahas to be expended for cattle, etc., for their benefit, was not complied with by supplying cattle which died after reaching the reservation as a result of bad condition when purchased or of bad treatment while being driven there from market; and a finding that such cattle "when they reached the reservation were in bad condition and 50 of them died," necessarily imports that death was due to one or the other of those causes rather than to the hardships of the drive. Pp. 279, 280.

Under the treaties of 1854, *supra*, Art. 4, and of 1865, *supra*, Art. 2, certain moneys of the Omahas were to be or might be expended by the United States in the way of improvements for their benefit, Art. 4 authorizing the President to expend part "for such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes." *Held:* (1) That a finding that a building, constructed as an infirmary, "was not used, and it was not such a building as was contemplated by the treaties," should be interpreted as meaning that it was not suitable for its purpose and was not accepted by the Indians; (2) that the Indians were not obliged to accept it, and the expenditure was a misappropriation of their funds "for purposes not for their material benefit," within the jurisdictional Act of June 22, 1910, *supra*. Pp. 279, 281.

By the Treaty of 1854, *supra*, the land of the Omahas south of a certain line was ceded for a fixed consideration to be paid in the future either in money or through expenditures for their use from time to time at the President's discretion, and it was provided that, upon a certain contingency (which took place), their land north of the line "shall be and is hereby ceded" at the same rate per acre as paid for the land south, deducting the area of a new reservation to be assigned. *Held*, that in the second case, as in the first, the passing of title was not conditioned upon payment of the consideration, and that interest upon the amount to be paid was not allowable. Jud. Code, § 177. P. 281.

The fact that the jurisdictional Act of June 22, 1910, *supra*, authorized the determination of all equitable as well as legal claims of the tribe did not take the case out of the rule denying interest on claims against the Government. P. 283. *United States* v. *Old Settlers*, 148 U. S. 427, distinguished.

53 Ct. Clms. 549, reversed in part; affirmed in part.

THE case is stated in the opinion.

Mr. Assistant Attorney General Davis, with whom *Mr. Geo. T. Stormont* was on the brief, for the United States.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler* and *Mr. Hiram Chase* were on the brief, for the Omaha Tribe of Indians.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here an appeal and a cross-appeal from a judgment of the Court of Claims in a suit brought under the Act of June 22, 1910, c. 313, 36 Stat. 580, which conferred upon that court jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha tribe of Indians may have or claim to have against the United States . . . under the treaty between the United States and the said tribe of Indians, ratified and affirmed March sixteenth, eighteen hundred and fifty-four, or under

any other treaties or laws, or for the misappropriation of any funds of said tribe for purposes not for its material benefit, or for failure of the United States to pay said tribe any money due"; with authority to hear and determine all legal and equitable claims of the tribe, and also any legal or equitable defense, set-off, or counterclaim, and to settle the rights both legal and equitable of the parties, notwithstanding lapse of time or statutes of limitation.

The Court of Claims, after hearing the case, made findings upon which it awarded judgment in favor of the Indians for various sums aggregating $122,295.31. 53 Ct. Clms. 549.

By Article 1 of the Treaty of March 16, 1854 (10 Stat. 1043), the Omaha Indians ceded to the United States all their lands west of the Missouri River and south of a line drawn due west from a point stated, reserving the country north of that line for their future home, with a proviso that if this country should not, on exploration, prove to be a satisfactory and suitable location for the Indians the President might with their consent set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them, not greater in extent than 300,000 acres, in which case all of the country belonging to said Indians north of the line specified should be ceded to the United States, and the Indians should receive the same rate per acre for it, less the number of acres assigned in lieu of it, as was agreed to be paid for the lands south of the line. By Article 4, in consideration of and payment for the country thus ceded, and certain relinquishments made by the Indians, the United States agreed to pay to them certain sums of money aggregating $840,000, in specified annual installments commencing on January 1, 1855; these sums to be paid to the Omahas or expended for their use and benefit under the direction of the President of the United States, who was from time to time to determine at his discretion what proportion of the annual payments should be paid in money and what proportion

applied to and expended for the moral improvement and education of the Indians; for such beneficial objects as in his judgment would be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, etc.; and for medical purposes. By Article 5, in order to enable the Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and for certain other expenses, they were to receive from the United States the further sum of $41,000, to be paid out and expended under the direction of the President and in such manner as he should approve.

The Court of Claims found that the Omahas were not satisfied with the country to the north of the east-and-west line mentioned, and duly elected to take for their future home a tract of 300,000 acres south of the line; and this fact being reported to the President, by his direction a tract of 300,000 acres south of the line was set apart for them. The court found that the area of the land north of the line belonging to the Indians was 783,365 acres, and that after deducting from this the 300,000 acres set apart for them in accordance with the provisions of the treaty there was an excess of 483,365 acres, for which they had not been paid. The price for this was fixed by taking the aggregate of the treaty payments ($881,000) and dividing it by 4,500,000 acres, the area of the lands south of the line ceded by the Omahas to the United States, making the treaty price 19.6 cents per acre, at which rate the 483,365 acres for which the Indians were still to be paid amounted to $94,739.54. This was awarded to them.

The court found that of the $41,000 specified in Article 5, the Government expended $23,453.21 in carrying out the provisions of that article, and the balance, $17,546.79, remained in the hands of the Indian agents of the United States charged with the disbursement of the treaty funds, who were guilty of defalcations of this and other moneys to the aggregate amount of $18,202.19. This was allowed.

By the 7th Article of the treaty the United States agreed to protect the Omahas from the Sioux and all other hostile tribes as long as the President might deem such protection necessary. The court found that after the treaty the Sioux made repeated attacks upon the Omahas in the year of removal and subsequent years; that the United States was called upon by the Omahas to protect them, and such protection was necessary as soon as they removed to their new home and for several years thereafter, but no protection was afforded them by the United States. The Sioux killed 22 Omahas and stole 152 horses, the latter worth $30 per head. The court allowed $4,560 for the horses, but made no allowance for the Indians killed.

By a treaty concluded March 6, 1865 (14 Stat. 667), the United States agreed to pay the Omahas for the cession of a part of their reservation the sum of $50,000, to be expended "for goods, provisions, cattle, horses," etc., for their benefit. Pursuant to this, as the Court of Claims found, 103 head of stock cattle were delivered in the year 1867 for which $3,432.99 was paid out of money belonging to the Omahas. "These cattle when they reached the reservation were in bad condition and 50 of them died," of an average value of $33.33 per head, the 50 being worth $1,666.50. This sum was allowed.

Under Article 4 of the Treaty of 1854 and Article 2 of the Treaty of 1865 certain moneys were to be or might be expended for the benefit of the Indians in the way of improvements upon their reservation, and in other ways. Under these provisions, in the year 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. The Court of Claims found that this building was not used, and was not such a building as was contemplated by the treaties with the Omahas; and that of its cost, $3,127.08 was paid out of money belonging to them. This sum was allowed.

The principal reason for the Government's appeal lay in

the award to the tribe of $94,739.54 for the excess land north of the dividing line mentioned in the treaty; it having been contended in the court below that the tribe owned none of that land. The Court of Claims having found to the contrary, the Government moved this court, after taking appeal, for an order remanding the case with directions for further findings on the question. This motion having been overruled, as well as a counter motion submitted by the claimant for a certification of the entire record to this court, the Government concedes that it cannot contest the correctness of the judgment upon this item.

As to the item of $4,560 allowed as the value of horses killed by the Sioux Indians, we conclude that the objection of the Government is well founded. The obligation of the treaty was to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." The obligation depended upon an exercise of discretion by the President. There is no finding of a failure to provide any protection deemed by the President to be necessary; hence nothing to create a liability, legal or equitable, under the treaty clause.

The item of $18,202.19 allowed for defalcations of the Indian agents is not disputed.

The Government contests the allowance for the stock cattle upon the ground that the fact that they were in bad condition when they reached the reservation is not sufficient to show that they were in such condition when purchased; it being suggested that their defective condition upon reaching the reservation may have been due to the rigors and hardships of the drive from the market to the reservation. We cannot so interpret the finding; deeming its necessary import to be that the cattle either were in bad condition when purchased or were badly cared for on the way to the reservation. In either event the fault lay with the agents of the United States, and the Indians were entitled to credit for the sum allowed on this account.

The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of Article 4 of the Treaty of 1854 authorizing the President to expend a part of the fund "for such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes." We construe the finding, "This building was not used, and it was not such a building as was contemplated by the treaties," as meaning not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseparable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable. *Ross* v. *Day*, 232 U. S. 110, 116–117, and cases cited. The fact that the building was not used shows that the tribe did not accept it, and received no benefit from it. And since, because of its unfitness, they were not obliged to accept it, the expenditure of their money in its construction was a misappropriation of funds of the tribe "for purposes not for its material benefit," within the meaning of the jurisdictional act. We affirm the allowance of this item.

Upon the cross-appeal, assignments of error are based upon the disallowance of interest. As to the $94,739.54 awarded for the land north of the dividing line in excess of 300,000 acres, it is contended that payment of this consideration was a concurrent condition of the passing of title to the United States, and as equity considers that as done which ought to be done the purchase money was, potentially, in the Treasury of the United States as a trust fund, and ought to be treated as if invested for the benefit of the Indians at 5 per cent. interest, under Rev. Stats.,

§§ 2095, 2096 and 3659; or, in the alternative, that the assumption by the United States of title to the land without compliance with the concurrent condition of payment to the Indians and its sale by the United States to settlers was a breach of trust requiring the United States to account to the Omahas for the minimum sale price of $1.25 per acre. But the provisions of Articles 1 and 4 of the treaty show that the theory that the passing of title was conditioned upon the payment of the consideration money, or any part of it, is untenable; hence there was no such trust as is asserted; and the price of the land was fixed by the treaty itself. By Article 1 there was a cession *in præsenti* of the land south of the described line, with a proviso that if upon exploration the country north of the line did not prove to be a satisfactory and suitable location for the Indians the President might, with their consent, set apart and assign to them a suitable residence, in which case all of the country belonging to them north of the line "shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line." By Article 4 the consideration money for the principal cession was to be paid in the future, and either paid to the Indians direct or expended for their use and benefit from time to time, in the discretion of the President; and, by fair construction, the money that the Indians were to receive under Article 1 for the additional cession of the land north of the line, in the event of such cession taking effect, was subject to the same terms as to payment, at least to the extent that it was for the President to determine in his discretion whether it should be paid in cash to the Omahas or expended for their benefit "from time to time." Clearly, an intent to defer passing of title until payment of consideration is negatived; and this as truly with respect to the land north of the line as to that south of it. In both cases there was

simply a present cession, with a covenant for payment of the consideration thereafter, no mention being made of interest. Clearly, the provision of § 177, Judicial Code, is applicable: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It is contended, however, both as to the award for the excess land and as to another claim allowed, that as the jurisdictional act calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest (*Himely* v. *Rose*, 5 Cranch, 313, 319, being cited). But the jurisdictional act cannot be regarded as taking the case out of the usual rule. *Tillson* v. *United States*, 100 U. S. 43, 46; *Harvey* v. *United States*, 113 U. S. 243, 249. Nor does *United States* v. *Old Settlers*, 148 U. S. 427, support the claim for interest; for there the particular question was a subject of difference in the negotiation that preceded the treaty; a clause of the treaty itself provided that it should be submitted to the Senate of the United States for decision; the Senate allowed interest; and its determination was accepted by the United States as valid and binding. This court held that the decision of the Senate was controlling, and that therefore interest must be allowed upon that part of the claim to which it applied. See 148 U. S. 433, 449, 451, 452, 478.

The contention of claimant that the Court of Claims erred in not making a pecuniary award for the members of the Omaha tribe killed by the Sioux is covered by what we have said to show that there was error in making an allowance for the horses stolen by the Sioux; the same treaty provision governing both claims.

Other assignments are based upon the failure of the court to find certain facts in accordance with claimant's contention. These require no discussion, since our review is based upon the findings as made.

The judgment will be reversed as to the sum of $4,560 awarded for horses killed by the Sioux Indians, and in other respects affirmed.

Reversed in part; affirmed in part.

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

PHILADELPHIA & READING RAILWAY COMPANY *v.* HANCOCK.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 415. Argued March 2, 1920.—Decided June 1, 1920.

Cars of coal destined beyond the State, as shown by memoranda delivered to the conductor at the mine, were moving from the mine to a yard, where they were to be gathered into a train and thence moved some miles to a weighing station, there to be weighed and billed to specific consignees in another State, the freight charges to be assessed and paid from mine to consignee. *Held*, in applying the Federal Employers' Liability Act, that the first movement was part of an interstate movement. P. 286.

264 Pa. St. 220, reversed.

THE case is stated in the opinion.

Mr. George Gowen Parry for plaintiff in error and petitioner.

Mr. Hannis Taylor for defendant in error and respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The judgment below affirmed an award for respondent under the Workmen's Compensation Act of Pennsylvania, granted because of the death of her husband from an accident while in the petitioner's employ as a trainman.

After a writ of error had been sued out we allowed a writ of certiorari. The former must be dismissed; the case is properly here upon the latter.

If, when the accident occurred, the husband was employed in commerce between States the challenged judgment must be reversed. And he was so employed if any of the cars in his train contained interstate freight. Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156, 161; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *New York Central R. R. Co.* v. *Porter*, 249 U. S. 168; *Southern Pacific Company* v. *Industrial Accident Commission*, 251 U. S. 259.

The essential facts are not in controversy; the nature of the employment, therefore, is a question of law.

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap Colliery to Locust Summit Yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the State.

Pursuing the ordinary course these cars were hauled to

Locust Summit Yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some ten miles to Shamokin Scales where they were inspected, weighed and billed to specifically designated consignees in another State. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin Scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another State when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another State. *Coe* v. *Errol*, 116 U. S. 517; *Railroad Commission of Ohio* v. *Worthington*, 225 U. S. 101, 108; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 124, 126; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336, 341; *Baer Brothers Mercantile Co.* v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479.

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

Mr. Justice Clarke dissents.

Counsel for Parties.

OHIO VALLEY WATER COMPANY *v.* BEN AVON BOROUGH ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 128. Argued October 15, 1919; restored to docket for reargument January 12, 1920; reargued March 5, 8, 1920.—Decided June 1, 1920.

An order of a commission fixing the maximum future rates chargeable by a water company violates due process of law if no fair opportunity is provided by the state law for submitting the question whether the rates are confiscatory to the determination of a judicial tribunal upon its own independent judgment as to both law and fact. P. 289.

The Public Service Commission Law of Pennsylvania, as construed by the Supreme Court of the State in this case, fails to provide such an opportunity by way of appeal from the Public Service Commission to the Superior Court, nor does it clearly appear, in the absence of definitive construction by that court, that such opportunity exists by way of injunction proceedings under §31 of the act or otherwise under the law of the State. P. 290.

260 Pa. St. 289, reversed.

THE case is stated in the opinion.

Mr. William Watson Smith and *Mr. John G. Buchanan*, with whom *Mr. George B. Gordon* was on the briefs, for plaintiff in error.[1]

Mr. Berne H. Evans and *Mr. Leonard K. Guiler*, with whom *Mr. David L. Starr* and *Mr. Albert G. Liddell* were on the briefs, for defendants in error.

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[1] At the first hearing the case was argued by *Mr. William Watson Smith* and *Mr. George B. Gordon*, for plaintiff in error. *Mr. John G. Buchanan* was on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be $924,744 and ordered establishment of a new and lower schedule which would yield seven per centum thereon over and above operating expenses and depreciation.

Claiming the Commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at $1,324,621.80, reversed the order and remanded the proceeding with directions to authorize rates sufficient to yield seven per centum of such sum.

The Supreme Court of the State reversed the decree and reinstated the order saying—"The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate making purposes." It considered those items and held that as there was competent evidence tending to sustain the Commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith. "A careful examination of the voluminous record in this case has led us to the

conclusion that in the items wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Lake Erie & Western R. R. Co.* v. *State Public Utilities Commission*, 249 U. S. 422, 424. In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 347; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 660, 661; *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the State to provide.

Article VI, Public Service Company Law of Pennsylvania—

"Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the Commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of § 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled—"Practice and Procedure before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the Commission's orders must be determined upon appeal—*St. Clair Borough* v. *Tamaqua & Pottsville Electric Ry. Co.*, 259 Pa. St. 462; *Pittsburgh Railways Co.* v. *Pittsburgh*, 260 Pa. St. 424—but they do not definitely decide the point.

Taking into consideration the whole act, statements by

the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that § 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the Federal Constitution. On the contrary, after specifying that within thirty days an appeal may be taken to the Superior Court (§ 17) the act provides (§ 22): "At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law." But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to § 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in *Prentis* v. *Atlantic Coast Line Co., supra.* This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly entrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the State (including of course § 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed and the cause remanded there with instructions to take further action not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS, dissenting.

The Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon Borough and others, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable; and it prescribed a schedule of lower rates which it estimated would yield seven per cent. net upon the value of the property used and useful in the service. The company appealed to the Superior Court, contending that the property had been undervalued and that the rates were, therefore, confiscatory in violation of the Fourteenth Amendment. That court, passing upon the weight of the evidence introduced before the Commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the Commission to reform its valuation accordingly and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the Superior Court the Commission appealed to the Supreme Court of the State, contending that the Superior Court had in passing upon the weight of the evidence exceeded its jurisdiction. The Supreme Court sustained this contention; and holding, upon a careful review of the evidence and of the opinions below, that the Commission had been justified in its findings by "ample testimony" or "competent evidence" and that they were not unreasonable, reversed the decree of the Superior Court and reinstated the order of the Commission. 260 Pa. St. 289. The case comes here on writ of error under § 237 of the Judicial Code, as amended, the company claiming that its rights guaranteed by the Fourteenth Amendment have been violated: (1) because the Public Service Company Law, as construed by the Supreme Court of the State, denies the opportunity of a judicial review of the Commission's

order; and (2) that the order, which was reinstated by the Supreme Court, confiscates its property.

First: The Commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 228. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the Commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the Superior Court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law" either to reverse the order or to remand the record to the Commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the Superior Court; but it may remand the case to the Commission with directions to hear newly discovered evidence and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order a like appeal lies to that court. Act of July 26, 1913, No. 854, §§ 21–25, P. L. 1913, pp. 1427, 1428; Act of July 3, 1915, No. 345, P. L. 1915, p. 779. The Supreme Court construed this act as denying to the Superior Court the power to pass upon the weight of evidence; and the company contends that for this reason the review had does not satisfy the constitutional requirements of a judicial review.[1]

[1] In *Napa Valley Electric Co.* v. *Railroad Commission*, 251 U. S. 366, this court had before it in § 67 of the Public Utilities Act of California a procedure substantially similar to that provided by §§ 21–25 of the

Whether the appeal to the Superior Court fails for the reason assigned, or for some other reason, to satisfy the constitutional requirements of a judicial review we need not determine; because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the federal court, to another and unrestricted remedy; the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement. See *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 311; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661. For § 31 (P. L. 1913, p. 1429) provides:

"No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

Resort to suit for injunction is made easy in rate controversies like the present by § 41, p. 1432, in which it is provided that the penalties for failure to obey the Commission's orders imposed by §§ 35, 36 and 39, pp. 1430, 1431, shall not apply to an order declaring a rate unreasonable, if the tariff of rates actually charged is filed

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Pennsylvania Act set forth above. The court strongly intimated, if it did not decide, that under the provisions of the act the mere denial of a petition to the Supreme Court of the State for a writ of certiorari amounted to an adequate judicial determination of the petitioner's rights.

with the Commission. The appeal provided for in §§ 22–25 was under the original act also to the Court of Common Pleas, but was changed to the Superior Court by the Act of July 3, 1915.

No decisions of the Supreme Court of Pennsylvania construing § 31 of this act have been brought to our attention. The company contends, however, that the construction here suggested has been inferentially made untenable by *dicta* in *St. Clair Borough* v. *Tamaqua & Pottsville Electric Ry. Co.*, 259 Pa. St. 462; *Pittsburgh Railways Co.* v. *Pittsburgh*, 260 Pa. St. 424; *Klein-Logan Co.* v. *Duquesne Light Co.*, 261 Pa. St. 526. But the language relied upon was in each instance used by the court in making the point, not that the sole method of review was by appeal as distinguished from a bill in equity, but that the function of the courts was to review only after the Commission had in the first instance passed upon the case.

Where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was in effect an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389. And it is the contention of the plaintiff that because the Supreme Court did not weigh the evidence but reinstated the order of the Commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. The defendants, on the other hand,

insist that the action of the Supreme Court, in reinstating the order, found not merely that there was substantial evidence, but, upon a full review, that there was ample evidence to support the findings, and that the order was reasonable. They contend that the course pursued by the Supreme Court in making such review was that customarily followed in Pennsylvania, both by appellate courts on appeals from chancellors and by trial courts on exceptions to reports of auditors, masters or referees, *Barnes's Estate,* 221 Pa. St. 399; and they point out that the same method was pursued on appeal to the Supreme Court prior to the enactment of the Public Service Company Law, at a time when proceedings by consumers to secure reduction of water rates alleged to be unreasonably high were brought in the Court of Common Pleas, subject to appeal to the Supreme Court. *Turtle Creek Borough* v. *Pennsylvania Water Co.,* 243 Pa. St. 401.

The contention of neither party is in my opinion wholly correct. Both overlook the nature of the question of law which was under review by the Supreme Court. It is true that there was no statutory limitation upon the scope of its review; but it does not follow either that the Supreme Court weighed the evidence and found that the preponderance supported the findings, or that because it failed to weigh the evidence there was either a denial of due process or even a mistake of law. The questions of law before the Supreme Court were, first, whether the Superior Court had jurisdiction to weigh the evidence; second, whether in rendering its decision it weighed the evidence; and third, whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, would confiscate its property. On each of these questions the Supreme Court found against the contentions of the plaintiff. It held that the Superior Court did not have revisory legislative powers, but only the power to

review questions of law—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found; and in so holding it acted upon the established principle applied in reviewing the findings of administrative boards, that "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order," *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548. It, therefore, reinstated the order of the Commission. But it did not do so as an appellate court reviewing on the weight of the evidence findings of fact made by the Superior Court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra; San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 441, 442. The presumption created by § 23, P. L., p. 1427, by which an order of the Commission is made *prima facie* evidence of its reasonableness is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body reached after a full hearing. *Darnell* v. *Edwards*, 244 U. S. 564, 569.

Second. As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the Commission were supported by substantial evidence, the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued or unless some error in law is shown.

The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law, *Dower* v. *Richards*, 151 U. S. 658; but, also, where, as in chancery, the record contains all the evidence and it was open for consideration by and actually passed upon by the highest court of the State, *Egan* v. *Hart*, 165 U. S. 188; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 107. And this is true, although the existence of a federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the Fourteenth Amendment. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53, 65. This court may, of course, upon writ of error to a state court "examine the entire record, including the evidence, . . . to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter," *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591–593; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668; *Graham* v. *Gill*, 223 U. S. 643, 645. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence, *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 528, and to substitute the judgment therein of this court for that of the lower court; but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605.

Here, it is clear, there was substantial evidence to support the findings of the Commission; and no adequate reason is shown for declining to accept as conclusive the

facts found by the state tribunals. See *Portland Railway, Light & Power Co.* v. *Oregon Railroad Commission*, 229 U. S. 397; *Miedreich* v. *Lauenstein*, 232 U. S. 236. The rates are predicated on the company's earning seven per cent. net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that seven per cent. is a fair return upon the investment and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company and that the processes by which the Commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the Supreme Court of Pennsylvania said: "The ascertainment of the fair value of the property, for rate making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts." The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the Commission, affirmed by the highest court of the State, is conclusive upon this court. The case at bar is wholly unlike *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; and *Union Pacific R. R. Co.* v. *Public Service Commission of Missouri*, 248 U. S. 67, where this court reversed the judgments as matter of law upon the facts found by the Commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

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

EX PARTE PETERSON, AS RECEIVER OF THE INTERSTATE COAL COMPANY, INC., PETITIONER.

ON PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION.

No. 28, Original. Argued March 15, 1920.—Decided June 1, 1920.

The question whether an order of the District Court appointing an auditor in a law case will operate to deprive a party of the right of trial by jury, may be determined by this court on application for a mandamus and prohibition. P. 305.

In an action at law for goods sold and delivered, involving a counterclaim and many items of cross account between the parties, it is within the power of the District Court, when necessary to a proper consideration of the case by court and jury, to appoint, without consent of parties, an auditor to examine books and papers, make computations, and hear testimony, and whose report shall separate the disputed from the undisputed items, express an opinion on those in dispute and, while leaving the parties as free to call, examine and cross examine witnesses as if it had not been made, shall function as *prima facie* evidence of the facts found and conclusions reached, unless rejected by the court. P. 306.

While, prior to the adoption of the Constitution, auditors, so empowered, were not appointed either in England or in any of the Colonies in connection with trial by jury, their employment does not violate the Seventh Amendment, since it works no obstruction of the right of trial by jury, and the Amendment does not require that old forms of practice and procedure be retained. P. 307.

An order of court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. P. 311.

The auditor is an officer of the court which appoints him; the proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court. P. 312.

In the absence of any controlling act of Congress, the power to make

a compulsory reference to simplify and clarify the issues and make tentative findings is possessed by the District Court inherently, at law as in equity. P. 312.

In the absence of any state or federal statute, or rule of court, excluding them, the fees of an auditor in a case at law and the expense of his stenographer, are taxable as costs. P. 314.

But such costs cannot be taxed in whole or in part against the prevailing party, the rule of the federal courts at law being that that party is entitled to the entire costs in the trial court and that the court is without power to apportion them. P. 317.

Error in apportioning costs *held* not to require remedy by mandamus or prohibition, a suitable remedy being available by application to the District Court or, after final judgment, by writ of error from the Court of Appeals. P. 319.

Rule discharged; petition denied.

THE case is stated in the opinion.

Mr. Abram J. Rose, with whom *Mr. Anthony L. Williams* was on the brief, for petitioner:

The order appointing the auditor is in direct conflict with the Seventh Amendment and the acts of Congress regulating trials of actions at law in the federal courts and altogether without power and void. In accordance with that Amendment, Congress has prescribed how trials in actions at law in the federal courts shall be had. Rev. Stats., §§ 648, 649, 700, 861, 863, 866. These sections constitute within themselves a perfect and complete system governing the federal courts in the trial of civil causes. *Hodges* v. *Easton*, 106 U. S. 408; *Baylis* v. *Travellers' Insurance Co.*, 113 U. S. 316; *Capital Traction Co.* v. *Hof*, 174 U. S. 1.

The hearing ordered is neither a trial by the court, nor by a referee, nor by an arbitrator, nor any other proceeding contemplated by the Constitution and the acts of Congress for the disposition of common-law cases. It obviously is not a trial by jury. *Capital Traction Co.* v. *Hof*, *supra*.

Nor is it a determination by the court without the intervention of a jury. Neither the parties nor their attorneys of record have filed with the clerk a stipulation in writing waiving a jury. On the contrary, the order was granted against the objection and protest of the plaintiff.

Nor is it a hearing before the "auditor" as an arbitrator or referee, as such a proceeding must derive its whole efficacy from the consent of the parties.

Nor does it conform to the requirements of Rev. Stats., § 861, that the mode of proof in trial of actions at common law shall be by oral testimony and examination of witnesses in open court.

Nor is it a deposition *de bene esse* under Rev. Stats., § 863, or a *dedimus potestatem* according to common usage under § 866.

The proceeding, therefore, clearly is not one provided for by the Constitution or by the acts of Congress for the disposition of an action at law.

It is true the auditor is "not to finally determine any of the issues in this action"; but in order to accomplish any purpose whatsoever the report of the auditor must at least be regarded as evidence, 254 Fed. Rep. 625. But as evidence it would be wholly incompetent, not being procured or based upon oral testimony and examination of witnesses in open court and being neither a deposition *de bene esse* nor a commission under a *dedimus potestatem*. At best it would be a record of the statements of persons before an officer unknown to the federal law, to whom no statute gives the right to administer an oath, and for false swearing before whom no punishment could be imposed, to whose rulings on the evidence no exception could be taken that could legally be reviewed, and whose report would be without force or effect as evidence or for any other purpose.

It is claimed that in the federal courts where a jury trial is a constitutional right in an action at law, an

auditor's report can be used as an aid to the court and jury as a method of simplifying the issues. In the present case there are no issues which need to be simplified for a proper hearing and determination before the court and jury, or at least none which could not be simplified by a bill of particulars as well, if not better, than by a hearing before the auditor. If, however, the fact were otherwise, the order is wholly without power and altogether void. *Howe Machine Co.* v. *Edwards*, 15 Blatchf. 402; *Sulzer* v. *Watson*, 39 Fed. Rep. 414; *Swift & Co.* v. *Jones*, 145 Fed. Rep. 489; *Ex parte Fisk*, 113 U. S. 713.

The cases cited in support of the order by the court below are either distinguishable on their facts or in direct conflict with the Constitution and acts of Congress referred to. Distinguishing: *Davis* v. *St. Louis & S. F. Ry. Co.*, 25 Fed. Rep. 786; *Fenno* v. *Primrose*, 119 Fed. Rep. 801; *Corporation of St. Anthony* v. *Houlihan*, 184 Fed. Rep. 252; *Craven* v. *Clark*, 186 Fed. Rep. 959; *Vermeule* v. *Reilly*, 196 Fed. Rep. 226; *United States* v. *Wells*, 203 Fed. Rep. 146.

A writ of mandamus or of prohibition is the proper remedy. *Ex parte Simons*, 247 U. S. 231; *McClellan* v. *Carland*, 217 U. S. 268; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Ex parte Metropolitan Water Co.*, 220 U. S. 539.

Mr. George Zabriskie for respondent.

Mr. Justice Brandeis delivered the opinion of the court.

This is a petition for a writ of mandamus and / or prohibition brought by Walter Peterson, receiver of the Interstate Coal Company, against the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York. The facts and the specific relief sought are these:

Peterson had brought an action at law in that court against Arthur Sidney Davison to recover a balance of $21,014.43, alleged to be due for coal sold and delivered as shown by a long schedule annexed. The answer substantially admitted the items set forth in the schedule filed by plaintiff, but denied that it presented a full account of the transactions between the parties and alleged that there were other deliveries of coal and other payments which the defendant had made, and also that he was entitled to additional allowances. It further alleged, by way of counter claim, that the plaintiff was indebted to him for failure to perform its contracts for coal in the sum of $9,999.10. In response to a demand for a bill of particulars, defendant filed schedules containing more than two hundred items which he proposed to establish by way of defense.

Upon motion of defendant and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. Rep. 625):

"With instructions to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury; but not to finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury on the trial; and the Auditor to have power to compel the attendance of, and administer the oaths to, witnesses; the expense of the Auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the Trial Judge."

The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute and, also, to set forth the detailed facts on which the specific claims made were rested;

but the auditor was also thereby required to express his opinion on disputed issues, thus:

"6. The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"7. His opinion as to the net amount due on each invoice of coal sold and delivered to defendant."

Thereupon, application was made here for leave to file this petition. It prays that Judge Hand and the auditor named be prohibited from proceeding under the order appointing him; and it prays also, that Judge Hand, or such other judge who may at the time hold the trial term of that court, be commanded to restore the case to the trial calendar and that the same be tried in the regular and usual way. Leave to file the petition was granted January 12, 1920, and an order to show cause issued. The petitioner insists that the District Court is without power to make the order appointing the auditor and that proceedings thereunder would violate the Seventh Amendment to the Federal Constitution.

First: Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties

and the Courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition.

Second: The question presented is one of power in the District Court. If, under any circumstances, it could appoint an auditor with the duties here prescribed without the consent of the parties, the facts clearly warranted such action in this instance. The plaintiff sued for a balance alleged to be due on an account annexed containing 298 items. The defendant set up another account containing 402 items. Included in the latter, besides certain charges against defendant for additional deliveries, were over 30 cash items of credit not allowed for in the plaintiff's account. These 402 items were alleged to arise out of 123 different deliveries of cargoes (or partial cargoes) of coal made on 91 different days during a period of eleven months. The coal delivered was of various kinds and the invoice prices for the same kind differed from time to time. In respect to most of these deliveries, there were claims for allowances by way of penalties, commissions and cash discounts; and, as to some, there were claims for allowances on account of freight.

The District Court found that in order to render possible an intelligent consideration of the case by court and jury it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy; and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions the auditor would be required not merely to examine books, vouchers and

other papers and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy judgment on the disputed items, would serve also to narrow the field of controversy. For such a tentative trial acts as a sifting process by which misunderstandings and misconceptions as to facts are frequently removed. In the course of it many contentions or assumptions made by one party or the other are abandoned. Agreement is thus reached as to some of the facts out of which liability is alleged to arise, even when the items to which they relate remain in dispute. See *Fair* v. *Manhattan Insurance Co.*, 112 Massachusetts, 329.

The order expressly declared that the auditor should not "finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury on the trial;" but it did not provide affirmatively what use should be made of the report at the trial. It may be assumed that, if accepted by the court, the report would be admitted at the trial before the jury as *prima facie* evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report being evidence sufficient to satisfy the burden of proof (*Wyman* v. *Whicher*, 179 Massachusetts, 276) would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

Third: Prior to the adoption of the Federal Constitution there did not exist in England, or so far as appears in any of the colonies, any officer, permanent or temporary,

who, in connection with trials by jury, exercised the powers of an auditor above described. An official called "auditor" had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies; but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment *quod computet* had been entered. But the parties were entitled to a jury trial before the interlocutory judgment was rendered; and further issues of fact arising before the auditor were not passed upon by him, but were certified to the court for trial by a jury. The use of this form of action was limited to cases where the defendant was under obligation to account to the plaintiff as guardian, bailiff, or receiver of his property.[1] In Maryland, by Act of 1785, c. 80, § 12, the power of the court to appoint auditors was extended to all cases in which it might be necessary to examine and determine accounts; but the jury trial was not affected thereby, for the proceedings thereon were to be "as in cases of account."[2] In Connecticut auditors were appointed by the court in actions of "book debt"—and the same practice was early introduced in Vermont and other States; but in this action the report of the auditor, if accepted by the court, is a substitute for the jury and operates to determine the issues of fact.[3] In New York

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[1] See Prof. Langdell, 2 Harvard Law Review, 241, 251–255; *Holmes* v. *Hunt*, 122 Massachusetts, 505, 512.

[2] See *United States* v. *Rose*, 2 Cranch C. C. 567; *Barry* v. *Barry*, 3 Cranch C. C. 120; *Bank of United States* v. *Johnson*, 3 Cranch C. C. 228. The report was not admitted before the jury as *prima facie* evidence of the truth of the statements or conclusions of the auditor. *McCullough* v. *Groff*, 2 Mackey (D. C.), 361, 366.

[3] *Sulzer* v. *Watson*, 39 Fed. Rep. 414; Connecticut General Statutes, § 5752 (ed. of 1918); Act of Vermont, October 21, 1782, Slade's Ver-

actions on long accounts are determined now, as in colonial days, by referees instead of by a jury.[1]

The office of auditor with functions and powers like those here in question was apparently invented in Massachusetts. It was introduced there by c. 142 of the Acts of the Legislature of the year 1818; and as a part of the judicial machinery it has received the fullest development in that State. No act of Congress has specifically authorized the adoption of the practice in the federal courts. We have therefore to decide, not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the District Court as a trial court.

Fourth: The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. *Walker* v. *New Mexico & Southern Pacific R. R. Co.*, 165 U. S. 593, 596. Compare *Twining* v. *New Jersey*, 211 U. S. 78, 101. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New de-

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mont State Papers, 456; *Hall* v. *Armstrong*, 65 Vermont, 421; Missouri, Wagner's Stat. 1041, § 18; *Edwardson* v. *Garnhart*, 56 Missouri 81.

[1] *Steck* v. *Colorado Fuel & Iron Co.*, 142 N. Y. 236. This fact has no bearing on the constitutional question involved here. The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute. *United States* v. *Wonson*, 1 Gall. 5, 20; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 8; see also *United States* v. *Rathbone*, 2 Paine, 578; *Howe Machine Co.* v. *Edwards*, 15 Blatchf. 402; *Sulzer* v. *Watson*, 39 Fed. Rep. 414; *United States* v. *Wells*, 203 Fed. Rep. 146, 149.

In *Davis* v. *St. Louis & S. F. Ry. Co.*, 25 Fed. Rep. 786, a case involving a long account, a referee was appointed to report; apparently to determine the facts in accordance with the practice prevailing in Kansas where the court was sitting.

vices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.[1] Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. *United States* v. *Gilmore*, 7 Wall. 491, 494; *Tucker* v. *United States*, 151 U. S. 164, 168. No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon. *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. *Capital Traction Co.* v. *Hof*, 174 U. S. 1. In view of these decisions it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as

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[1] See "Trial by Jury and The Reform of Civil Procedure," by Prof. A. W. Scott, 31 Harvard Law Review, 669.

evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. *Marx* v. *Hanthorn*, 148 U. S. 172, 182; *Turpin* v. *Lemon*, 187 U. S. 51, 59; *Reitler* v. *Harris*, 223 U. S. 437. In *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430, it was held that the provision in § 16 of the Interstate Commerce Act making the findings and order of the Commission *prima facie* evidence of the facts therein stated in suits brought to enforce reparation awards, does not infringe upon the right of trial by jury. See also *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473; *Chicago, Burlington & Quincy R. R. Co.* v. *Jones*, 149 Illinois, 361, 382. In the *Meeker Case* this court relied especially upon *Holmes* v. *Hunt*, 122 Massachusetts, 505, and called attention to the fact that there the statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury.[1] The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce

[1] Acts making findings in the tentative hearing before an auditor *prima facie* evidence were held not to infringe the right of trial by jury in Maine; *Howard* v. *Kimball*, 65 Maine, 308, 327; and in New Hampshire; *Doyle* v. *Doyle*, 56 N. H. 567; *Perkins* v. *Scott*, 57 N. H. 55. A different conclusion was reached in *Francis* v. *Baker*, 11 R. I. 103, and *Plimpton* v. *Town of Somerset*, 33 Vermont, 283.

Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court.

That neither the hearing before the auditor, nor the introduction of his report in evidence abridges in any way the right of trial by jury was the conclusion reached in 1902 in the District of Massachusetts in *Primrose* v. *Fenno*, 113 Fed. Rep. 375; 119 Fed. Rep. 801, the first reported case in which an auditor was appointed with the powers here conferred. The practice there established has been followed in the Southern District of New York, *Vermeule* v. *Reilly*, 196 Fed. Rep. 226; and in the Eastern District of Tennessee, *United States* v. *Wells*, 203 Fed. Rep. 146.

Fifth: There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon District Courts power to make the order. There is here, unlike *Ex parte Fisk*, 113 U. S. 713, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts, 80, 87–90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by

appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon; these are among the purposes for which such aids to the judges have been appointed. *Kimberly* v. *Arms*, 129 U. S. 512, 523. Whether such aid shall be sought is ordinarily within the discretion of the trial judge; but this court has indicated that where accounts are complex and intricate, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself. *Heirs of P. F. Dubourg de St. Colombe* v. *United States*, 7 Pet. 625; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167, 180. Of the appointment made in *Field* v. *Holland*, 6 Cranch, 8, 21, Mr. Chief Justice Marshall said: "It is a reference to 'auditors,' a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made." And in *Railroad Company* v. *Swasey*, 23 Wall. 405, 410, Mr. Chief Justice Waite said of the master's report: "Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

What the District Judge was seeking when he appointed the auditor in the case at bar was just such aid. He required it himself; because without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues submitted for their determination and

of directing their attention to the matters actually in issue. *United States* v. *Philadelphia & Reading R. R. Co.*, 123 U. S. 113, 114. The hearing and report were also essential as shown above to enable the jury to perform their specific duty. Owing to the difference in the character of the proceedings and of the questions ordinarily involved, the occasion for seeking such aid as is afforded to a judge by special masters, auditors or examiners arises less frequently at law than in equity. A compulsory reference with power to determine issues is impossible in the federal courts because of the Seventh Amendment, *United States* v. *Rathbone*, 2 Paine, 578, but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. *Heckers* v. *Fowler*, 2 Wall. 123. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court.

Sixth: The clause in the order which provides that "the expense of the Auditor, including the expense of a stenographer, (to) be paid by either or both parties to this action, in accordance with the determination of the Trial Judge" requires special consideration. As Congress [1] has made

[1] In Massachusetts the expense of the auditor was prior to 1878 taxed in all cases as costs to be paid by the defeated party. See Acts of 1818, c. 142; Rev. Stats. (1836), c. 96, § 31; Gen. Stats. (1860), c. 121, § 50; Act of March 16, 1867, c. 67; Act of June 6, 1873, c. 342. By Act of April 23, 1878, c. 173, the expense of the auditor in cases tried in the Superior or in the Supreme Judicial Court was made payable by the

no provision for paying from public funds either the fees of auditors or the expense of the stenographer, the power to make the appointment without consent of the parties is practically dependent upon the power to tax the expense as costs. May the compensation of auditor and stenographer be taxed as costs; and, if so, may the expense be imposed in the discretion of the trial court upon either party?

Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity Rule 68 provides for taxing the fees of masters and Rule 50 for the expense of a stenographer. Both rules embody substantially the practice which had theretofore prevailed generally in equity proceedings, and which in the Southern District of New York had been followed not only in equity, *American Diamond Drill Co.* v. *Sullivan Machine Co.*, 32 Fed. Rep. 552; 131 U. S. 428; *Brickill* v. *Mayor, etc., of City of New York*, 55 Fed. Rep. 565; *Hohorst* v. *Hamburg-American Packet Co.*, 76 Fed. Rep. 472; but also in admiralty, *The E. Luckenback*, 19 Fed. Rep. 847; *Rogers* v. *Brown*, 136 Fed. Rep. 813. The expense of printing the records and briefs in the trial court has been made by rule of court in

county. See also Rev. Laws (1902), c. 165, § 60; Act of June 5, 1911, c. 237; Act of 1914, c. 576.

In Maine the fees of the auditor were prior to 1897 taxed as costs in favor of the prevailing party. Laws (1821), c. 59, § 25; Acts of 1826, c. 347, § 1; Rev. Stats. (1883), c. 82, § 70. Since the Act of March 12, 1897, c. 224, the fees and necessary expenses of the auditors are paid by the county.

In New Hampshire the fees of the auditor are also taxable as costs in favor of the prevailing party; but the court may now, in its discretion, order them paid by the county. Act of June 23, 1823, c. 19, § 1; Act of July 20, 1876, c. 35, § 4; Pub. Stats. (1901), c. 227, § 7.

several of the circuits taxable as costs against the defeated party, *Hake* v. *Brown*, 44 Fed. Rep. 734. Compare *Kelly* v. *Springfield Ry. Co.*, 83 Fed. Rep. 183; *Tesla Electric Co.* v. *Scott*, 101 Fed. Rep. 524. As early as 1843 Mr. Justice Story, sitting at circuit in *Whipple* v. *Cumberland Cotton Manufacturing Co.*, 3 Story, 84, approved, in an action at law for damages, although not specially authorized by any rule, the order of a survey, as "necessary for the true understanding of the cause on both sides; " and ordered the expense paid by them. In cases in which courts have refused to tax as costs copies of stenographer's minutes and other expenditures incident to the litigation, attention has been called to the fact that they were made for the benefit of the party as distinguished from expenditures incurred under order of the court to make possible or to facilitate its consideration of the case. *Stallo* v. *Wagner*, 245 Fed. Rep. 636; *New Hampshire Land Co.* v. *Tilton*, 29 Fed. Rep. 764. But see *Bridges* v. *Sheldon*, 7 Fed. Rep. 17, 42.

The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Mr. Justice Woodbury in *Hathaway* v. *Roach*, 2 Woodb. and M. 63; Mr. Justice Nelson in *Costs in Civil Cases*, 1 Blatchf. 652; *The Baltimore*, 8 Wall. 377. In *Hathaway* v. *Roach*, p. 67, it is said to have been the usage of the federal courts "to conform to the state laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." And in *The Baltimore*, pp. 390–391, this court stated that "the costs taxed in the Circuit and District Courts were the same as were allowed at that time in the courts of the State, including such matters as travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the

services of referees, auditors, masters, and assessors, and many other matters not embraced in the fee bills, since passed by Congress." [1] Neither the Act of February 26, 1853, c. 80, 10 Stat. 161, Rev. Stats., § 983, nor any later act of Congress or rule of court deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the federal courts. See *Huntress* v. *Town of Epsom*, 15 Fed. Rep. 732. But, so far as appears, the preliminary hearing before an auditor in aid of jury trials is not a part of the judicial machinery of that State. The nearest analogy to it is the reference had in actions at law on long accounts as a substitute for a jury trial. The expense of the compulsory reference in such actions is so taxable. Code Civ. Proc., § 3256. As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case.

Seventh: The further question is whether the District Court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law followed by the federal courts since their organization, preclude its adoption.

While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held

[1] *Shreve* v. *Cheesman*, 69 Fed. Rep. 785, 789; see also *Scatcherd* v. *Love*, 166 Fed. Rep. 53; *Michigan Aluminum Foundry Co.* v. *Aluminum Co. of America*, 190 Fed. Rep. 903, 904.

that in actions at law the prevailing party is entitled to costs as of right: (compare *United States* v. *Schurz*, 102 U. S. 378, 407), except in those few cases where by express statutory provision or by established principles costs are denied.[1] It has also been generally held that this right to costs of the prevailing party in actions at law extends to the *entire* costs in the trial court, and that the court is without power to make an apportionment based upon the fact that the prevailing party has failed in a part of his claims or that for other reasons only a part or none of the costs should in fairness be allowed.[2] This rule of practice established by long usage is confirmed by the language of § 983 of the Revised Statutes. It would, therefore, be held to prevail over a rule, if any, to the contrary established in the courts of the State. But the practice in the courts of New York appears to be in this respect in entire harmony with that of the federal courts.[3] In *Whipple* v. *Cumberland Cotton Manufacturing Co.*, *supra*, the expense of the survey ordered by the court was imposed by it equally on the two parties; and the same disposition was made in *Primrose* v. *Fenno*, *supra*, where the auditor had been appointed at the instance of the court without objection by either party. But in *Houlihan* v. *Corporation of*

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[1] For instance, Rev. Stats., § 968, denying costs to a plaintiff or petitioner who recovers less than $500.

[2] *Crabtree* v. *Neff*, 1 Bond, 554; *Hooe* v. *Alexandria*, 1 Cranch C. C. 98; *Bartels* v. *Redfield*, 47 Fed. Rep. 708; *Trinidad Asphalt Paving Co.* v. *Robinson*, 52 Fed. Rep. 347; *United States* v. *Minneapolis, etc., Ry. Co.*, 235 Fed. Rep. 951, 953; *West End St. Ry. Co.* v. *Malley*, 246 Fed. Rep. 625, 627; *Sears, Roebuck & Co.* v. *Pearce*, 253 Fed. Rep. 960, 962; *Wheeler* v. *Taft*, 261 Fed. Rep. 978.

[3] The general rule that in actions at law the prevailing party is entitled as of right to the taxable costs prevails in New York; and there is a further provision that when plaintiff demands a judgment for a sum of money only, the plaintiff, if prevailing, is entitled to the costs whether the suit be one at law or in equity. *Murtha* v. *Curley*, 92 N. Y. 359; *Norton* v. *Fancher*, 92 Hun, 463.

St. Anthony, 173 Fed. Rep. 496; 184 Fed. Rep. 252; where the auditor was appointed by consent of the parties, the same court taxed both the auditor's and the stenographer's fees against the losing party, holding that it had discretion, if it was not obliged to do so; and a petition for writ of certiorari was denied by this court; 220 U. S. 613.

Although the order was erroneous in declaring that the expense of the auditor shall, instead of abiding the result of the action, be paid by one or both of the parties in accordance with the determination of the trial judge, the error does not require that either of the extraordinary remedies applied for here be granted. If the petitioner deems himself prejudiced by the error he may get redress through application to the District Court for a modification of the order; or after final judgment, on writ of error, from the Circuit Court of Appeals. *In re Morrison*, 147 U. S. 14, 26. The petition for writs of mandamus and/ or prohibition is

Denied.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.

PENNSYLVANIA RAILROAD COMPANY *v.* KITTANNING IRON & STEEL MANUFACTURING COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 301. Argued March 26, 1920.—Decided June 1, 1920.

The policy of the "Uniform Demurrage Code" is to treat the car as the unit and fix a standard of diligence in releasing cars independent of the circumstances of the particular consignee. P. 324.

The "Uniform Demurrage Code" fixes 48 hours as the "Free Time"

during which a car may be held for unloading without demurrage charge, but provides, (1) the "Bunching Rule," designed to relieve from charges due to the carrier's act in delivering cars in numbers exceeding the daily rate of shipment, and, (2) the "Average Agreement Rule," under which the "Bunching Rule" is inapplicable but charges for detaining cars more than 48 hours are reduced by credit given for other cars released within 24 hours, during the calendar month; and it further provides that demurrage shall not be collected "When shipments are frozen while in transit so as to prevent unloading during the prescribed free time," provided the consignees "make diligent effort to unload such shipments." *Held*, that a consignee, party to the Average Agreement plan, which was prevented from unloading a number of carloads of frozen ore during the free time, due to their accumulation and delivery by the carrier in numbers exceeding its facilities for thawing and unloading, was not relieved from demurrage by the clause governing frozen shipments. P. 323.

263 Pa. St. 205, reversed.

THE case is stated in the opinion.

Mr. Henry Wolf Biklé and *Mr. Frederic D. McKenney* for petitioner.

Mr. R. L. Ralston, with whom *Mr. H. V. Blaxter* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Uniform Demurrage Code discussed in *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 283, was duly published as a part of the freight tariffs of the Pennsylvania Railroad prior to November 1, 1912. From time to time during the months of December, 1912, and February and March, 1913, the Kittanning Iron and Steel Manufacturing Company received from the railroad an aggregate of 227 cars of iron ore, all interstate shipments; and on account of them the railroad claimed $1,209 for demurrage.

The company refused to pay these, among other, demurrage charges, whereupon this action was brought in a state court of Pennsylvania to recover the amount. The trial court disallowed the claim. The judgment there entered was affirmed by the Supreme Court of the State; and a petition by the Railroad for a writ of certiorari was granted, 249 U. S. 595.

Before receipt of any of the cars the Kittanning Company had entered into an average agreement with the railroad as provided in Rule 9.[1] The aggregate number of days detention of these cars after they reached the company's interchange tracks (in excess of the free time under the average agreement), was 1209; and the demurrage

[1] Rule 9. Average Agreement: When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by Rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

SECTION A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5) days' credit be applied in cancellation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

SECTION B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and $1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

SECTION C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under Section A, Paragraphs 1 and 3, or Section B of Rule 8.

charge fixed by Rule 7 was $1 for each day, or fraction thereof, that a car is detained after the expiration of the free time. The ore in these cars was frozen in transit; and the company insisted that this detention of the cars beyond the "free time" had resulted from this fact and claimed exemption from demurrage charges under Rule 8, Section A, Subdivision 2, which declares that none shall be collected,

"When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments."

The Kittanning Company had at its plant a device for thawing cars of frozen ore through "steaming." By this means it was able to unload as much as five cars of frozen ore a day. The daily average number of cars of frozen ore received during the three months was far less than five cars; but the number received on single days varied greatly. On many days none were received; on some only one or two; and on some, as many as thirty-five. The railroad contended that the standard to be applied for determining, under the rule here in question, whether unloading within the prescribed free time was prevented by the shipments being frozen, was, as in other cases under the code, the conditions applied to the car treated as a unit. It insisted, therefore, that the determination in any case whether a detention was due to the fact that the contents of a car were frozen could not be affected by the circumstances that a large number of such cars happened to have been "bunched"; and that, as each car considered separately could have been unloaded within the free time, the consignee must bear whatever hardship might result from many having arrived on the same day, unless relief were available to him either under the "Bunching

Rule" [1] or under the "Average Agreement." The question presented is that of construing and applying the frozen shipments clause. But, in order to determine the meaning or effect of that clause, it is necessary that it be read in connection with others.

The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate. The aim of the code was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable. In fixing the free time the framers of the code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered.

When they prescribed forty-eight hours as the free time they fixed the period which, in their opinion, was reasonably required by the average shipper to avail himself of the carrier's service under ordinary circumstances. The framers of the code made no attempt to equalize conditions among shippers. It was obvious that the period fixed was more than would be required by many shippers most of the time, at least for certain classes of traffic; and that it was less than would be required by some shippers, most of the time, for any kind of traffic. Among the reasons urged for rejecting consideration of the needs or

[1] Rule 8, Section B. Bunching. . . . 2. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the railroad company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claims to be presented to railroad company's agent within fifteen (15) days.

merits of the individual shipper, was the fear that, under the guise of exempting shippers from demurrage charges because of conditions peculiar to them, unjust discrimination and rebates to favored shippers might result.

In applying the allowance of free time and the charges for demurrage, the single car was treated throughout as the unit, just as it is in the making of carload freight rates. Compare *Darling & Co.* v. *Pittsburgh, etc., Ry. Co.*, 37 I. C. C. 401. The effect on the charges of there being several cars involved was, however, provided for by two rules: (1) The Bunching Rule, under which the shipper is relieved from charges, if by reason of the carrier's fault, the cars are accumulated and detention results. (2) The Average Agreement Rule, under which a monthly debit and credit account is kept of detention and the shipper is relieved of charges for detaining cars more than forty-eight hours by credit for other cars released within twenty-four hours.

It was urged that the use in this rule of the word "shipment" and not "car," implies that the whole consignment is to be considered in determining whether the delay was caused by the ore being frozen. Obviously the word shipment was used because it is not the car, but that shipped in it, which is frozen. Furthermore, the agreed facts do not state whether the cars, which by their number prevented unloading within the forty-eight hours, came in one consignment or in many.

Excessive receipts of cars is a frequent cause of detention beyond the free time even where shipments are not frozen. From the resulting hardship either the Bunching Rule or the Average Agreement ordinarily furnish relief. If the company had not elected to enter into the Average Agreement, the Bunching Rule might have afforded relief under the circumstances which attended the deliveries here in question. Since any one of the 227 cars on which demurrage was assessed might have been unloaded within

the forty-eight hours free time, the undue detention was not the necessary result of the ore therein being frozen, but was the result of there being an accumulation of cars so great as to exceed the unloading capacity. Compare *Riverside Mills* v. *Charleston & Western Carolina Ry. Co.*, 20 I. C. C. 153, 155; *Central Pennsylvania Lumber Co.* v. *Director General*, 53 I. C. C. 523. It does not seem probable that those who framed and adopted the frozen shipment rule and the Interstate Commerce Commission, which approved it, intended therein to depart from the established policy of treating the single car as the unit in applying demurrage charges as well as in applying carload freight rates. Such was the conclusion reached in the informal ruling of the Commission to which counsel called attention.

The judgment of the Supreme Court of Pennsylvania is *Reversed.*

CREAM OF WHEAT COMPANY *v.* COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA.

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

No. 302. Argued April 29, 1920.—Decided June 1, 1920.

A State may tax a domestic corporation on the excess of the market value of its outstanding stock over the value of its real and personal property and certain indebtedness although the corporation does no business within the State and has there no tangible real or personal property nor any papers by which intangible property is customarily evidenced, and it is immaterial whether the tax be considered a franchise or a property tax. P. 328.

The limitation of the Fourteenth Amendment upon the power of a

State to tax the property of its residents which has acquired a permanent situs outside the State does not apply to intangible property even though it has acquired a "business situs" and is taxable in another State. P. 329.

The Fourteenth Amendment does not prevent double taxation. P. 330.

170 N. W. Rep. 863, affirmed.

THE case is stated in the opinion.

Mr. Harry S. Carson and *Mr. Rome G. Brown*, with whom *Mr. Arnold L. Guesmer* and *Mr. Edwin C. Brown* were on the briefs, for plaintiff in error.

Mr. Albert E. Sheets, Jr., Assistant Attorney General of the State of North Dakota, and *Mr. George E. Wallace*, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the statutes of North Dakota, as construed by the Supreme Court of the State, a manufacturing corporation organized under its laws is taxed in the following manner: Its real and personal property within the State is assessed like that of an individual. In addition there is assessed against it an amount equal to the aggregate market value of its outstanding stock less the value of its real and personal property and certain indebtedness. The corporation in submitting its list of property for purposes of taxation is required to enter this additional amount as "bonds and stocks" under item 23 in the prescribed statutory schedule. On this additional amount, as upon the value of its real and personal property, the corporation is taxed at the same rate and in the same manner as individuals are upon their property. The statute does not in terms impose a franchise tax as distinguished, or separated, from a tax on personal property, but the Supreme Court of

the State construes the tax upon this additional amount as "in substance or effect, to some degree at least, a tax upon the privilege of being a corporation;" or, in other words, a tax upon the corporate franchise granted it by the State. Individuals are not required to include in their lists of taxable property any share or portion of the capital stock or property of any corporation which such corporation is required to list. Compiled Laws of North Dakota for 1913, §§ 2110, 2103, 2102, 2077. *Grand Forks County* v. *Cream of Wheat Co.*, 170 N. W. Rep. 863.

The Cream of Wheat Company was incorporated under the laws of North Dakota after the enactment of the tax legislation above described and it maintained throughout the years 1908 to 1914, both inclusive, a public office in the City of Grand Forks in said State for the transaction of its usual and corporate business. Its manufacturing, commercial and financial business was conducted wholly without the State; and it had not at any time during any of those years within the State either any tangible property real or personal or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in States other than North Dakota. In 1914 the officials of North Dakota assessed against the company in the manner prescribed by law for each year from 1908 to 1913, both inclusive, a tax at the uniform rate on the sum of $50,000, as representing personal property, to wit, "bonds and stocks," which had escaped taxation. They also assessed a similar tax for the then current year. The taxes not being paid, this action was brought in a state court for the amount; and the facts above stated were proved. The trial court entered judgment for the defendant; but its judgment was reversed by the Supreme Court of the State which entered judgment for the county for the full amount of the taxes. The case is here on writ of error under § 237 of the Judicial Code.

The company concedes that the State of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws even though it had no property within the State. The contentions are that the Supreme Court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the Fourteenth Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen, 298. The view also renders it unnecessary to consider whether the company having been incorporated in North Dakota after the enactment of the law in question is in a position to complain. Compare *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 84; *International & Great Northern Ry. Co.* v. *Anderson County*, 246 U. S. 424, 433; *Corry* v. *Baltimore*, 196 U. S. 466.

The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*,

188 U. S. 385 (an incorporeal hereditament partaking of the nature of real property) [1] and the tangible personal property permanently outside the State involved in *Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, and *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, were held immune from taxation by the States in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a sea-going vessel, the property has no permanent situs anywhere. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 68. Nor has it any application to intangible property, *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*, p. 205; *Hawley* v. *Malden*, 232 U. S. 1, 11, even though the property is also taxable in another State by virtue of having acquired a "business situs" there, *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, 59. As stated in that case: "It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 146, 162, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

Counsel for the company direct our attention to cases like *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 227; 166 U. S. 185, which hold that a State may tax a foreign corporation not only on the value of its tangible property within the State but also on that proportion of its entire

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[1] See *Hawley* v. *Malden*, 232 U. S. 1, 12; *Bowman* v. *Wathen*, 2 McLean, 376; *Lewis* v. *Gainesville*, 7 Alabama, 85; *Dundy* v. *Chambers*, 23 Illinois, 369; *The Queen* v. *Cambrian Ry. Co.*, L. R. 6 Q. B. 422. Compare *Thompson* v. *Schenectady Ry. Co.*, 124 Fed. Rep. 274. The "franchise" referred to in *Home Insurance Co.* v. *New York*, 134 U. S. 594, 601, as personal property, consisted in the right to do business as a corporation, see p. 599.

intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once and that it may be subjected to double taxation. To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. *Coe* v. *Errol*, 116 U. S. 517, 524; *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Fidelity & Columbia Trust Co.* v. *Louisville, supra.*

Affirmed.

UNITED STATES *v.* NORTH AMERICAN TRANSPORTATION & TRADING COMPANY.

NORTH AMERICAN TRANSPORTATION & TRADING COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 319, 320. Argued April 30, 1920.—Decided June 1, 1920.

When the Government without condemnation proceedings appropriates with legislative authority private property for a public use, it impliedly promises to pay therefor, but in order that the Government be liable it must appear that the officer taking possession of the property is authorized so to do by Congress or by the official on whom Congress conferred the power. P. 333.

The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and of May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for quarters for troops, sufficiently authorize the Secretary of War to take land for this purpose, but vest no authority in a general commanding a department. *Held*, that the action of the general in taking possession of the land was tortious and no liability on the part of the Government was created until the action was approved by the

Secretary of War, and since this approval occurred within six years before the commencement of this suit the suit was not barred by § 156 of the Judicial Code. P. 333.

The President's order reserving a tract largely public land, "subject to any legal rights which may exist to any land within its limits" did not mean that private land actually occupied for a public use was not taken, but merely that the right to compensation was recognized, and, in any event, the continued occupation of the private land and the erection of buildings thereon was such an appropriation as would give rise to a cause of action against the Government. P. 334.

The right to bring a suit against the United States in the Court of Claims for private property taken for a public purpose without condemnation proceedings is not founded on the Fifth Amendment but on the existence of an implied contract to pay the value of the property as of the date of the taking, and interest may not be added, because of § 177 of the Judicial Code. P. 335.

While interest might be allowed in condemnation proceedings instituted by the United States against the owner of property taken for a public purpose, as compensation for the use and occupation of the land prior to the passage of the title, it cannot be recovered in a suit in the Court of Claims against the United States. P. 336.

53 Ct. Clms. 424, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Davis, with whom *The Solicitor General* and *Mr. R. P. Whiteley* were on the brief, for the United States.

Mr. Burt E. Barlow, with whom *Mr. Abram R. Serven* was on the brief, for the North American Transportation & Trading Co.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought by the North American Transportation and Trading Company in the Court of Claims on December 7, 1906. The petitioner seeks to recover the

value of a placer mining claim situated on the public land near Nome, Alaska, which is alleged to have been taken by the Government on December 8, 1900, and also compensation for use and occupation thereof after that date. Ownership of the property by the company and the physical taking and continued possession of it by the Government were not controverted. The lower court found, also, that about July 1, 1900, General Randall, United States Army, commanding the Department of Alaska, took possession, as a site for an army post, of a large tract of public land which included the mining claim. The company yielded possession of the part occupied by it, being unable to withstand his authority; but at the same time it demanded compensation which General Randall promised would be paid. Use of the site for an army post was thereafter recommended by him to the Secretary of War. Pursuant to this recommendation, the President issued on December 8, 1900, an order by which the tract was reserved from sale and set aside for military purposes; and on December 20, 1900, the Secretary of War announced it as a public reservation, for the present under the control of the War Department. The tract has been used as an army post continuously since possession was first taken by General Randall. The buildings erected thereon are situated on that portion of the land which had been the company's placer claim; so that at no time since General Randall took possession of the land has the company been able to operate its claim or do any further mining work thereon.

The Government contended that, if on the facts there was a legal taking or other act entitling petitioner to recover compensation, the cause of action had accrued more than six years prior to the commencement of this suit; and that therefore under § 156 of the Judicial Code the petition should be dismissed. The Court of Claims found that the company's property was taken within the

six years; that is, on December 8, 1900, and that its then reasonable value was $23,800. It entered judgment for that amount (53 Ct. Clms. 424). Both parties appealed; the Government, on the ground that the right of recovery, if any, was barred; the company, on the ground that no compensation was allowed for the use and occupation between the date of the taking and the date of entry of judgment.

First. When the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445, 462, 465; *United States* v. *Cress*, 243 U. S. 316, 329. But although Congress may have conferred upon the Executive Department power to take land for a given purpose, the Government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 54–57. In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in *Hooe* v. *United States*, 218 U. S. 322, does not exist here. But the power granted by those acts was conferred upon the Secretary of War. Act of August 1, 1888, c. 728, § 1, 25 Stat. 357; Act of August 18, 1890, c. 797, § 1, 26 Stat. 316. It was for him to determine whether

the army post should be established and what land should be taken therefor. Compare *Nahant* v. *United States*, 136 Fed. Rep. 273; 153 Fed. Rep. 520; *United States* v. *Certain Lands in Narragansett, R. I.*, 145 Fed. Rep. 654. Power to take possession of the company's mining claim was not vested by law in General Randall; and the Secretary of War had not, so far as appears, either authorized it or approved it before December 8, 1900. It was only after the President reserved from sale and set aside for military purposes the large tract of land in which the company's mining claim was included that the Secretary of War took action which may be deemed an approval or ratification of what General Randall had done. What he had done before that date, having been without authority and hence tortious, created no liability on the part of the Government. *Hijo* v. *United States*, 194 U. S. 315, 323. Since the cause of action arose after December 7, 1900, this suit was not barred by § 156 of the Judicial Code.

The suggestion is made that, as the President's order reserved the land "subject to any legal rights which may exist to any land within its limits," the Secretary's action thereafter was not a taking of the mining claim. But this clause and the reference to it in the announcement made by the Secretary must, in view of the circumstances, have meant merely that the right to compensation of the company and of any others was preserved. Furthermore, the suggestion if sound would not aid the Government; it would result, at most, in slightly postponing the date of the legal taking. For the continued holding possession of the land after the announcement of the Secretary of War and the erection of buildings thereon by his authority was such an appropriation as would, in any event, give the right of action against the Government.

Second. The company contends that it should receive, in addition to the value of the property at the time of the taking, compensation for the occupation and use

thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment.[1] In a number of cases in the lower federal courts also the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable. *United States* v. *Engeman,* 46 Fed. Rep. 898; *Town of Hingham* v. *United States,* 161 Fed. Rep. 295, 300; *United States* v. *Sargent,* 162 Fed. Rep. 81; *United States* v. *First National Bank,* 250 Fed. Rep. 299; *United States* v. *Rogers,* 257 Fed. Rep. 397; *United States* v. *Highsmith,* 257 Fed. Rep. 401. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings brought in the Court of Claims.

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States,* 155 U. S. 163, 168; *Basso* v. *United States,* 239 U. S. 602, but upon the existence of an implied contract entered into by the United States. *Langford* v. *United States,* 101 U. S. 341; *Bigby* v. *United States,* 188 U. S. 400; *Tempel* v. *United States,* 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co., supra; United States* v. *Lynah, supra.* And the contract which is implied is to pay the value of property as of the date of the taking. *Bauman* v. *Ross,*

[1] See cases collected in 15 Cyc., pp. 930, 931, and in 10 R. C. L., p. 163.

167 U. S. 548, 587; *United States* v. *Honolulu Plantation Co.*, 122 Fed. Rep. 581, 585; *Burt* v. *Merchants' Insurance Co.*, 115 Massachusetts, 1, 14. Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." *Tillson* v. *United States*, 100 U. S. 43. Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), cannot be attributed to the sovereign. *United States* v. *North Carolina*, 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman*, 98 U. S. 565, 567–8. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it. *United States* v. *Verdier*, 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby*, 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp*, 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or

delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see *Klages* v. *Philadelphia & Reading Terminal Co.*, 160 Pa. St. 386); and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common-law rule which exempts the sovereign from liability to pay interest. *United States* v. *New York*, 160 U. S. 598, 622. This may be the theory on which interest should be allowed in compensation proceedings;[1] and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government. For, as suggested in *United States* v. *Sargent, supra*, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U. S. 570. On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7,500 per year. If the company had brought the suit immediately after the taking, it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in contract

[1] Compare *Moll* v. *Sanitary District*, 228 Illinois, 633, 636; *Lake Roen &c. Co.* v. *McLain Co.*, 69 Kansas, 334, 341–342; *Kidder* v. *Oxford*, 116 Massachusetts, 165; *Hamersley* v. *New York City*, 56 N. Y. 533, 537; *Sioux City R. R. Co.* v. *Brown*, 13 Nebraska, 317, 319; *Atlantic & Great Western Ry. Co.* v. *Koblentz*, 21 Oh. St. 334, 338.

can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of $23,800, which is found to be the value of the mining claim when it was taken nearly twenty years ago, must be deemed to be due, in part, to its delay in instituting the suit, and, in part, to the delays of litigation for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

Furthermore, if it is not interest which the company seeks, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the $100,000, alleged to be the value of the property, the further sum of $7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation the company did not, so far as appears, make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal.

In *Shoemaker* v. *United States*, 147 U. S. 282, 321, and *Bauman* v. *Ross*, 167 U. S. 548, 598, to which both counsel refer, the point here decided was not involved, since the court held that under the express terms of the acts there in question the United States were not entitled to possession of the land until the damages had been assessed and actually paid.

The judgment below is

Affirmed.

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

STALLINGS *v.* SPLAIN, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 534. Argued April 23, 1920.—Decided June 1, 1920.

A fugitive under indictment in one federal district may be arrested without a warrant by the marshal in another and may be detained for a reasonable time pending the initiation of removal proceedings; and a warrant issued upon the indictment in the first district will serve at least as probable cause for making the arrest. P. 341.

When a person so arrested and detained procures a writ of *habeas corpus* and is bailed by the court to await a hearing, the pendency of the *habeas corpus* proceedings does not prevent the initiation of removal proceedings based on such indictment by affidavit before a United States Commissioner and issuance of warrant thereon. P. 342.

And, in such circumstances, if he voluntarily appear before the commissioner and at his own request be bailed for his appearance in the foreign district to answer the indictment, the effect is to do away with any basis for the *habeas corpus*, since the actual restraint is terminated and the questions of the validity of the arrest and detention and of the right of removal are rendered immaterial. P. 343.

Under Rev. Stats., § 2294, as amended, and the rules of the General Land Office, a United States Commissioner who in taking proofs of applicants under the public land laws collects fees and commissions for transmission to the register and receiver, receives the money as commissioner and is indictable, if he embezzle it, under § 97 of the Penal Code. P. 344.

In removal proceedings doubts as to whether the indictment states an offense should be left to the court in which it was found. P. 345.

49 App. D. C. 38, affirmed.

THE case is stated in the opinion.

Mr. William B. Jaynes for appellant.

The Solicitor General for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Stallings was indicted in the District Court of the United States for the District of Wyoming for embezzling monies entrusted to him as United States Commissioner. Being in the District of Columbia, he was arrested there by Splain, marshal for the District, and was detained to await the institution of proceedings for his removal. In making the arrest Splain had relied, not upon a warrant issued by a commissioner for the District, but upon a bench warrant issued to the marshal for the District of Wyoming on the indictment. Stallings filed immediately in the Supreme Court of the District of Columbia a petition for writ of *habeas corpus*, contending, for this reason apparently, that the arrest and detention were illegal. The writ issued; Splain produced the body; the hearing on the writ was postponed; and Stallings was admitted to bail.

While he was at large on bail, awaiting a hearing in the *habeas corpus* proceedings, an affidavit of complaint was filed before a United States Commissioner for the District, setting forth the same offences charged in the indictment. A warrant issued thereon, but Stallings was not arrested. He appeared voluntarily before the Commissioner; admitted his identity and that he held the office named at the times the offences were charged to have been committed; declined to offer any evidence; and moved that he be discharged. The Commissioner denied the motion. Then, certified copies of the indictment and other papers having been introduced, he found probable cause. No order was made that Stallings be held to await an application for his removal. He requested that he be admitted to bail for his appearance in Wyoming to answer the charges

against him. The bail was fixed at $2,000 and was furnished.

After this, Splain filed a return to the petition for writ of *habeas corpus* setting up the above facts and Stallings demurred. He also secured, in aid of the *habeas corpus* proceeding, a writ of certiorari by which all proceedings before the United States Commissioner were certified to the Supreme Court of the District. The case was then heard both upon the demurrer to the petition for writ of *habeas corpus* and upon the return to the writ of certiorari. The demurrer was overruled; and, Stallings electing to stand thereon, the court dismissed the petition for a writ of *habeas corpus* and discharged the writ issued thereon. The petition for a writ of certiorari and the writ issued thereon were also dismissed and the proceedings were remanded to the Commissioner for further action. Stallings appealed to the Court of Appeals of the District which affirmed the final order below. 49 App. D. C. 38. It is contended here that Stallings should be discharged; (a) because the original arrest and detention on the bench warrant were illegal and the later proceedings before the Commissioner were without jurisdiction since he could not legally be re-arrested for the same offence until the *habeas corpus* proceeding had been disposed of; (b) because the affidavit and the indictment fail to charge a crime against the United States.

First. The original arrest and detention were lawful. A person duly charged with a felony in one State, may, if he flees to another, be arrested, without a warrant, by a peace officer in the State in which he is found and be detained for the reasonable time necessary to enable a requisition to be made. *Burton* v. *New York Central & Hudson River R. R. Co.*, 245 U. S. 315, 318. See *Kurtz* v. *Moffitt*, 115 U. S. 487, 504. The rule is not less liberal where the fugitive stands charged by an indictment found in one federal district and flees to another. See

2 Moore on Extradition, § 540. If the bench warrant issued in Wyoming was not effective as a warrant within the District of Columbia, the possession of it did not render illegal an arrest which could lawfully have been made without it. It would, at least, serve as evidence that Splain had reasonable cause to believe that a felony had been committed by Stallings. *Commonwealth* v. *Phelps*, 209 Massachusetts, 396, 404.

Second. The pendency of the *habeas corpus* proceeding did not deprive the Commissioner of jurisdiction to entertain the application for arrest on the affidavit of complaint. When Splain, in obedience to the writ, brought Stallings before the court, he passed from the custody of the marshal into that of the court and he remained under its protection and control although enlarged on bail. *Barth* v. *Clise*, 12 Wall. 400. But he did not thereby become immune from all other process until the *habeas corpus* proceedings should have been finally disposed of. *Commonwealth* v. *Hall*, 9 Gray, 262. Lack of jurisdiction in the Commissioner did not follow from the fact that the court had acquired, by virtue of the *habeas corpus* proceedings, the custody of and control over Stallings. Even if the affidavit of complaint had related to another indictment brought in a different district, the Commissioner would have had jurisdiction to entertain it. The question would merely have been whether a second arrest could properly be made where it conflicted with the first. *Peckham* v. *Henkel*, 216 U. S. 483; *In re Beavers*, 125 Fed. Rep. 988; 131 Fed. Rep. 366. Here there could be no conflict; for the second arrest, if it had been made, would have been merely for the purpose of carrying out the first. The Government was not precluded from taking such additional proceedings as it might deem necessary or advisable to supplement or perfect those originally instituted. If the original arrest was lawful, the detention would remain legal only for the reasonable time required to enable

appropriate removal proceedings to be instituted. Unless the lawful arrest was promptly followed by such proceedings the prisoner would be entitled to his discharge. *Matter of Fetter*, 23 N. J. L. 311, 321. On the other hand, if the orginal arrest and detention had been illegal, Stallings would not be entitled to his discharge, if before final hearing in the *habeas corpus* proceedings legal cause for detaining him had arisen through the institution of removal proceedings. Where it appears that sufficient ground for detention exists a prisoner will not be discharged for defects in the original arrest or commitment. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Iasigi* v. *Van De Carr*, 166 U. S. 391; *Kelly* v. *Griffin*, 241 U. S. 6, 13.

Third. The admission to bail by the Commissioner to answer the indictment in the District of Wyoming was upon his own request on advice of counsel. When this bail was given no application had been made to the court for his removal; and there had not even been an order of the Commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention and who has been released on bail pending the *habeas corpus* proceeding. *Sibray* v. *United States*, 185 Fed. Rep. 401. Stallings' position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that under such circumstances a petitioner is not entitled to be discharged on *habeas corpus*. *Respublica* v. *Arnold*, 3 Yeates, 263; *Dodge's Case*, 6 Martin, 569; *State* v. *Buyck*, 1 Brev. 460. Being no longer under actual restraint within the District of Columbia, he was not entitled to the writ of *habeas corpus*. *Wales* v. *Whitney*, 114 U. S. 564.

Furthermore, by voluntarily giving bail to appear in Wyoming, the purpose of the removal proceedings had been accomplished, and all questions in controversy in the *habeas corpus* and in the removal proceedings terminated.

Whether his arrest and detention had originally been valid was thereby rendered immaterial. *In re Esselborn*, 8 Fed. Rep. 904. And likewise the question whether there was a right then to remove him. Compare *Cheong Ah Moy* v. *United States*, 113 U. S. 216; *Ex parte Baez*, 177 U. S. 378.

Fourth. Stallings' contention that he should be discharged because the indictment failed to charge a crime under the laws of the United States is also unfounded. He was indicted under § 97 of the Penal Code which declares that any officer of the United States who shall embezzle any money which may have come into his possession in the execution of such office or under claim of authority as such officer shall be punished. The indictment charges Stallings with having received as commissioner divers sums of money from persons named to be paid over to the Receiver of the Land Office at Cheyenne and embezzling the same. It is contended that the money could not have been received as commissioner for transmission, because it is not among the statutory duties of a commissioner. But § 2294 of the Revised Statutes, as amended by Act of March 4, 1904, c. 394, 33 Stat. 59, provides that where applicants for the benefit of the homestead and other land laws make the required affidavits before commissioners of the United States the proof so made shall have the same effect as if made before the register and receiver "when transmitted to them with the fees and commissions allowed and required by law." The circular issued by the Land Office in 1905 (33 L. D. 480, 481), containing "Suggestions to United States Commissioners," etc., directs that the proofs so taken be "transmitted to the register and receiver with the necessary fees and commissions." And the circular issued in 1915 (44 L. D. 350, 352) directs that in "no case should the transmittal thereof be left to the claimant."

Duties of an officer may be prescribed by rule. If the validity of the indictment was open to reasonable doubt,

it was to be resolved not by the committing magistrate but, after the removal, by the court which found the indictment. *Beavers* v. *Henkel*, 194 U. S. 73, 83; *Benson* v. *Henkel*, 198 U. S. 1, 10, 11, 12; *Haas* v. *Henkel*, 216 U. S. 462, 481.

Affirmed.

PORTO RICO RAILWAY, LIGHT & POWER COMPANY *v.* MOR.

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

No. 728. Argued April 23, 1920.—Decided June 1, 1920.

In the provision of the Act of March 2, 1917, c. 145, 39 Stat. 965, which gives the United States District Court for Porto Rico jurisdiction "where all the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico," etc., the clause "not domiciled in Porto Rico" relates to both preceding clauses, so that jurisdiction is not conferred over an action by an alien domiciled in Porto Rico against a local corporation. P. 346.

When several words are followed by a clause which is applicable as much to the first and other words as to the last, the clause should be read as applicable to all. P. 348.

THE case is stated in the opinion.

Mr. Carroll G. Walter for Porto Rico Railway, Light & Power Co.

No brief filed for Mor.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Mor, a subject of the King of Spain, domiciled in Porto Rico, brought in the United States District Court for

Porto Rico this action at law for an amount exceeding $3,000, exclusive of interest and costs, against the Porto Rico Railway, Light and Power Company, a Porto Rico corporation having its principal place of business there. Objection to the jurisdiction of the trial court was overruled and the plaintiff recovered judgment. The case came before the Circuit Court of Appeals for the First Circuit on writ of error and that court has presented to us by certificate the question whether the District Court had jurisdiction. The answer depends upon the construction to be given to the following provision contained in § 41 of the so-called Jones Act of March 2, 1917, c. 145, 39 Stat. 951, 965, which provides a civil government for Porto Rico:

"Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000. . . ."

It is clear under this act that if Mor, instead of being a Spanish subject, had been a citizen of one of the United States, the court would not have had jurisdiction since he was domiciled in Porto Rico. The precise question, therefore, is whether the restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens.

The judicial system of Porto Rico prior to annexation to the United States comprised a Supreme Court and district trial courts of general jurisdiction and municipal courts. The proceedings in all of these courts were conducted in the Spanish language and according to the forms of the civil law. By § 33 of the Foraker Act, April 12, 1900, c. 191, 31 Stat. 77, 84, which established what was intended

as a temporary civil government for the island, these insular courts were continued, with the proviso that the judges of the Supreme Court should be appointed by the President, and the judges of the inferior courts by the Governor. By § 40 of the Jones Act the jurisdiction of these courts and the forms of procedure in them were further continued.

The "District Court of the United States for Porto Rico" provided for by § 41 of the Jones Act was, in effect, a continuation of the district court of the United States provided for by § 34 of the Foraker Act, as amended by the Act of March 2, 1901, c. 812, § 3, 31 Stat. 953.[1] Both acts conferred upon the court jurisdiction of all cases cognizable in circuit or district courts of the United States; the court is by both directed to proceed in the same manner as those courts; and in both there is an express provision that the pleadings and all proceedings shall be conducted in the English language. But the Jones Act greatly abridged the jurisdiction. The jurisdictional amount, which by the amendatory Act of March 2, 1901, had been lowered to $1,000, was raised to $3,000. And, whereas by the amendment of 1901 the court had been given jurisdiction in case either party was a citizen of the United States, even if he was domiciled in Porto Rico, the Jones Act limited the jurisdiction dependent on American citizenship to the cases where the Americans were not domiciled in Porto Rico. Whether it likewise limited jurisdiction dependent on alienage is the question submitted to us.

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[1] Act of March 2, 1901, c. 812, § 3: "That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

No reason appears why the clause "not domiciled in Porto Rico" should not be read as applying to the entire phrase "citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States." When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. *United States* v. *Standard Brewery*, 251 U. S. 210, 218; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18–19, and cases cited. Furthermore, special reasons exist for so construing the clause in question. The act manifests a general purpose to greatly curtail the jurisdiction of the District Court. If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress. *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491; *Inter-Island Steam Navigation Co.* v. *Ward*, 242 U. S. 1. But it seems to us clear that it applies alike to aliens and to American citizens.

Suit may be brought in the District Court if either party has the jurisdictional qualifications; that is, the act confers upon such party not merely the right to sue but the liability to be sued. In the population of Porto Rico there are many aliens and these are largely Spaniards.[1] If the limitation "not domiciled in Porto Rico" were

[1] "It is somewhat surprising to find that 886,442 of the actual population are classed as Spaniards, and only 4,324 as foreigners." Report on the Island of Porto Rico by Henry C. Carroll, Special Commissioner, October 6, 1899, p. 11.

"Spanish-born were 7,690, or 55% of the total foreign born. The United States contributed 1,069." Commercial Porto Rico, Department of Commerce and Labor, April, 1907, p. 11.

"Of the total number of males 21 and over in 1910, 238,685 were of Porto Rican citizenship, 4,112 were of Spanish citizenship, 1,836 were citizens of the United States, and 2,385 were citizens of other foreign countries." Statistics for Porto Rico, 13th Census, p. 24.

inapplicable to aliens, the result would work peculiar hardship and assuredly unintended discrimination against these Spaniards. A Spanish subject domiciled in Porto Rico might be sued by an American domiciled in Porto Rico or a Porto Rican in the District Court, where the proceedings are conducted in the English language and according to the forms of Anglo-American law; whereas an American domiciled in Porto Rico could be sued only in the insular courts where the proceedings are conducted in the Spanish language and according to the procedure and processes of the civil law. This might not only prove very inconvenient to Spanish residents, but would be inconsistent with the spirit of Article XI of the Treaty of 1898 between Spain and the United States (30 Stat. 1754, 1760), under which Spaniards residing in Porto Rico were guaranteed "the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong."

Congress could not have intended to give the District Court jurisdiction of any controversy to which a domiciled alien is a party while denying under similar circumstances jurisdiction where a domiciled American is a party.

The question submitted is answered

No.

NATIONAL PROHIBITION CASES.

ORIGINAL, AND APPEALS FROM THE DISTRICT COURTS OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, THE WESTERN DISTRICT OF KENTUCKY, THE DISTRICT OF NEW JERSEY, THE EASTERN DISTRICT OF WISCONSIN, AND THE EASTERN DISTRICT OF MISSOURI.

Nos. 29, 30, Original, and Nos. 696, 752, 788, 794, 837.—Argued March 8, 9, 10, 29, 30, 1920.—Decided June 7, 1920.

The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. P. 386.

The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Id.* *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S. 276.

The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Id.* *Hawke* v. *Smith*, *ante*, 221.

The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution. *Id.*

That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument. *Id.*

The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits. *Id.*

350. Statement.

The second section of the Amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means. P. 387.

The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs. *Id.*

The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them. *Id.*

That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced. *Id.*

While there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, those limits are not transcended by the provision of the National Prohibition Act (Title II, § 1), wherein liquors containing as much as one-half of one per cent. of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Id.* *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Nos. 29 and 30, Original, bills dismissed; No. 794, reversed; Nos. 696, 752, 788 (264 Fed. Rep. 186), and 837, affirmed.

THE seven cases here given one name for convenient reference involved the validity of the Eighteenth Amendment and of certain general features of the National Prohibition Act designed for its enforcement. They were as follows:

No. 29, Original. *State of Rhode Island* v. *A. Mitchell Palmer, Attorney General*, and *Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

No. 30, Original. *State of New Jersey* v. *A. Mitchell Palmer, Attorney General,* and *Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

No. 696. *George C. Dempsey* v. *Thomas J. Boynton, United States Attorney for Massachusetts,* and *Andrew J. Casey, Acting Collector of Internal Revenue for Massachusetts.* Appeal from the District Court of the United States for the District of Massachusetts. Decree refusing injunction affirmed.

No. 752. *Kentucky Distilleries & Warehouse Company* v. *W. V. Gregory, District Attorney for the United States for the Western District of Kentucky,* and *Elwood Hamilton, Collector of Internal Revenue for the Collection District of Kentucky.* Appeal from the District Court of the United States for the Western District of Kentucky. Decree refusing injunction affirmed.

No. 788. *Christian Feigenspan, a corporation,* v. *Joseph L. Bodine, United States Attorney for the District of New Jersey,* and *Charles V. Duffey, Collector of Internal Revenue of the Fifth District of New Jersey.* Appeal from the District Court of the United States for the District of New Jersey. Decree refusing injunction affirmed.

No. 794. *Hiram A. Sawyer, as United States Attorney for the Eastern District of Wisconsin, Burt Williams, as Collector of Internal Revenue of the Second District of Wisconsin,* and *Thomas A. Delaney, as Federal Prohibition Enforcement Director for Wisconsin* v. *Manitowoc Products Company.* Appeal from the District Court of the United States for the Eastern District of Wisconsin. Decree granting injunction reversed.

No. 837. *St. Louis Brewing Association, a corporation,* v. *George H. Moore, Collector of Internal Revenue of the First District of Missouri, Walter L. Hensley, United States Attorney for the Eastern District of Missouri,* and *Frank L. Diggs, Prohibition Agent for the First Internal Revenue District of Missouri.* Appeal from the District Court of

the United States for the Eastern District of Missouri. Decree refusing injunction affirmed.

Mr. Herbert A. Rice, Attorney General of Rhode Island, for the plaintiff in No. 29, Original. *Mr. A. A. Capotosto*, Assistant Attorney General, was on the briefs. See *post*, p. 354.

Mr. Thomas F. McCran, Attorney General of New Jersey, for the plaintiff in No. 30, Original. *Mr. Francis H. McGee*, Assistant Attorney General, was on the briefs. See *post*, p. 356.

Mr. Patrick Henry Kelley for the appellant in No. 696. See *post*, p. 357.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for the appellant in No. 752. See *post*, p. 357.

Mr. Elihu Root and *Mr. William D. Guthrie* for the appellant in No. 788. *Mr. Robert Crain* and *Mr. Bernard Hershkopf* were on the briefs. See *post*, pp. 361, 368.

Mr. Ralph W. Jackman for the appellee in No. 794. *Mr. William H. Austin* was on the brief. See *post*, p. 380.

Mr. Charles A. Houts, *Mr. John T. Fitzsimmons* and *Mr. Edward C. Crow*, for the appellant in No. 837, submitted. See *post*, p. 380.

The Solicitor General and *Mr. William L. Frierson*, Assistant Attorney General of the United States, for the defendants in No. 29, Original, the appellees in Nos. 752 and 788, and the appellants in No. 794. *Mr. Frierson* for the defendants in No. 30, Original, and for the appellees in No. 696, *The Solicitor General* appearing also on the briefs

in those cases. *The Solicitor General* and *Mr. Frierson*, for the appellees in No. 837, submitted. See *post*, p. 381.

By leave of court, briefs of *amici curiæ* were filed, viz: By *Mr. Charles E. Hughes*, with the attorneys general of numerous States, supporting the motions to dismiss the bill in No. 29, Original, and against the appeal in No. 752; by *Mr. Elihu Root* with *Messrs. William D. Guthrie, Robert Crain* and *Bernard Hershkopf*, supporting the bill in No. 29, Original; by *Mr. Alexander Lincoln* with *Mr. Michael J. Lynch*, supporting the bills in Nos. 29 and 30, Original; by *Mr. Aaron A. Ferris*, supporting the bill in No. 29, Original; by *Mr. Wayne B. Wheeler* with *Messrs. George S. Hobart, G. Rowland Monroe, R. C. Minton, J. A. White, B. W. Hicks, E. L. McIntyre* and *Walter H. Bender*, against the appeals in Nos. 696, 752 and 788, and supporting the appeal in No. 794; and by *Mr. Levi Cooke* with *Mr. George R. Beneman*, supporting the appeal in No. 788.

The chief contentions made in the numerous arguments will be here indicated as fairly as space limits permit—more fully in some of the cases to avoid undue abridgment and repetition in all.

Mr. Rice, for the State of Rhode Island, in No. 29, Original, confined his argument to the validity of the Amendment. Various objections were stated, the one chiefly elaborated being that the Amendment is an invasion of the sovereignty of the complaining State and her people, not contemplated by the amending clause of the Constitution. The amending power, it was contended, is not a substantive power but a precautionary safeguard inserted incidentally to insure the ends set forth in that instrument against errors and oversights committed in its formation. Amendments, as the term indeed implies, are to be limited to the correction of such errors.

The doctrine that any and every change may be introduced in guise of amendment is a novelty subversive of fundamental principles. It would bring about a constitutional revolution, converting the sovereignty of the people into a sovereignty of officials. It would permit the boundary between federal and state authority, established by the Constitution, to be shifted at will, as officials might be influenced by political cowardice or expediency, and would ultimately reduce the States to mere dependencies of the Federal Government.

All sovereignty resides in the people. The Constitution therefore was submitted for ratification to conventions chosen directly by the people. The possibility of federal encroachment upon state sovereignty was the subject of principal concern when the Constitution was in process of adoption, and, practically as a part of the process, the first ten amendments were added to prevent such encroachments. And it was generally understood and agreed that the boundaries set between state and federal powers were fundamental and permanent.

It is "This Constitution" that may be amended. "This Constitution" is not a code of transient laws but a framework of government and an embodiment of fundamental principles. By an amendment, the identity or purpose of the instrument is not to be changed; its defects may be cured, but "This Constitution" must remain. It would be the greatest absurdity to contend that there was a purpose to create a limited government and at the same time to confer upon that government a power to do away with its own limitations. All of the prior amendments have been declaratory and interpretative or have had relation to a power or to a subject-matter dealt with in the instrument itself. The amending function (under Art. V) is purely federal. The State is not a party to an amendment and her people do not participate. A legislature in ratifying does not act for the State and cannot limit her

sovereign powers. A State is bound in respect of sovereign powers only by the explicit act of her whole people. To be valid, an amendment must have such relation to the general grant of powers and to the scope and purposes of the Constitution as will carry an implication of assent on the part of the people of the United States, springing from their adoption of the Constitution.

In the case of this so-called amendment, the representatives of the people of the United States have attempted, not to amend the Constitution of the United States, but to amend the constitution of every State in the Union. If the amending function is construed as coextensive with absolute sovereignty, then the basis of our political system is no longer the right of the people of a State to make and alter their constitution, for their political institutions are at the mercy of others and may be changed against their will.

Mr. McCran, for the State of New Jersey, in No. 30, Original, attacked the Amendment as an invasion of state sovereignty not authorized by the amending clause and as not, properly speaking, an amendment, but legislation, revolutionary in character.

The right to amend the Constitution, in the manner provided by Article V, is a right incident to the powers of the citizens of the United States as distinguished from the right of the citizens of the respective States; no amendment can be made not of right belonging to the citizenship of the United States; all powers not enumerated and not of right belonging to the citizenship of the United States, are reserved to the respective States under Article X, including the right to legislate concerning the manufacture, use and sale intrastate of intoxicating liquors.

The Amendment is also invalid because its proposal was not affirmatively voted by two-thirds in number of both houses of Congress, and because the proposal did not on

its face disclose that both houses deemed the Amendment necessary.

Three-fourths of the States have not ratified it in the constitutional sense, because, in a number of the States counted, the proposal has been, or is subject to be, referred to the people, in pursuance of their constitutions.

Concurrent power under the Amendment is a power in the Federal Government to enforce it only as it relates to the external concerns of the United States or to the domain of the Federal Government in the regulation of interstate commerce heretofore recognized, as distinguished from the right of the State of New Jersey to enforce the Amendment intrastate by virtue of the power conferred upon her exclusively under the Amendment.

The National Prohibition Act is not appropriate legislation under the Amendment. It purports to regulate the manufacture, possession, sale and use of beverages which are not intoxicating and of liquor devoted to medicinal and other non-beverage uses.

Mr. Patrick Henry Kelley, for the appellant in No. 696, took the ground that the Amendment is not self-executing; that, until it is put in execution in the manner prescribed, the existing laws of the States concerning intoxicating liquors must stand unaffected; and that the only way in which the laws and sovereign powers of the States could be superseded under it would be by legislation enacted by the concurrent power of Congress and the several States in the only manner provided for such concurrent action, viz., as authorized by Article V of the Constitution.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for the appellant in No. 752:

The power of "amendment" contained in Art. V does not authorize the invasion of the sovereign powers expressly reserved to the States and the people by the Ninth

and Tenth Amendments, except with the consent of *all* the States. If it be argued that the expression of one exception in Art. V negatives the possibility of others to be implied, the answer is to be found in the contrary principle of construction applied by this court to Art. I, § 7, in *Hollingsworth* v. *Virginia*, 3 Dall. 378, that the existence of one exception to a power does not make the power unlimited in all other respects, but that there may be other qualifications or exceptions not expressed literally.

If amendment under Art. V were unlimited, three-fourths of the legislatures would have it in their power to establish a state religion and prohibit free exercise of other religious beliefs; to quarter a standing army in the houses of citizens; to do away with trial by jury and republican form of government; to repeal the provision for a president; and to abolish this court and with it the whole judicial power vested by the Constitution. See *Ableman* v. *Booth*, 21 How. 506, 521. They might form several new States within other States, and, at the same time, form one State by the junction of two or more others (while still giving the old States their equal suffrage in the Senate), and thus concentrate the entire power of the Government in the hands of a few States acting in concert. Indeed, if such right to amend exists, then the three-fourths required by Art. V can be reduced to a majority or even a minority of the legislatures, or the requirement be dispensed with entirely.

A construction should be judged by its consequences. The fact that a construction "radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people" is an irresistible argument against it, "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 16 Wall. 36, 78.

The Ninth and Tenth Amendments must be read, with the whole Constitution, exactly as if they had been a part of it from the outset. Before their adoption they were implied, and, after their adoption, they were, by Art. V, "to all intents and purposes part of this Constitution." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405; *Collector* v. *Day*, 11 Wall. 113, 124; *Gordon* v. *United States*, 117 U. S. 697, 705; 2 Elliot's Debates, pp. 435, 436.

"The power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three-fourths of the States to grasp new power at the expense of any unwilling State." Curtis, Const. History of the United States, vol. 2, p. 160. Every one of the preceding seventeen amendments is concerned with and pertains to "the original provisions and powers of the Constitution." In addition, the Thirteenth, Fourteenth and Fifteenth Amendments were the result of the arbitrament of war, and their acceptance by the seceding States was made a condition of their readmission into the Union.

If it be decided that the legislatures of three-fourths of the States may, by ratification, validate any amendment, "the indestructible Union of indestructible States" will turn out to be a mere dream and the States will cease "to be coexistent with the National Government." *Texas* v. *White*, 7 Wall. 700, 725; *Lane County* v. *Oregon*, 7 Wall. 71, 76; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 31.

It is a well-known and established historical fact that the Constitution was ratified by the original States with the distinct agreement that the Bill of Rights expounded in the first ten amendments would be immediately adopted. The States went into the Union with the understanding that by these amendments the sovereignty of the several States would be perpetually preserved, against all federal

encroachments, and no sound reason can be advanced for maintaining that the Ninth and Tenth Amendments did not forever preserve such sovereignty. The powers reserved by those amendments are powers reserved from the operation of Art. V, as well as from the operation of any other articles of the Constitution.

Two-thirds of both houses of Congress did not vote to propose the Eighteenth Amendment; and hence, it was never properly submitted to the States for ratification.

The Eighteenth Amendment has not been ratified by the legislatures of three-fourths of the States. Of the forty-five States which have purported to ratify it, one of them,—Ohio,—has rejected the Amendment by popular vote; and in twelve others petitions for a referendum with respect to the Amendment have been presented, but have not yet been submitted to the electorate. In these States the people have reserved the right to make themselves a part of the "legislature."

The Eighteenth Amendment, like Art. V, must be construed with the other provisions of the Constitution (*Prout* v. *Starr*, 188 U. S. 537), including the Fifth Amendment, which, being for the security of person and property, should be construed liberally. *Boyd* v. *United States*, 116 U. S. 616, 635. The allegations of the bill in this case, which are admitted, establish that the plaintiff could not possibly have sold its stock of whiskey before the Amendment became effective, and that the demand for non-beverage purposes will be insignificant. To deprive of the power of sale is to take the property itself. *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445; *Wynehamer* v. *People*, 13 N. Y. 378, 387, 389, 396, 398. The liquor has therefore been taken by the Government for a public use, viz., for the protection of the people of the United States from the alleged evils of the traffic in intoxicating liquors. This court, as is pointed out in *Hamil-*

ton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, has never held that even statutes passed pursuant to the police power of the State could be applied to liquor acquired before the enactment of the prohibitory law. One of the judgments affirmed in *Mugler* v. *Kansas*, 123 U. S. 623, referred to in *Ruppert* v. *Caffey*, 251 U. S. at p. 302, was for violation of the act by selling beer acquired before its enactment, but the beer involved was acquired after the enactment of the prohibition amendment to the constitution of Kansas, pursuant to which the law was passed. If an attempt be made to extend the doctrine of the *Hamilton Case*, *supra*, so as to hold that the Volstead Act does not appropriate stocks of liquor existing before the Eighteenth Amendment was proposed by Congress, because an insignificant non-beverage use is still permitted, it is sufficient to call attention to the irreconcilable conflict between such contention and the rule in *Buchanan* v. *Warley*, *supra*. Although the prohibition of a particular physical use to which property may be put (so long as the possession and title thereto are not interfered with) may under some circumstances not constitute a taking in violation of the Fourteenth Amendment, even if the monetary value be reduced (*Mugler* v. *Kansas*, *supra*), yet when, as here, the owner of the property is deprived of the rights of sale, transportation, and even of possession and use (except in a few limited instances) there is a taking of property. The whiskey sought here to be protected was manufactured on the faith of the rules of property established by decisions of this court.

Mr. Root for the appellant in No. 788:

I. The substantive and operative part of the so-called Eighteenth Amendment is contained in its first section. This provision does not relate to the powers or organization of government, as does an ordinary constitutional

provision. On the contrary, it is itself an exercise of the legislative power of government, and a direct act of legislation regulating the conduct of life of the individual. The first question before the court is, therefore, whether Article V of the Constitution authorizes any amendment which in substance and effect is merely a police regulation or statute.

To uphold such a power of amendment would do violence to what Hamilton (Federalist, No. 22, p. 135, Ford's ed.) described as "the fundamental maxim of republican government . . . which requires that the sense of the majority should prevail." If the so-called Eighteenth Amendment be a valid part of the Constitution, its repeal can hereafter be perpetually prevented by a minority, for if but one State more than one-fourth of the States refuse to assent thereto, it is irrepealable. The census of 1910 discloses that there are in the Union thirteen States whose aggregate population does not equal five per cent. of the entire population of the United States. Consequently, however vast the majority of the population in the future may be who are persuaded by experience that this direct legislative regulation of their lives and personal habits was or has become unwise and unnecessary, they will be helpless to change the law if there be dissent on the part of a minority representing only five per cent. of the population or perhaps less.

There is plainly a distinction in this respect between the so-called amendment as adopted and as it would be if it had conferred *power* upon Congress to prohibit the use of intoxicating liquors. An amendment in the latter form would, it is true, be precisely as irrepealable as the one here in question, but the conduct of individual life thereunder would at all times be within the control of representatives of the majority of the people. Congress would then have the power to prohibit intoxicants or not, completely or qualifiedly, as it from time to time deemed

best; and if the majority of the people then desired prohibition, Congress could respond to their wish; and if, on the other hand, the majority thereafter became persuaded that extreme prohibition was no longer necessary, in that respect also Congress could effectuate the will of the people. In every free government the direct regulation of the lives of the people by legislation should at all times be in the hands of the majority, however the powers of government may be distributed and allocated.

This fundamental consideration differentiates sharply the Eighteenth Amendment from the Thirteenth Amendment, to which the Eighteenth bears a superficial resemblance. As is now universally conceded, slavery was the creation of positive law, and it was always unauthorized unless some exercise of government permitted it. A constitutional declaration that slavery was prohibited, would, therefore, in substance, be only the withdrawal from every governmental authority of the *power* to license or permit involuntary servitude. That amendment, consequently, only affected the *powers* of government, and did not constitute, as does the so-called Eighteenth Amendment, a direct legislative exercise of those powers.

Article V of the Constitution should not be construed to confer unlimited legislative power upon the amending authorities. To assume that it does is inconsistent with the plain provision of § 1 of Article I of the Constitution that "*all* legislative powers herein granted shall be vested in a Congress of the United States," and with the terms of Article V itself, as the proceedings of the Constitutional Convention disclose that the framers themselves understood those terms. The framers undoubtedly regarded the power to amend only as authorizing the inclusion of matter of the same general character as the instrument or thing to be amended; and as all the constitutions of their day were concerned solely with the distribution and limitation of the powers of government,

and not with the direct exercise thereof by the constitution makers themselves, no amendment of the latter sort would have been deemed appropriate or germane by them.

It does not advance the discussion to urge that *the people* can adopt any amendment to the Constitution they see fit. No doubt an amendment of any sort could be adopted by the same means as were employed in the adoption of the Constitution itself. In that manner alone do or can *the people* themselves act. But the amending authorities provided for in Article V of the Constitution, as clearly appears from the debates in the Constitutional Convention, are only *agents* of the people and not the people themselves. They must, therefore, act within the authority conferred in Article V, and that authority does not embrace the right under color of amendment to adopt mere sumptuary laws which are not constitutional amendments in truth or essence. The people could by appropriate proceedings amend the Constitution so as to impair such vital rights as freedom of religion, but it is inconceivable that any such unlimited power has been delegated to the amending agents, who may represent but a minority of the people. The census discloses that there are three-fourths of the States of the Union whose total population amounts to less than forty-five per cent. of the people of the United States, and two-thirds of a quorum of both houses of Congress may, therefore, likewise represent only a minority of the population.

Ratification by state legislatures does not as matter of fact provide an opportunity for the people to express their will regarding the proposed Eighteenth Amendment as the calling of conventions might have done. Thus, for example, the Missouri legislature ratified it, notwithstanding an express provision of the Missouri constitution (Art. II, § 3) forbidding them so to do, and in Ohio ratification by the legislature was subsequently rejected by the people at the polls, while in other States the people

have been denied all right to have the question of ratification referred to them for approval.

If, as contended by the defendants, the power of amendment vested in Congress and three-fourths of the state legislatures be absolute and unrestricted, then there would be no limitation whatever upon their legislative authority. They could then by amendment establish a state religion, or oppress or discriminate against any denomination, or authorize the taking away of life, liberty and property, without due process of law, etc., etc. This would destroy the most essential limitation upon power under the American system of government, which is that the rights of the individual citizen shall be protected by withholding from the legislative function the power to do certain things inconsistent with individual liberty. This was the reason of the irresistible demand for the first ten amendments.

When the Federal Constitution was adopted, the people of practically every State had limited by bills of rights their own governments in their own States, which were composed of men elected by themselves. We are not at liberty to assume that in and by Article V it was contemplated that they were vesting legislative power without limitation in the Congress and the legislatures of three-quarters of the States. For these reasons and others it is submitted that the adoption of the so-called Eighteenth Amendment by the agents of the people was beyond the amending power of such agents and therefore invalid.[1]

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[1] Journal of Constitutional Convention of 1787, pp. 370, 70; 3 Documentary History of U. S. Constitution, pp. 405, 409, 410, 518; *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, 407; *Cohens* v. *Virginia*, 6 Wheat. 264, 389; *State ex rel. Mullen* v. *Howell*, 107 Washington, 167; *Opinion of the Justices*, 118 Maine, 544; Federalist, No. 33 (Ford's ed.), pp. 202, 260, 263; 2 Elliot's Debates, pp. 126, 128, 364; 4 *id.*, pp. 144, 176, 188; 1 Bryce's American Commonwealth, p. 350; Story on the Constitution, 5th ed., § 352; Cooley on Constitutional Limitations,

II. The Eighteenth Amendment, furthermore, if valid, would tend to undermine a fundamental principle of our federal system. As Chief Justice Chase declared in *Texas* v. *White*, 7 Wall. 700, 725, "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Manifestly, the federal system of government created in the Constitution contemplated indestructible States—not indestructible geographic units merely, but indestructible self-governing, local sovereignties. The establishment of our dual system of government must necessarily imply that neither government shall be permitted to destroy the other, and that the States must be preserved, not as mere electoral and administrative districts of a unified and consolidated national government, but as true local, self-governing sovereignties, inviolate and indestructible members of a dual, and not a consolidated, system of government, and with a perma-

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7th ed., pp. 2–4, 50; Jameson on Constitutional Conventions, 4th ed., §§ 63, 85; *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308; Century Dictionary, tit. "Constitution"; Encyclopædia Britannica (9th ed.), tit. "Constitution"; Holland's Jurisprudence, 11th ed., p. 365; The Constitutional Review, April, 1918, p. 97; Mass. Law Quarterly, May, 1918, p. 334; *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, 227; Federalist, No. 15 (Ford's ed.), p. 87; *Marbury* v. *Madison*, 1 Cranch, 137, 176; *In re Pennsylvania Tel. Co.*, 2 Chester Co. Rep. 129; 5 Hinds' Precedents, §§ 5753, 5767; *Gagnon* v. *United States*, 193 U. S. 451, 457; *Shields* v. *Barrow*, 17 How. 130, 144; Federalist No. 43 (Ford's ed.), p. 291; *id.*, No. 85, p. 586; 3 Elliot's Debates, pp. 233–4; *Commonwealth* v. *Griest*, 196 Pa. St. 396, 404; *Warfield* v. *Vandiver*, 101 Md. 78; *Livermore* v. *Waite*, 102 Cal. 113, 118, 119; *Gibbons* v. *Ogden*, 9 Wheat. 1, 187, 188; *Calder* v. *Bull*, 3 Dall. 386, 388; *Fletcher* v. *Peck*, 6 Cranch, 87, 139; *Loan Association* v. *Topeka*, 20 Wall. 655, 663; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Collector* v. *Day*, 11 Wall. 113, 127; *Hollingsworth* v. *Virginia*, 3 Dall. 378; Madison's Notes, Sept. 12, 1787, p. 720, *Legal Tender Cases*, 12 Wall. 457; *Texas* v. *White*, 7 Wall. 700, 720, 724; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 192; 3 Elliot's Debates, pp. 446–7; *Somerset* v. *Stewart*, 20 State Trials, 1, 82; 2 Mass. Law Quarterly, pp. 437–44; *Slaughter-House Cases*, 16 Wall. 36, 67, 68.

nent and effectual reason for being, namely, the possession of the power and the right to exercise forever the functions of internal and local self-government.

The so-called Eighteenth Amendment *directly* invades the police powers of the States and *directly* encroaches upon their right of local self-government. If this amendment be valid, then any amendment which directly impairs the police powers of the States and absolutely withdraws from them their right to local self-government in any important particular, heretofore indisputably a matter of internal concern, must likewise be valid. In other words, if the so-called Eighteenth Amendment be lawful, then the States are not in truth indestructible. It must be manifest that the precedent necessarily erected by a holding that the Eighteenth Amendment is constitutional, would authorize the complete subversion of our dual and federal system of government. It is submitted that the authority conferred in Article V to amend the Constitution carries no power to destroy its federal principle in a most fundamental aspect.

The Civil War amendments afford no justification for the Eighteenth Amendment. Their primary purpose was to crystallize into the Constitution some of the essentials of a free republican government, and it was expressly made the constitutional duty of the Federal Government to guarantee to the States such a form of government. This federal duty the Civil War amendments helped to realize; and the fact that, as an incident and indirectly, they interfered to some extent with the States is of no consequence. They are not like the Eighteenth Amendment, which is germane to no original federal duty, and which directly, primarily and deliberately invades the right of the States to govern themselves.[1]

[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 327, 403, 431; *Cohens* v. *Virginia*, 6 Wheat. 264, 389; *Texas* v. *White*, 7 Wall. 700, 725, 728; *Hammer* v. *Dagenhart*, 247 U. S. 251, 275; *Gordon* v. *United States*, 117

Mr. Guthrie for the appellant in No. 788:

The correct construction of § 2 of the Eighteenth Amendment required the concurrence of the State of New Jersey in any legislation of Congress regulating internal or intrastate commerce in intoxicating liquors, and conversely required the concurrence of Congress in any legislation of the State regulating interstate or foreign commerce in intoxicating liquors; but that section did not impair or qualify the existing reserved power of the several States independently to regulate their own internal or intrastate commerce or the existing power of

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U. S. 697, 701, 705; *Rathbone* v. *Wirth*, 150 N. Y. 459, 470, 483–4; *Calder* v. *Bull*, 3 Dall. 386, 388; *Loan Association* v. *Topeka*, 20 Wall. 655, 662–3; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *Collector* v. *Day*, 11 Wall. 113, 124, 125, 127; *Downes* v. *Bidwell*, 182 U. S. 244, 290–1; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Matter of Fraser* v. *Brown*, 203 N. Y. 136, 143; *Keller* v. *United States*, 213 U. S. 138, 148; *Colon* v. *Lisk*, 153 N. Y. 188, 194; *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Civil Rights Cases*, 109 U. S. 3, 11–15, 19, 20; *In re Rahrer*, 140 U. S. 545, 554–6; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina* v. *United States*, 199 U. S. 437, 448, 451, 453–4; *State ex rel. Mullen* v. *Howell*, 107 Washington, 167; *License Cases*, 5 How. 504, 583, 628; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59; *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 300; *Patterson* v. *Kentucky*, 97 U. S. 501, 503; *Fertilizing Co.* v. *Hyde Park*, *id.*, 659, 667; *Ex parte Rowe*, 4 Ala. App. 254; *Stone* v. *Mississippi*, 101 U. S. 814, 819–20; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 567; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; 2 Hare on American Constitutional Law, p. 766; Cooley on Constitutional Limitations (7th ed.), pp. 101–2, 243, 263; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629; *Lane County* v. *Oregon*, 7 Wall. 71, 76; *Ex parte Bain*, 121 U. S. 1, 12; Story on the Constitution, § 1908; *Slaughter-House Cases*, 16 Wall. 36, 67, 68, 70–1, 77–8; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 348; *Kentucky* v. *Dennison*, 24 How. 66, 107; *Guinn* v. *United States*, 238 U. S. 347, 362; *United States* v. *Railroad Co.*, 17 Wall. 322, 327; *Pollock* v. *Farmers' Loan & Tr. Co.*, 157 U. S. 429, 584; Congressional Globe, 38th Cong., 1st sess., p. 2985; Elliot's Debates, vol. II, pp. 304, 309; vol. IV, pp. 53, 58; 2 Curtis on the Constitutional History of the United States, pp. 160–1; Miller on the Constitution, pp. 24, 412; 1 Tucker on the Con-

Congress to regulate interstate or foreign commerce or the internal commerce of the District of Columbia, the Territories, or the Insular Possessions.

The prohibition contained in § 1 of the Amendment is self-executing. *Civil Rights Cases*, 109 U. S. 3, 20. If the Amendment contained no grant of power of enforcement, Congress would have complete power to enforce the prohibition as it saw fit in interstate or foreign commerce or domestically in the District of Columbia, etc., and the States would have power to enforce it within their respective jurisdictions as to their intrastate or internal commerce. But Congress then would have no power under the Constitution to legislate in respect of the internal commerce of a State even with its consent and a State could not constitutionally legislate in respect of interstate or foreign commerce without the assent or concurrence of Congress. The second section of the Amendment granted to Congress the additional or supplemental power to authorize federal officers to enter the States and apply and enforce the sanctions of federal or state legislation in respect of their internal affairs provided the State concurred in such legislation, and it granted to the respective States the power to apply and enforce their legislation or the legislation of Congress against interstate and foreign

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stitution, pp. 323–4; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 554, 555; *Wilkinson* v. *Leland*, 2 Pet. 627, 647, 657; *State* v. *Keith*, 63 N. Car. 140, 144; *Eason* v. *State*, 11 Ark. 481, 491; *Coyle* v. *Oklahoma*, 221 U. S. 559, 580; 2 Madison's Notes (Farrand), pp. 629–31; *Maxwell* v. *Dow*, 176 U. S. 581, 601–2; *State* v. *St. Louis & S. W. Ry. Co.*, 197 S. W. 1012, 1013 (Tex.); *Alexander* v. *People*, 7 Colo. 155, 167; Federalist (Ford's ed.), Nos. 39 and 43, pp. 251, 291–2; *Spies* v. *Illinois*, 123 U. S. 131, 161; *Barron* v. *Baltimore*, 7 Pet. 243, 250; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 217; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Bartemeyer* v. *Iowa*, 18 Wall. 129, 138; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *In re Kemmler*, 136 U. S. 436, 448, 449; *Stewart* v. *Kahn*, 11 Wall. 493, 507; *Dred Scott* v. *Sandford*, 19 How. 393; Cong. Globe, 39th Congress, 1st sess., pt. 3, p. 2766; *id.*, pt. 4, p. 2961.

commerce, provided Congress concurred in such state legislation.

This construction would give reasonable scope and effect to § 2 and every word thereof; would be consistent with the plan and provisions of the Constitution as a whole; would recognize the dual sovereignty in our federal system of Nation and State each supreme within its own sphere; would tend to promote coöperation and harmonious, effective, economical and satisfactory enforcement of the prohibition of intoxicating liquors, and would be efficient, conservative and beneficent as a practical method of enforcement. In other words, such a construction would not interfere with the power of Nation or State within their respective and exclusive spheres, would provide for coöperation in enforcement when found desirable, and would make fixed and permanent the constitutional principle and the governmental policy embodied in the acts of Congress known as the Wilson Act of August 8, 1890, the Webb-Kenyon Act of March 1, 1913, and the Reed Amendment of March 3, 1917. Indeed, the learned Assistant Attorney General urged, after referring to the decisions of the court in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, and *United States* v. *Hill*, 248 U. S. 420, that § 2 of the Amendment in providing for concurrent power was not revolutionary or an innovation in principle, but made a permanent part of the Constitution the principle upon which these three intoxicating liquor statutes of Congress had been sustained.

Section 2 of the Amendment in providing for concurrent power of enforcement is unique and unprecedented and a departure from the precedents of the Thirteenth, Fourteenth and Fifteenth Amendments. The different form was adopted and submitted to the States for their approval undoubtedly because more likely to be acceptable if the States were retaining a voice in regulations affecting their

own internal affairs. The controlling inquiry, however, is not so much what Congress itself understood as what the States reasonably understood from the language of the proposed Amendment as submitted by Congress. *State* v. *St. Louis & S. W. Ry. Co.*, 197 S. W. 1012, 1013; *Alexander* v. *People*, 7 Colorado, 155, 167; *White* v. *Hoyt*, 73 N. Y. 505, 511. Did they understand that they were surrendering to Congress their then exclusive legislative power over the internal traffic in intoxicating liquors? Did they understand that they were turning over to Congress practically supreme control over intrastate regulation in all its phases? Would not such a radical and far-reaching surrender and new delegation of power to Congress, in conflict with our traditions and history and our dual system, have readily found apt and direct expression?

Section 1 shows that the controlling thought of Congress was to secure national prohibition; and § 2 shows a purpose to commend this main proposal to the States for their acceptance by assuring them of the least possible interference with their police powers. This would tend to secure ratification when a proposition to surrender or abdicate their police powers would probably have been rejected. The question, therefore, upon which state legislatures voted was, Shall there be national prohibition without loss of state control over local affairs? The construction now urged by the Government, however, would result practically in complete loss of state control. Disguise it as they may, the learned counsel for the Government ask the court to give no practical effect whatever to the clause which was the inducement to the States to ratify the proposed prohibition Amendment.

The history of the proposed Amendment in the Sixty-fifth Congress should be traced and the following facts emphasized, namely, that both houses rejected the form originally proposed which vested power in "the Congress and the several States independently or concurrently to

enforce" the proposed Amendment; that the Senate adopted on August 1, 1917, a form limiting the power of enforcement to Congress alone as in the prior constitutional amendments, that this form was not acceptable to the House, and that the Amendment made by the House and concurred in by the Senate vested in "the Congress and the several States . . . concurrent power to enforce." The significance and effect of this amendment cannot be disregarded unless it is to be held that the change of wording made no change whatever in practical meaning, and that the language of the modification made by the House can be disregarded as of no practical effect whatever notwithstanding "'the elementary canon of construction which requires that effect be given to every word of the Constitution" as declared in *Knowlton* v. *Moore*, 178 U. S. 41, 87; and see also *Hurtado* v. *California*, 110 U. S. 516, 534; *Holmes* v. *Jennison*, 14 Pet. 540, 570–571; *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218; *Schick* v. *United States*, 195 U. S. 65, 68; *Newell* v. *People*, 7 N. Y. 9, 97; Cooley's Constitutional Limitations, 7th ed., p. 92.

Ordinary definitions of the adjective "concurrent" show its current meaning to be "concurring or acting in conjunction; agreeing in the same act, contributing to the same event or effect; operating with; coincident" (Century Dictionary). See also Webster and Standard Dictionaries. The exact meaning can be determined by a consideration of the subject-matter, probable purpose and context. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 19; 1 Story on the Constitution, § 455; *Wedding* v. *Meyler*, 192 U. S. 573, 584; *In re Mattson*, 69 Fed. Rep. 535, 542; *Ex parte Desjeiro*, 152 Fed. Rep. 1004, 1007; *Nielsen* v. *Oregon*, 212 U. S. 315.

For thirty years prior to the framing of the Eighteenth Amendment there had been a public movement and tendency to secure coöperation, that is, *concurrence*,

between Nation and State in the regulation and prohibition of intoxicating liquors, as evidenced by the legislation of Congress in the Wilson Act in 1890, the Webb-Kenyon Act in 1913, and the Reed Amendment in 1917. The Wilson Act was based upon the language of this court in *Leisy* v. *Hardin*, 135 U. S. 100, 119, which suggested that the States could regulate interstate commerce in intoxicating liquors if Congress assented by appropriate legislation, and the act was upheld upon that theory, not only in respect of interstate commerce, but in respect of foreign commerce as well. *In re Rahrer*, 140 U. S. 545; *Delamater* v. *South Dakota*, 205 U. S. 93; *De Bary* v. *Louisiana*, 227 U. S. 108. In furtherance of this policy of coöperation and *concurrence* with the States, which thus began with the Wilson Law in 1890, Congress passed the Webb-Kenyon Law of 1913, and the Reed Amendment of 1917. *Vance* v. *Vandercook Company*, 170 U. S. 438; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420. The Chief Justice declared in the *Clark Distilling Co. Case* that the regulation of intoxicating liquors was "a subject as to which both State and Nation in their respective spheres of authority possessed supremest authority" and that "Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation between the local and national forces of government to the end of preserving the rights of all." *Slaughter-House Cases*, 16 Wall. 36, 78. Under these acts of Congress there was no uniformity as to regulation of interstate commerce in intoxicating liquors, for such commerce was subjected to the varying regulations of the respective States.

The Eighteenth Amendment, therefore, embodied in a permanent constitutional provision a principle that had

been judicially sustained as within the scope of the constitutional power of Congress, though not without dissent in this court and on the part of President Taft and the then Attorney General, and it had been a matter of grave constitutional controversy in Congress and in the forum of public opinion whether the decisions of this court were based on sound reasoning and tenable grounds.

The principal ground upon which the supremacy of the National Prohibition Act was deduced by the learned court below, even as to intrastate regulation, was that by Article VI the Constitution and all laws and treaties made in pursuance thereof are declared to be the supreme law of the land, anything in any state constitution or statute to the contrary notwithstanding. But Article VI applies and controls only when an act of Congress is passed *in pursuance* of the Constitution, and if the Eighteenth Amendment requires the concurrence of the State, an act of Congress without such concurrence cannot be said to have been passed in pursuance of the Constitution. Indeed, it should logically and reasonably follow that the insertion of the word "concurrent" in the Eighteenth Amendment was for the very purpose of preventing Article VI from operating to make the legislation of Congress supreme and practically exclusive. It begs the whole question to advance Article VI as controlling.

The clause vesting concurrent power cannot mean one thing as applied to the action of the several States, and quite another and different thing when applied to the action of Congress. It cannot mean that if there be conflict, the action of Congress must control, for that would plainly be to say that the power of the States was not concurrent, but subordinate, and, in practical effect, no power at all. *Wedding* v. *Meyler*, 192 U. S. 573, 584; *Nielsen* v. *Oregon*, 212 U. S. 315; *In re Mattson*, 69 Fed. Rep. 535, 542; *Ex parte Desjeiro*, 152 Fed. Rep. 1004, 1007; *Houston* v. *Moore*, 5 Wheat. 1, 22; *Passenger Cases*, 7 How.

282, 395, 396, 399. If, therefore, the clause in question does not authorize the States to invade the field of federal jurisdiction, *i. e.*, interstate and foreign commerce, without the concurrence of Congress, it would be illogical to argue that it authorized Congress to invade the field of state jurisdiction without the concurrence of the States.

It is not contended by the appellant that Congress and the several States must adopt identical or practically identical enforcement measures, or that any enforcement act adopted by one must be wholly inoperative if not adopted by the other. But it is assumed that no unnecessary fundamental change in the federal system and its controlling and vivifying spirit was intended or contemplated, that the Nation and the State were to continue supreme and independent each within its own historic and constitutional sphere, that no undue interference of one with the other was intended, and that additional or supplemental power was being granted to both, which would authorize each to enter the sphere of the other provided the latter concurred; in other words, coöperated by concurring.

The appellant further contends that Title II of the National Prohibition Act is unconstitutional in certain particulars because not appropriate legislation and because it contains arbitrary and oppressive provisions depriving persons of their property rights without due process of law.

It is conceded of record by the Government and not challenged in its argument that the definition contained in § 1 of Title II of the National Prohibition Act includes beverages which are as matter of fact non-intoxicating. The prohibition of the Eighteenth Amendment, however, is expressly limited to intoxicating liquors.

The power of Congress in peace times to enforce the specific prohibition of intoxicating liquors is not as broad and comprehensive as the police powers of the States.

The case of *Ruppert* v. *Caffey*, 251 U. S. 264, does not hold otherwise. The court was then dealing solely with the war power of Congress, which is the highest attribute of governmental sovereignty, and the comparison in the opinion in that case with the state police power as an analogy was merely to illustrate freedom from restraint.

Incidental power to enforce a grant of power to Congress cannot be used to enlarge and expand the grant itself—particularly when to allow it would impinge upon the reserved powers of the States. *Civil Rights Cases*, 109 U. S. 3. The mere fact that the prohibition of non-intoxicating beverages may in the judgment of Congress tend to aid and render more effective the enforcement of prohibition against intoxicating liquors is insufficient. *United States* v. *Dewitt*, 9 Wall. 41; *Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *United States*, 203 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251.

The first section of Title II of the National Prohibition Act plainly purports to constitute no more than a definition of the term "intoxicating liquors" as used in the Eighteenth Amendment. It was enacted as and for a definition, and that is its declared intent. The provision might not have been enacted had its wording been changed so as to declare that it was in truth not a definition at all, but was being inserted in the act because it was believed to be advisable to include non-intoxicating liquors in order more effectively to enforce the prohibition against intoxicating liquors. The definition of an intoxicating liquor is one distinct and concrete idea and intent; the banning of non-intoxicating liquors as an incidental measure of enforcement is quite a different idea and intent.

No more objectionable or dangerous doctrine could be imagined than that an enactment, clearly avowed and intended to be a definition of a constitutional term and

having in view solely that purpose and end, can be sustained as an exercise of a very different power and intent having in view a different end and supported by entirely different considerations—an intent and purpose that may not have been in the minds of Congress at the time. Such a practice, if tolerated, would enable the courts to attribute to a statute a meaning and effect not at all contemplated or understood by those who enacted it, and possibly in conflict with their actual intent.

It may be proper, in reviewing state legislation which has been upheld by a state court as within the legislative powers of a State, for this court to attribute the intent as found by the state court, and not at all permissible to attribute an intent not expressed in the case of a provision in an act of Congress purporting on its face solely to be a definition and passed in the exercise of a distinctly limited power of legislation—as here limited to intoxicating liquors. Congress is always exercising delegated, limited, circumscribed and enumerated powers, and not the broad and elastic police powers of a State.

The Eighteenth Amendment must be read in connection with the Tenth Amendment. It could not have been intended by the use of the phrase "appropriate legislation" to authorize Congress to construe a prohibition limited to intoxicating liquors as including authority to regulate the vast field of non-intoxicating beverages, which the Amendment itself had left unprohibited and therefore free for state regulation.

Sixty years of regulation by Congress of the alcoholic content of beverages has demonstrated that adequate provisions for licensing and supervising the production of non-intoxicating malt or vinous liquors at the breweries or places of manufacture, and for licenses, stamps, labels and inspection certificates before shipment, could easily have been framed, as was done in respect of analogous subjects in the Food and Drug Act of Congress of June 30,

1906; the Meat Inspection Act of March 4, 1907; the Insecticide Act of April 26, 1910; the Plant Quarantine Act of August 20, 1912; the Pure Seed Act of August 24, 1912, and the Grain Standards Act of August 11, 1916.

If non-intoxicating beer, ale and porter may be prohibited, and even the use of their names made a criminal offense, because they look like intoxicating liquor, then grape juice, which looks like many kinds of wine, and syruped soda-water, nearly all the varieties of which look like some species of intoxicating liquors, may also be prohibited. It may be properly mentioned in this connection as a *reductio ad absurdum* that water looks like gin! It seems to be urged that it is merely a question of degree of regulation, and that the court ought not to override the judgment of Congress on any question of degree in the exercise of its constitutional powers. But the court is constantly called upon to determine just such questions of degree.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, principally relied on by the Government, is readily distinguishable if it be borne in mind that the state legislation then in question was enacted in the exercise of the unlimited police power of the State and that the legislation had been sustained by the highest court of the State as not prohibited by the state constitution.

The definition of intoxicating liquors as those containing one-half of one per cent. or more by volume of alcohol is arbitrary and contrary to conceded facts. This standard of alcoholic content originated for purposes of federal internal revenue taxation in connection with the Civil War Revenue Act of July 13, 1866, 14 Stat. 164, § 48, and was first adopted by the Treasury Department as a test of what should be deemed "fermented liquors" under taxing statutes. Treasury Decision Special No. 102, May 17, 1871; T. D. No. 804, June 29, 1904; T. D. No.

892, April 26, 1905; T. D. No. 1307, February 5, 1908; T. D. No. 1360, May 19, 1908; T. D. No. 2354, August 2, 1916; *United States* v. *Standard Brewery*, 251 U. S. 210, 219; P. O. Department Liquor Bulletin No. 2, June 15, 1917. States adopted the same standard as a matter of practical, convenient and economical administration. See, *e. g.*, New York Liquor Tax Law, § 2, subd. 6; Revised Code of Delaware, c. 6, Art. 11, § 137; Oregon General Laws of 1905, c. 2, § 18; Oklahoma Constitution, Prohibition Amendment of 1907. As state legislatures could, if they saw fit, prohibit not only intoxicating liquors but liquors containing no alcohol at all (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192), the present question could not arise.

The definition of an intoxicating liquor contained in § 1 of Title II of the National Prohibition Act is conceded on the record to be arbitrary and false, and it is not even attempted to be upheld as a definition. As declared by this court in *Eisner* v. *Macomber*, 252 U. S. 189, Congress cannot by any definition conclude the matter, since it cannot by legislation alter the Constitution or add to its powers. The authority conferred by the Amendment is not as to liquor in general but only as to "intoxicating liquors for beverage purposes." If Congress can under the guise of a definition or of appropriate enforcement legislation forbid the manufacture and sale of non-intoxicants as a State may under the doctrine of the *Purity Extract Co. Case*, it can likewise, under the plea that it deems it necessary, forbid the manufacture and sale of any liquor whatever, whether alcoholic or not, for medicinal, industrial, or sacramental purposes; for if one qualifying and limiting term, *i. e.*, "intoxicating," can be disregarded, the other qualifying term of the same nature and of no higher obligation, may also be deleted. Such a method of construing a constitutional provision is condemned by settled canons of constitutional interpretation, and more

important still is the fact that it would violate fundamental principles of honesty and good faith in public affairs.

Mr. Jackman for the appellee in No. 794, advanced the following propositions:

Neither Congress nor the several States have power to define "intoxicating liquor" under the Eighteenth Amendment.

Congress cannot under the enforcement clause enlarge the express grant of power so as to include beverages non-intoxicating in fact.

The State of Wisconsin having, under the power reserved and granted it by the Amendment, enacted legislation to enforce the prohibition, and not having concurred in the later congressional legislation, the act of Congress cannot be enforced and the state law overridden as to strictly intrastate transactions.

The Amendment is void because (a) it is not an amendment within the meaning of Article V, (b) it violates the Tenth Amendment.

Messrs. Houts, Fitzsimmons and *Crow*, for the appellant in No. 837, submitted, on the following main propositions:

The Amendment has not been ratified by three-fourths of the States.

It is invalid as an amendment, leading to the destruction of the system of dual sovereignties, and also as an attempt to exercise ordinary legislative power.

Under § 2 of the Amendment concurrence of the State is necessary to render the act of Congress effective as to internal transactions.

The National Prohibition Act is not appropriate legislation under the Amendment. (For the reasons stated in the other cases.)

350. Argument of Solicitor General and Asst. Attorney General.

The Amendment destroys appellant's property, existent before its adoption, and is therefore unconstitutional.

Argument of *The Solicitor General* and *Mr. Assistant Attorney General Frierson:*

The bills filed by the States of Rhode Island and New Jersey can not be maintained. They seek to enjoin officers of the Federal Government from enforcing criminal laws enacted by Congress. The sole ground upon which the original jurisdiction of this court can be invoked is that they involve controversies between a State and the citizens of other States. The fact that a State assumes to sue and names as defendants citizens of other States is not conclusive that this court must take jurisdiction. The judicial power of the United States over controversies to which a State is a party extends only to those cases "in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States." *United States* v. *Texas*, 143 U. S. 621, 644; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. A State can not invoke judicial action by making the case of its citizens its own and thus suing in vindication of grievances of particular individuals. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *South Dakota* v. *North Carolina*, 192 U. S. 286; *Louisiana* v. *Texas*, 176 U. S. 1, 16, 24–25.

The questions as to whether the Eighteenth Amendment is of such a nature as to be within the amending power provided by Article V of the Constitution, and whether the Eighteenth Amendment has, in fact, been ratified, are questions committed by the Constitution to the political branch and not to the judicial branch of the Government. *Luther* v. *Borden*, 7 How. 42–43, 45; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118; *Mississippi* v. *Johnson*, 4 Wall. 475; *Georgia* v. *Stanton*, 6 Wall. 50; *Field* v. *Clark*, 143 U. S. 649, 680; *Harwood* v. *Wentworth*,

162 U. S. 547, 562; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143; *Myers* v. *Anderson*, 238 U. S. 368, 373–374; 15 Stat. 707–711.

The Eighteenth Amendment, establishing a fundamental rule of law, is an amendment within the meaning of Article V of the Constitution. The Constitution and the amendments heretofore adopted are full of rules of law by which the activities of the various agencies of government, both state and federal, and the rights and duties of persons are fixed or regulated. The Thirteenth Amendment, particularly, is almost an exact prototype of the Eighteenth Amendment and operates upon individuals in the same way. It has always been understood that there is no limitation upon the character of amendments which may be adopted, except such limitations as are imposed by Article V itself. Washington's Writings, vol. XII, pp. 4–5, 222. With these specific limitations, whatever amendments or changes Congress may deem necessary to propose are incorporated in the Constitution if ratified in the manner provided by Article V. Gales and Seaton, Annals of Congress, vol. 1, p. 712.

The fact that the Eighteenth Amendment confers upon Congress a power which had previously belonged exclusively to the States does not prevent that Amendment from being within the amending power conferred by Article V of the Constitution. A provision to the effect that no State should, without its consent, "be affected in its internal police" by an amendment to the Constitution was twice proposed in the Convention and twice rejected. Elliot's Debates, vol. 1, pp. 316–317; Madison's Papers, pp. 531–532, 551–552. In scope, the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate. Willoughby on the Constitution, § 227. Many of the amendments heretofore adopted have taken away from the States powers previously reserved to them. This is particularly

true of the Thirteenth, Fourteenth and Fifteenth Amendments. *Minor* v. *Happersett*, 21 Wall. 162, 172.

No State by any provision of its laws or its constitution can make the ratification of an amendment to the Constitution of the United States by its legislature subject to a referendum vote of the people. The only method of ratification mentioned in the Constitution is through representatives assembled either in the legislature or a convention called for that purpose. It is clearly contemplated that the action of the State in ratifying shall not be by direct vote of the people but by their representatives, and the body, or bodies, who shall be recognized as acting for the States are specifically named. A legislature in ratifying an amendment, therefore, derives its power not from the State or the people of the State but from the people of the United States through the Constitution of the United States. This power can not be abrogated, limited, or restricted by any state statute or constitution, *Dodge* v. *Woolsey*, 18 How. 331, 348; *McPherson* v. *Blacker*, 146 U. S. 1, 34; Gales and Seaton, Annals of Congress, vol. 1, p. 716; *Davis* v. *Ohio*, 241 U. S. 565.

The Volstead Act, if otherwise constitutional, is effective in all the States without the concurrence of any state legislature. The effect of § 2 of the Eighteenth Amendment, providing that Congress and the several States shall have concurrent power to enforce the Amendment by appropriate legislation, enables Congress and the several state legislatures to enact such laws as they deem necessary to suppress the liquor traffic—the laws of Congress to be enforced through the courts of the United States, and the laws of each State to be enforced through its own courts. The provision is not that legislation shall be concurrent, but that the concurrent power to legislate shall exist. Congress and the several state legislatures may, therefore, legislate for the accomplishment of the same purpose, but independently of each other. *Fox* v.

Ohio, 5 How. 410, 418, 432; *Houston* v. *Moore*, 5 Wheat. 1, 47; *Prigg* v. *Pennsylvania*, 16 Pet. 536, 621; *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209, 211; *Passenger Cases*, 7 How. 282, 396; *United States* v. *Marigold*, 9 How. 559.

In order to enforce, with any degree of efficiency, the Eighteenth Amendment, a definition of intoxicating liquor was essential. The definition provided by the Volstead Act includes nothing which Congress could not properly deem necessary to enforce the provisions of the Amendment, and therefore is not arbitrary. *Crane* v. *Campbell*, 245 U. S. 304, 308; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Ruppert* v. *Caffey*, 251 U. S. 264.

The fact that by the passage of the Volstead Act on October 28, 1919, and the going into effect of the second title of that act and the Eighteenth Amendment on January 16, 1920, the sale of non-intoxicating beer containing as much as one-half of one per centum of alcohol was prohibited by the War Prohibition Act does not render Title II of the Volstead Act invalid, even as to the sale of such beer lawfully manufactured before October 28, 1919. *Mugler* v. *Kansas*, 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156–157; *Ruppert* v. *Caffey*, 251 U. S. 264.

The fact that the Amendment does not provide compensation for liquors previously manufactured does not render it invalid.

Mr. Justice Van Devanter announced the conclusions of the court.

Power to amend the Constitution was reserved by Article V, which reads:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legisla-

tures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The text of the Eighteenth Amendment, proposed by Congress in 1917 and proclaimed as ratified in 1919, 40 Stat. 1050, 1941, is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 83, 41 Stat. 305, which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases —Nos. 29 and 30, Original,—were brought in this court, and the others in district courts. Nos. 696, 752, 788 and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in

printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S. 276.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Hawke* v. *Smith*, *ante*, 221.

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every

legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, § 1), wherein liquors containing as much as one-half of one per cent. of alcohol by volume and fit for use for beverage

purposes are treated as within that power. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree is reversed.

In Nos. 696, 752, 788 and 837 the decrees are affirmed.

MR. CHIEF JUSTICE WHITE, concurring.

I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the Amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily, in doing this I notice various contentions made concerning the proper construction of the provisions of the Amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the Amendment.

The Amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into,

or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The second is as follows: "Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the States in enforcing the prohibition of the first section and hence that in the absence of such concurrent action by Congress and the States no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second, to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as practically to nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the States does not as a prerequisite exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the States and makes each action effective, but, as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the States in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged, because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent powers con-

ferred upon Congress and the States are not subject to conflict because their exertion is authorized within different areas, that is, by Congress within the field of federal authority, and by the States within the sphere of state power, hence leaving the States free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress, the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a State, since the basis of the distinction upon which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction and therefore is not operative within a State.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead serve in my judgment to make it certain that it cannot possibly be that Congress and the States entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true, indeed, that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the Amendment dealt and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is undisputable, as I have stated,

that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to State and Nation is, not to construct or perfect or cause the Amendment to be completely operative, but as already made completely operative, to enforce it. Observe also the words of the grant which confine the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist no one would gainsay that the first section in and of itself granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the Amendment would become fully operative. This being

true it would follow, if the contentions under consideration were sustained, that the second section gave the States the power to nullify the first section, since a refusal of a State to define and sanction would again result in no amendment to be enforced in such refusing State.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the States to give effect to, that is, to carry out or enforce, the Amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice McReynolds, concurring.

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances, I prefer to remain free to consider these questions when they arrive.

Mr. Justice McKenna, dissenting.

These cases are concerned with the Eighteenth Amendment of the Constitution of the United States, its validity and construction. In order to have it, and its scope in attention, I quote it:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The court in applying it has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgments reversing No. 794 and affirming Nos. 696, 752, 788 and 837.

I am, however, at a loss how, or to what extent, to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the Eighteenth Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and as part of the Constitution of the United States is to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5 and 6, seem to assert the undisputed. I neither assent to them nor dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration. My only comment is that I know of no

intimation in the case that § 2, in conferring concurrent power on Congress and the States to enforce the prohibition of the first section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition and was made concurrent to engage the resources and instrumentalities of the Nation and the States. The power was conferred for use, not for abuse.

Conclusions 8 and 9 as I view them, are complements of each other, and express, with a certain verbal detail, the power of Congress and the States over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the States, its exportation from them, and its importation into them—in a word, give power over the liquor business from producer to consumer and to prescribe the quality of the latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of § 2 do not mean joint power in Congress and the States, nor the approval by the States of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts?—and there are conflicts, and more there may be, between it and state legislation. The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered, States are litigants as well as private citizens, the former presenting the rights of the States, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state legislation,—why not a deci-

sion upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the States, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the States being supreme and exclusive within the spheres of their exercise—called by counsel "historical fields of jurisdiction." I submit again, they should have consideration and decision.

The Government has felt and exhibited the necessity of such consideration and decision. It knows the conflicts that exist or impend. It desires to be able to meet them, silence them and bring the repose that will come from a distinct declaration and delimitation of the powers of Congress and the States. The court, however, thinks otherwise, and I pass to the question in the case. It is a simple one, it involves the meaning of a few English words —in what sense they shall be taken, whether in their ordinary sense, or have put upon them an unusual sense.

Recurring to the first section of the Amendment, it will be seen to be a restriction upon state and congressional power, and the deduction from it is that neither the States nor Congress can enact legislation that contravenes its prohibition. And there is no room for controversy as to its requirement. Its prohibition of "intoxicating liquors" "for beverage purposes" is absolute. And, as accessory to that prohibition, there is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation from "the United States." Its prohibition, therefore, is National, and, considered alone, the means of its enforcement might be such as Congress, the agency of National power, might

prescribe. But it does not stand alone. Section 2 associates Congress and the States in power to enforce it. Its words are, "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

What then is meant by the words "concurrent power"? Do they mean united action, or separate and independent action; and, if the actions differ (there is no practical problem unless they differ), shall that of Congress be supreme?

The Government answers that the words mean separate and independent action, and, in case of conflict, that that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents.[1] I contest the assertions and oppose to them the common usage of our language, and the definitions of our lexicons,

[1] The following is the contention of the Government which I give to accurately represent it: "It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means, in other connections, a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections, it has a well-fixed and established meaning, which is controlling in this case."

And again, "It is to be noted that section 2 does not say that *legislation shall be concurrent*, but that the *concurrent power* to legislate shall exist. The concurrent power of the States and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers, in referring to the concurrent power of Congress and the States to legislate."

And after citing cases, the Government says: "It will thus be seen that in legal nomenclature the concurrent power of the States and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject-matter separately and independently."

general and legal.[1] Some of the definitions assign to the words "concurrent power," action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance. Such is the result of the Government's contention. It does not satisfy the definitions, or the requirement of § 2—"a concurrent power excludes the idea of a dependent power," Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 399.

Other definitions assign to the words, "existing or happening at the same time," "concurring together," "coexistent." These definitions are, as the others are, inconsistent with the Government's contention. If coexistence of the power of legislation is given to Congress and the States by § 2, it is given to be coexistently exercised. It is to be remembered that the Eighteenth Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation. It was naturally thought that legislation enacted by "the Congress and the several States," by its concurrence would better enforce prohibition and avail for its enforcement of the two great divisions of our governmental system,

[1] Definitions of the dictionaries are as follows: The Century: "Concurrent: **2. Concurring, or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident. 3. Conjoint; joint; concomitant; coördinate; combined.** That which concurs; a joint or contributory thing." Webster's first definition is the same as that of the Century. The second is as follows: "Conjoint; associate; concomitant; existing or happening at the same time."

the Nation and the States, with their influences and instrumentalities.

From my standpoint, the exposition of the case is concluded by the definition of the words of § 2. There are, however, confirming considerations; and militating considerations are urged. Among the confirming considerations are the cases of *Wedding* v. *Meyler*, 192 U. S. 573, and *Nielsen* v. *Oregon*, 212 U. S. 315, in which "concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by act of Congress. And it was decided that the jurisdiction given conferred equality of powers, "legislative, judicial and executive," and that neither State could override the legislation of the other. Other courts have given like definitions. 2 Words and Phrases Judicially Defined, 1391, *et seq.*, Bouvier's Dictionary, vol. 1, p. 579. Analogy of the word "concurrent" in private instruments may also be invoked.

Those cases are examples of the elemental rule of construction that, in the exposition of statutes and constitutions, every word "is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it," and there cannot be imposed upon the words "any recondite meaning or any extraordinary gloss." 1 Story, Const., § 451; *Lake County* v. *Rollins*, 130 U. S. 662. And it is the rule of reason as well as of technicality, that if the words so expounded be "plain and clear, and the sense distinct and perfect arising on them" interpretation has nothing to do. This can be asserted of § 2. Its words express no "double sense," and should be accepted in their single sense. It has not yet been erected into a legal maxim of constitutional construction, that words were made to conceal thoughts. Besides, when we depart from the words, ambiguity comes. There are as many solutions

as there are minds considering the section, and out of the conflict, I had almost said chaos, one despairs of finding an undisputed meaning. It may be said that the court, realizing this, by a declaration of conclusions only has escaped the expression of antithetical views, considering it better not to blaze the trails, though it was believed that they all led to the same destination.

If it be conceded, however, that to the words "concurrent power" may be ascribed the meaning for which the Government contends, it certainly cannot be asserted that such is their ordinary meaning, and I might leave § 2, and the presumptions that support it, to resist the precedents adduced by the Government. I go farther, however, and deny the precedents. The Federalist and certain cases are cited as such. There is ready explanation of both, and neither supports the Government's contention. The dual system of government contemplated by the Union encountered controversies, fears, and jealousies that had to be settled or appeased to achieve union, and the Federalist in good and timely sense explained to what extent the "alienation of State sovereignty" would be necessary to "National sovereignty," constituted by the "consolidation of the States," and the powers that would be surrendered, and those that would be retained. And the explanation composed the controversies and allayed the fears of the States that their local powers of government would be displaced by the dominance of a centralized control. And this court, after Union had been achieved, fulfilled the assurances of the explanation and adopted its distribution of powers, designating them as follows: (1) Powers that were exclusive in the States—reserved to them; (2) Powers that were exclusive in Congress, conferred upon it; (3) Powers that were not exclusive in either, and hence said to be "concurrent." And it was decided that, when exercised by Congress, they were supreme—"The authority of the States then retires" to inaction.

To understand them, it must be especially observed that their emphasis was, as the fundamental principle of the new government was, that it had no powers that were not conferred upon it, and that all other powers were reserved to the States. And this necessarily must not be absent from our minds, whether construing old provisions of the Constitution or amendments to it or laws passed under the amendments.

The Government nevertheless contends that the decisions (they need not be cited) constitute precedents for its construction of § 2 of the Eighteenth Amendment. In other words, the Government contends (or must so contend for its reasoning must bear the test of the generalization) that it was decided that in all cases where the powers of Congress are concurrent with those of the States, they are supreme as incident to concurrence. The contention is not tenable; it overlooks the determining consideration. The powers of Congress were not decided to be supreme because they were concurrent with powers in the States, but because of their source, their source being the Constitution of the United States, as against the source of the powers of the States, their source being the constitutions of the States, the Constitution and laws of the United States being made by Article VI the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 426.

This has example in other powers of sovereignty that the States and Congress possess. In *McCulloch* v. *Maryland*, at pages 425, 430, Chief Justice Marshall said that the power of taxation retained by the States was not abridged by the granting of a similar power to the Government of the Union, and that it was to be concurrently exercised, and these truths, it was added, had never been denied, and that there was no "clashing sovereignty" from incompatibility of right. And necessarily; a con-

currence of power in the States and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that § 2, by giving concurrent power to Congress and the States, gave Congress supreme power over the States. I repeat the declaration of Mr. Justice McLean: "A concurrent power excludes the idea of a dependent power."

It is, however, suggested (not by the Government) that if Congress is not supreme upon the considerations urged by the Government, it is made supreme by Article VI of the Constitution. The Article is not applicable. It is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the constitutions and laws of the States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 209, 211; 2 Story, Const., 5th ed., § 1838, *et seq.*

The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as Article VI. There seems to be a denial of this, based on Article V. That Article provides that the amendments proposed by either of the ways there expressed "shall be valid to all Intents and Purposes, as Part of this Constitution." Some undefinable power is attributed to this in connection with Article VI, as if Article V limits in some way, or defeats, an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have? And it would be nullified by the mythical power attributed to Article V, either alone or in conjunction with Article VI. A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it. Section 2, therefore, is a new provision of power, power to the

States as well as to Congress, and it is a contradiction to say that a power constitutionally concurrent in Congress and the States, in some way becomes constitutionally subordinate in the States to Congress.

If it be said that the States got no power over prohibition that they did not have before, it cannot be said that the power already possessed was not preserved to them by the Amendment, notwithstanding the policy of prohibition was made national; and besides, there was a gift of power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the States should remain with the States and be participated in by Congress only in concurrence with the States, and thereby preserved from abuse by either, or exercise to the detriment of prohibition. There was, however, a power given to the States, a power over importations. This power was subject to concurrence with Congress and had the same safeguards.

This construction of § 2 is enforced by other considerations. If the supremacy of Congress had been intended, it would have been directly declared as in the Thirteenth, Fourteenth and Fifteenth Amendments. And such was the condition when the Amendment left the Senate. The precedent of preceding amendments was followed, there was a single declaration of jurisdiction in Congress.

Section 2 was amended in the House upon recommendation of the Judiciary Committee, and the provision giving concurrent power to Congress and to the States was necessarily estimated and intended to be additive of something. The Government's contention makes it practically an addition of nothing but words, in fact denuding it of function, making it a gift of impotence, not one of power to be exercised independently of Congress or concurrently with Congress, or, indeed, at all. Of this there can be no contradiction, for what power is assigned to the States to legislate if the legislation be immediately

superseded—indeed, as this case shows, be possibly forestalled and precluded by the power exercised in the Volstead Act? And meaningless is the difference the Government suggests between concurrent power and concurrent legislation. A power is given to be exercised, and we are cast into helpless and groping bewilderment in trying to think of it apart from its exercise or the effect of its exercise. The addition to § 2 was a conscious adaptation of means to the purpose. It changed the relation between the States and the National Government. The lines of exclusive power in one or the other were removed, and equality and community of powers substituted.

There is a suggestion, not made by the Government, though assisting its contention, that § 2 was a gift of equal power to Congress and to the States, not, however, to be concurrently exercised, but to be separately exercised; conferred and to be exercised, is the suggestion, to guard against neglect in either Congress or the States, the inactivity of the one being supplied by the activity of the other. But here again we encounter the word "concurrent" and its inexorable requirement of coincident or united action, not alternative or emergency action to safeguard against the delinquency of Congress or the States. If, however, such neglect was to be apprehended, it is strange that the framers of § 2, with the whole vocabulary of the language to draw upon, selected words that expressed the opposite of what the framers meant. In other words, expressed concurrent action instead of substitute action. I cannot assent. I believe they meant what they said and that they must be taken at their word.

The Government with some consciousness that its contention requires indulgence or excuse, at any rate in recognition of the insufficiency of its contention to satisfy the words of § 2, makes some concessions to the States. They are, however, not very tangible to measurement. They seem to yield a power of legislation to the States

and a power of jurisdiction to their courts, but, almost at the very instant of concession, the power and jurisdiction are declared to be without effect.

I am not, therefore, disposed to regard the concessions seriously. They confuse; "make no light; but rather darkness visible." Of what use is a concession of power to the States to enact laws which cannot be enforced? Of what use a concession of jurisdiction to the courts of the States when their judgments cannot be executed, indeed the very law upon which it is exercised may be declared void in an antagonistic jurisdiction exerted in execution of an antagonistic power? [1] And equally worthless is the analogy that the Government assays between the power of the National Government and the power of the States to criminally punish violations of their respective sovereignties, as for instance in counterfeiting cases. In such cases the exercises of sovereignty are not in antagonism. Each is inherently possessed and independently exercised, and can be enforced no matter what the other sovereignty may do or abstain from doing. On the other hand, under the Government's construction of § 2, the legislation of Congress is supreme and exclusive. Whatever the States may do is abortive of effect.

The Government, seeking relief from the perturbation of mind and opinions produced by departure from the words of § 2, suggests a modification of its contention that in case of conflict between state legislation and congres-

[1] The Government feels the inconsistency of its concessions and recessions. It asserts at one instant that the legislation of the States may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the federal courts for the same act as a violation of the federal law. From this situation the Government hopes that there will be rescue by giving the Eighteenth Amendment "such a meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offense in the courts of the other." The Government considers, however, the question is not now presented.

sional legislation that of Congress would prevail, by intimating that, if state legislation be more drastic than congressional legislation, it might prevail; and, in support of the suggestion, urges that § 1 is a command to prohibition, and that the purpose of § 2 is to enforce the command, and whatever legislation is the most prohibitive subserves best the command, displaces less restrictive legislation and becomes paramount. If a State, therefore, should define an intoxicating beverage to be one that has less than one-half of one per cent. of alcohol, it would supersede the Volstead Act, and a State might even keep its legislation supreme by forestalling congressional retaliation by prohibiting all artificial beverages of themselves innocuous, the prohibition being accessory to the main purpose of power,—adducing *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264. Of course this concession to the more drastic legislation destroys all that is urged for congressional supremacy; for necessarily supremacy cannot be transferred from the States to Congress or from Congress to the States as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" and declares that "those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the States as well.

From these premises the deduction seems inevitable that there must be united action between the States and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the Amendment—will it not bring to the enforcement of prohibition the power of the States and the power of

Congress, make all the instrumentalities of the States, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its courts and officers, agencies of the enforcement? Will it not bring to the States as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections?—and it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so, sacrifices nothing of the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the Amendment, for without legislation its prohibition would be ineffectual; and that it is impossible to secure the concurrence of Congress and the States in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the Amendment,—will impel its execution through Congress and the States. It may not be in such legislation as the Volstead Act with its ½ of 1% of alcohol, or in such legislation as some of the States have enacted with their 2.75% of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement, in view of the requirement of § 2, it may be answered as this court answered in *Wedding* v. *Meyler*, *supra*, "The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but, in relief of the solitude of my position, I invoke the coincidence of my views with

those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

MR. JUSTICE CLARKE, dissenting.

I concur in the first seven paragraphs and in the tenth paragraph of the announced "conclusions" of the court, but I dissent from the remaining three paragraphs.

The eighth, ninth and eleventh paragraphs, taken together, in effect, declare the Volstead Act to be the supreme law of the land,—paramount to any state law with which it may conflict in any respect.

Such a result, in my judgment, can be arrived at only by reading out of the second section of the Eighteenth Amendment to the Constitution the word "concurrent," as it is used in the grant to Congress and the several States of "concurrent power to enforce this article by appropriate legislation." This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this court,—that in expounding the Constitution of the United States no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word to the extent that this is reasonably possible.

This rule was first announced in 1824 in *Gibbons* v. *Ogden*, 9 Wheat. 1; it was applied with emphasis in 1840 in *Holmes* v. *Jennison*, 14 Pet. 540, 570; and in the recent case of *Knowlton* v. *Moore*, 178 U. S. 41, it is referred to as an elementary canon of constitutional construction.

The authoritative dictionaries, general and law, and the decided cases, agree, that "concurrent" means "joint and equal authority", "running together, having the same

authority," and therefore the grant of concurrent power to the Congress and the States should give to each equal,—the same,—authority to enforce the Amendment by appropriate legislation. But the conclusions of the court from which I dissent, by rendering the Volstead Act of Congress paramount to state laws, necessarily deprive the States of all power to enact legislation in conflict with it, and construe the Amendment precisely as if the word "concurrent" were not in it. The power of Congress is rendered as supreme as if the grant to enforce the Amendment had been to it alone, as it is in the Thirteenth, Fourteenth and Fifteenth Amendments and as it was in one proposed form of the Eighteenth Amendment which was rejected by Congress. Cong. Rec., July 30, 1917, p. 5548, and December 17, 1917, p. 469.

Such a construction should not be given the Amendment if it can reasonably be avoided, as it very clearly may be, I think, with a resultant giving of a large and beneficent effect to the grant, as it is written. Giving to the word "concurrent" its usual and authoritative meaning, would result in congressional legislation under this grant of power being effective within the boundaries of any State only when concurred in by action of Congress and of such State, which, however, could readily be accomplished by the approval by either of the legislation of the other or by the adoption of identical legislation by both. Such legislation would be concurrent in fact and in law and could be enforced by the courts and officers of either the Nation or the State, thereby insuring a more general and satisfactory observance of it than could possibly be obtained by the federal authorities alone. It would, to a great extent, relieve Congress of the burden and the general government of the odium to be derived from the antagonism which would certainly spring from enforcing, within States, federal laws which must touch the daily life of the people very intimately and often very irritatingly.

Such coöperation in legislation is not unfamiliar to our Constitution or in our practical experience.

By § 10 of Art. I of the Constitution of the United States the States are deprived of power to do many things without the consent of Congress, and that consent has frequently been given, especially to contracts and agreements between States, which without it would be unconstitutional and void. The Wilson Act of 1890, the Webb-Kenyon Act of 1913, and the Reed Amendment of 1917 are familiar examples of coöperative legislation on the subject of intoxicating liquors. Other instances could readily be supplied. When to this we add that the Volstead Act is obviously in very large part a compilation from the prohibition codes of various States and is supposed to contain what is best in each of them, there is every reason to believe that, if concurrent legislation were insisted upon, the act would be promptly approved by the legislatures of many of the States and would thereby become the concurrent law of the State and Nation throughout a large part of the Union.

Under this construction, which I think should be given the Amendment, there would be large scope also for its operation even in States which might refuse to concur in congressional legislation for its enforcement. In my judgment, the law in such a State would be as if no special grant of concurrent power for the enforcement of the first section had been made in the second section, but, nevertheless, the first section, prohibiting the manufacture, sale, transportation, importation or exportation, of intoxicating liquors for beverage purposes, would be the supreme law of the land within the non-concurring States and they would be powerless to license, tax, or otherwise recognize as lawful anything violating that section, so that any state law in form attempting such recognition would be unconstitutional and void. Congress would have full power under the interstate commerce clause,

and it would be its duty, to prevent the movement of such liquor for beverage purposes into or out of such a State and the plenary police power over the subject, so firmly established in the States before the Eighteenth Amendment was adopted, would continue for use in the restricted field which the first section of the Amendment leaves unoccupied,—and the presumption must always be indulged that a State will observe and not defy the requirements of the National Constitution.

Doubtless such a construction as I am proposing would not satisfy the views of extreme advocates of prohibition or of its opponents, but in my judgment it is required by the salutary rule of constitutional construction referred to, the importance of which cannot be overstated. It is intended to prevent courts from re-writing the Constitution in a form in which judges think it should have been written instead of giving effect to the language actually used in it; and very certainly departures from it will return to plague the authors of them. It does not require the eye of a seer to see contention at the bar of this court against liberal, paramount, congressional definition of intoxicating liquors as strenuous and determined as that which we have witnessed over the strict definition of the Volstead Act.

With respect to the 11th conclusion of the court, it is enough to say that it approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered. This is deemed warranted, I suppose, as legislation appropriate to the enforcement of the first section, and precedent is found for it in prohibition legislation by States. But I cannot agree that the prohibition of the manufacture, sale, etc., of intoxicating liquors in the first section of the Eighteenth Amendment gives that plenary power over the subject which the legislatures of the States derive from the people or which may be derived from the war powers

of the Constitution. Believing, as I do, that the scope of the first section cannot constitutionally be enlarged by the language contained in the second section, I dissent from this conclusion of the court.

In the *Slaughter-House* [16 Wall. 36], and other cases, this court was urged to give a construction to the Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of our state and federal governments by transferring to the general government that police power, through the exercise of which the people of the various States theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its varieties of climate, of industry and of habits of the people. But this court, resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government, in a number of decisions which came to command the confidence of the generation active when they were rendered and which have been regarded by our succeeding generation as sound and wise and highly fortunate for our country.

The cases now before us seem to me to again present questions of like character to, and of not less importance than, those which were presented in those great cases, and I regret profoundly that I cannot share in the disposition which the majority of my associates think should be made of them.

F. S. ROYSTER GUANO COMPANY *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 165. Argued March 19, 22, 1920.—Decided June 7, 1920.

A state law which taxes all the income of local corporations derived from business done outside of the State and business done within it, while exempting entirely the income derived from outside the State by local corporations which do no local business, is arbitrary and violates the equal protection clause of the Fourteenth Amendment. P. 415.

Reversed.

THE case is stated in the opinion.

Mr. Cadwallader J. Collins for plaintiff in error.

Mr. J. D. Hank, Jr., Assistant Attorney General of the Commonwealth of Virginia, with whom *Mr. Jno. R. Saunders*, Attorney General of the Commonwealth of Virginia, was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error is a corporation created by and existing under the laws of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. It operates a manufacturing plant in the County of Norfolk in that State and several plants in other States. From the operation of its plant in Virginia it made net profits during the year ending December 31, 1916, amounting in round figures to $260,000; and from the operation of its plants in other States during the same year made net profits amounting to about $270,000. Under the revenue law of

the State (Act of April 16, 1903, Va. Acts, c. 148, p. 155, as amended by Act of March 22, 1916, Va. Acts, c. 472, p. 793), plaintiff in error returned for taxation as income the former amount, omitting the latter. Under appropriate provisions of law the state officials added the latter amount, and assessed an income tax against plaintiff in error upon the aggregate. It petitioned the Corporation Court of the City of Norfolk for relief from so much of the tax as represented the $270,000, among other reasons upon the ground that, so far as c. 472 of 1916 taxed that part of its business which was transacted outside of the limits of Virginia, the law imposed upon plaintiff in error a burden not placed upon domestic corporations doing no part of their business in Virginia but transacting business beyond the limits thereof, such corporations, by c. 495 of 1916 (Va. Acts, p. 830), being expressly exempted from a tax on income derived from business done without the limits of the State; and hence c. 472, as applied to the business of plaintiff in error transacted beyond the limits of the State, denied to it the equal protection of the laws, in violation of the Fourteenth Amendment. Other points were raised, but they require no mention. The Corporation Court having sustained the tax, plaintiff in error applied to the Supreme Court of Appeals of the State for a writ of error and supersedeas to review the judgment. That court being of opinion that the decision was right, the application was denied and an order entered in effect affirming the judgment of the Corporation Court; whereupon this writ of error, directed to the Supreme Court of Appeals in accordance with the practice indicated in *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269, was sued out under § 237, Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726.

The statute thus assailed (Va. Acts 1916, c. 472) imposes an income tax of 1 per centum upon "the aggregate amount of income of each person or corporation," subject

to specified deductions and exemptions; including in income "all profits from earnings of any partnership or business done in or out of Virginia," and also "all other gains and profits derived from any source whatever." Under this act, as applied to plaintiff in error by the state officers, whose action was sustained by the court of last resort, a tax was imposed upon the income derived from its plants without the State as well as from that within the State. At the same time, c. 495, Laws 1916 (p. 830), approved on the same day, was in force. This reads as follows: "Whereas, certain corporations have been organized under the laws of Virginia, and it is anticipated that certain others will be organized thereunder, which do no business within this State; therefore—1. Be it enacted by the general assembly of Virginia, That no income tax nor ad valorem taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under the laws of this State which do no part of their business within this State; and the mere holding of stockholders meetings in this State by such corporations required by law, shall not be construed as doing any business in this State within the meaning of this act; " with further matter not necessary to be quoted. It is not disputed that, under this act, corporations created by and existing under the laws of Virginia, and doing business in other States but none within the State except the holding of stockholders' meetings, are exempted from the payment of any income tax.

Of course, these two statutes—c. 472 and c. 495—must be considered together as parts of one and the same law; and by their combined effect, if the judgment under review be affirmed, plaintiff in error will be required to pay a tax upon its income derived from business done without as well as from that done within the State, while other corporations owing existence to the same laws and simul-

taneously deriving income from business done without the State but none from business within it, are exempt from taxation.

It is unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Michigan Central R. R. Co.* v. *Powers,* 201 U. S. 245, 293; *Keeney* v. *New York,* 222 U. S. 525, 536; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139. Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the State warranting the imposition of taxes upon their incomes derived from without the State or property taxes upon their intangibles, and in recognition of the impolicy if not injustice of imposing such taxes upon them while they are liable, and presum-

ably subjected, to taxation in the State or States where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State. Corporations of this class derive no more protection from the State of their origin with respect to their outside business, and are no less subject to taxation by the States in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the State of origin. Their business done within the State presumably is of some general benefit to the State, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under c. 472 of taxes not only upon this income but also upon income that they derive from business conducted outside of the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that which ought to operate if at all in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design.

We suggest that it was inadvertent because shortly after the present suit was brought, and as if in recognition of and in order to correct the discrimination, the revenue act was amended by Act of March 14, 1918 (c. 219, Va. Acts, p. 395), providing: "Persons and corporations

doing a part of their business within the State and a part without the State, and having offices or other regular places of business both within and without the State, shall be taxed only upon such income as is derived from business transacted and property located within the State, which may be determined by an allocation and separate accounting," etc. But this was not retrospective, and, for the reasons given, we are constrained to hold that so far as c. 472 of the Laws of 1916 operated to impose upon plaintiff in error a tax upon income derived from business transacted and property located without the State because of the mere circumstance that it also derived income from business transacted and property located within the State, while at the same time, under c. 495, other corporations deriving their existence and powers from the laws of the same State, and receiving income from business transacted and property located without the State but none from sources within the State, were exempted from income taxes, there was an arbitrary discrimination, amounting to a denial to plaintiff in error of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

It is settled that mere inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment; that the power of the State to make any reasonable classification of property, occupations, persons or corporations for purposes of taxation is not abridged thereby; and that the Amendment forbids merely inequality which is the result of clearly arbitrary action and, particularly, of action

attributable to hostile discrimination against particular persons or classes. *Beers* v. *Glynn*, 211 U. S. 477, 485; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 463, 464; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. The question presented for our decision is whether the action of Virginia in subjecting its domestic corporations which transact business within the State to a tax on all their income, wherever earned, while exempting from the tax those domestic corporations which transact no business within the State, is so clearly arbitrary or invidious, as to fall within the constitutional prohibition.

The court declares the act void on the ground that no substantial reason for difference in treatment between the two classes of domestic corporations has been suggested or can be conceived; and that the classification is illusory and the States' action arbitrary. I can conceive of a reason for differentiating in respect to taxation between the two classes of domestic corporations. The following reason is, in my opinion, substantial, and shows that the classification is not illusory, nor the State's action necessarily arbitrary or invidious.

It is a matter of common knowledge that some States have, in the past, made the granting of charters to non-residents for companies, which purpose transacting business wholly without the State of incorporation, an important source of revenue. The action of those States has materially affected the legislation of other States. Sometimes it has led to active competition for the large revenues believed to be available from this source. More often, it has led to protective measures. The legislature of Virginia may have believed that its own citizens interested in corporations whose business was transacted wholly in other States or countries, might be tempted to incorporate under more favorable laws of other States, but that such temptation would prove ineffective where the companies transacted a part of their business within

the State of Virginia and enjoyed compensating advantages. If the legislature of Virginia enacted the laws of 1916 here in question because it held that view, we surely cannot say that its action was unreasonable or arbitrary. And with the wisdom of its action we have no concern.

If there were a doubt as to its reasonableness the facts which were, or may have been, before the legislature should be considered. Every private domestic business corporation makes a substantial contribution to the revenues of Virginia even if it is not subjected to property or income taxes. It pays an organization tax on incorporation; and annually thereafter both a registration fee and an annual franchise tax. These fees and taxes are graduated. For a corporation with a $1,000,000 capital the organization fee is $200; the annual registration fee and franchise tax $225. Laws of 1903, c. 148, §§ 37, 43, 41, pp. 179, 182, 180; as amended respectively by Laws of 1912, c. 301; 1910, c. 58; 1908, c. 227. In the year 1915–1916 the fees and taxes from this source aggregated $114,-175.80.[1] The number of charters issued was 1067—many of them, as the list indicates, to companies whose business would be transacted wholly without the State of Virginia.[2] The dangers from competition incident to less burdensome corporation laws of other States had, in other connections, been considered by the Tax Commission.[3] It may well have been the case that the legislature did not wish to put in peril revenues already being received from concerns which, as they transacted no business within the State, might easily have surrendered their Virginia charters and reincorporated under the laws of the other States; and it would have been natural that

[1] Report of Auditor of Virginia (1916), p. 66; Report of State Corporation Commission of Virginia (1916), p. 270.

[2] Report of State Corporation Commission of Virginia (1916), pp. 226–248, 269.

[3] Report of Virginia Tax Commission (1911), p. 354.

to avert such loss the legislature should have relieved such corporations from the payment of income taxes. The Joint Committee on Tax Revision had recommended that the income tax cover "all profits from earnings of any partnership or business done in or out of Virginia," and had not suggested that domestic corporations should be exempted from it.[1] It was reasonable that other domestic corporations should have been subjected, like natural persons domiciled within the State to a tax on all income—whether earned within or without the State. Compare *Cream of Wheat Co.* v. *County of Grand Forks*, *ante*, 325.

The court calls attention to the Act of March 14, 1918 (c. 219, Va. Acts, p. 395), which exempts all individuals and corporations from the burden of taxation on incomes earned without the State. The effect of this act is, among other things, to remove the alleged discrimination here complained of. But its enactment does not, in my opinion, indicate that the imposition of the tax was inadvertent. To my mind it indicates rather that the legislatures of the several States may safely be entrusted with the duty of legislation.

I cannot doubt that the classification for purposes of taxation made by the Act of 1916 was within the power of the State. But if I did not think the matter clear, I should, for the reasons stated by me fully elsewhere, feel constrained to resolve the doubt in favor of the constitutionality of the act.

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[1] Report of Joint Committee on Tax Revision (Virginia, 1914), p. 203.

Counsel for Parties.

FEDERAL TRADE COMMISSION *v.* GRATZ ET AL., COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WARREN, JONES & GRATZ, ET AL.

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

No. 492. Argued April 20, 21, 1920.—Decided June 7, 1920.

Under the Federal Trade Commission Act (Sept. 26, 1914, c. 311, 38 Stat. 717), an order of the commission requiring parties to desist from a course of business as unfair competition must correspond with the complaint which the commission is required to issue and serve as the basis for the proceedings; and where the complaint, liberally construed, is plainly insufficient to show unfair competition, the order is without foundation and, when challenged, will be annulled by the court. P. 427.

The commission's complaint alleged that some of the respondents were engaged in selling, in interstate commerce, directly to the trade or through their co-respondents, steel ties, manufactured by a certain company, made and used for binding bales of cotton, and jute bagging, manufactured by another company, used to wrap bales of cotton; that the other respondents, as their agents, sold and distributed such ties and bagging, in interstate commerce, principally to jobbers and dealers who resold the same to retailers, cotton-ginners and farmers; and that, with the purpose, intent and effect of discouraging and stifling competition, all of the respondents refused, and for more than a year had refused, to sell any such ties unless the prospective purchaser would also buy from them the bagging to be used with the number of ties proposed to be bought. *Held*, plainly insufficient to show an unfair method of competition. *Id.* 258 Fed. Rep. 314, affirmed.

THE case is stated in the opinion.

Mr. Huston Thompson, with whom *The Solicitor General* and *Mr. Claude R. Porter* were on the brief, for petitioner.

Mr. Thomas F. Magner for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By an Act approved September 26, 1914, c. 311, 38 Stat. 717, Congress made provision for the Federal Trade Commission and declared its powers.

Section 4 defines commerce as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Section 5.—"That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce. Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited

by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition."

Section 5 further provides that the commission may apply to the designated Circuit Court of Appeals to enforce an order, "And shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code. Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the

enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive."

Sections 6 and 7 empower the commission to require reports and compile information concerning corporations; to inquire concerning execution of decrees restraining violations of the anti-trust acts; to investigate alleged violations of such acts; to recommend readjustments of corporate business; to publish information and make reports to Congress; to classify corporations and make rules and regulations; to investigate trade conditions; to act, under orders of the court, as a master in chancery in certain designated circumstances, etc.

Undertaking to proceed under § 5, June 4, 1917, the commission issued a complaint containing two counts against respondents. The first related to unfair methods of competition, and the second charged violation of § 3 of the Clayton Act, approved October 15, 1914, c. 323, 38 Stat. 730. Respondents denied both charges. After taking much testimony the commission held there was no evidence to support the second count; but it ruled that respondents had practiced unfair competition and ordered that they, "their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind."

Upon respondents' petition the Circuit Court of Appeals, Second Circuit, annulled the commission's order. 258 Fed. Rep. 314. It said, "We think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufac-

turing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances."

The challenged order is based solely upon the first count of the complaint which follows:

"Federal Trade Commission

"*vs.*

"Anderson Gratz and Benjamin Gratz, co-partners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh and Alex. Fitzhugh, co-partners, doing business under the firm name and style of P. P. Williams & Co., and Charles O. Elmer.

"The Federal Trade Commission having reason to believe, from a preliminary investigation made by it that Anderson Gratz and Benjamin Gratz, co-partners, doing business under the firm name and style of Warren, Jones & Gratz; P. P. Williams, W. H. Fitzhugh and Alex. Fitzhugh, co-partners, doing business under the firm name and style of P. P. Williams & Co., and Charles O. Elmer, all of whom are hereinafter referred to as respondents, have been, and are, using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief, as follows:

"I.

"Paragraph one: That the respondents, Anderson Gratz and Benjamin Gratz, are co-partners, doing business under the firm name and style of Warren, Jones & Gratz, having their principal office and place of business

in the city of St. Louis and State of Missouri, and are engaged in the business of selling, in interstate commerce, either directly to the trade, or through the respondents hereinafter named, steel ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Company of Pittsburg, Pennsylvania, and also selling, in the same manner, jute bagging, used to wrap bales of cotton, and which jute bagging is manufactured by the American Manufacturing Company, of St. Louis, Missouri.

"Paragraph two: That the respondents, P. P. Williams, W. H. Fitzhugh and Alex. Fitzhugh, are co-partners, doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg and State of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans and State of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners, and farmers.

"Paragraph three: That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging."

It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the commission and effect of the evidence presented. The

judgment below must be affirmed since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the fair intendment of those words. We go no further and confine this opinion to the point specified.

When proceeding under § 5, it is essential, *first*, that, having reason to believe a person, partnership or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding "in respect thereof would be to the interest of the public;" *next*, that it formulate and serve a complaint stating the charges "in that respect" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If after a hearing the commission shall deem "the method of competition in question is prohibited by this Act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.

The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was

certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

Count one alleges, in effect, that Warren, Jones & Gratz are engaged in selling, either directly to the trade or through their co-respondents, cotton ties produced by the Carnegie Steel Company and also jute bagging manufactured by the American Manufacturing Company. That P. P. Williams & Company of Vicksburg, and Charles O. Elmer of New Orleans, are the selling and distributing agents of Warren, Jones & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers who resell them to retailers, ginners and farmers. That with the purpose and effect of discouraging and stifling competition in the sale of such bagging all the respondents for more than a year have refused to sell any of such ties unless the purchaser would buy from them a corresponding amount of bagging—six yards with as many ties.

The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion

in respect of his own business methods must be preserved. *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85.

The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident.

The judgment of the court below is

Affirmed.

MR. JUSTICE PITNEY concurs in the result.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE CLARKE concurs.

First. The court disposes of the case on a question of pleading. This, under the circumstances, is contrary to established practice. The circumstances are these:

The pleading held defective is not one in this suit. It is the pleading by which was originated the proceeding before the Federal Trade Commission, an administrative tribunal, whose order this suit was brought to set aside. No suggestion was made in the proceeding before the Commission that the complaint was defective. No such objection was raised in this suit in the court below. It was not made here by counsel. The objection is taken now for the first time and by the court.

This suit, begun in the Circuit Court of Appeals for the Second Circuit, was brought to set aside an order of the Federal Trade Commission. Before the latter the matter involved was thoroughly tried on the merits. There was a complaint and answers. Thirty-five witnesses were examined and cross-examined. A report of proposed findings as to facts was submitted by the Examiner and exceptions were filed thereto. Then, the case was heard before the Commission, which made a finding of facts, stated its conclusions as to the law, and ultimately issued the order in question. The proceedings occupied more

than sixteen months. The report of them fills four hundred pages of the printed record. In my opinion it is our duty to determine whether the facts found by the Commission are sufficient in law to support the order; and, also, if it is questioned, whether the evidence was sufficient to support the findings of fact.

Second. If the sufficiency of the complaint is held to be open for consideration here, we should, in my opinion, hold it to be sufficient. The complaint was filed under § 5 of the Federal Trade Commission Act which declares unlawful "unfair methods of competition in commerce"; empowers the Commission to prevent their use; and directs it to issue and serve "a complaint stating its charges in that respect" whenever it has reason to believe that a concern "has been or is using" such methods. The function of the complaint is solely to advise the respondent of the charges made so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime like an indictment or information, nor the elements of a cause of action like a declaration at law or a bill in equity. All that is requisite in a complaint before the Commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence. The practice of the Federal Trade Commission in this respect, as in many others, is modelled on that which has been pursued by the Interstate Commerce Commission for a generation and has been sanctioned by this as well as the lower federal courts. *United States Leather Co.* v. *Southern Ry. Co.*, 21 I. C. C. 323, 324; *Clinton Sugar Refining Co.* v. *C. & N. W. Ry. Co.*, 28 I. C. C. 364, 367; *Stuarts Draft Milling Co.* v. *Southern Ry. Co.*, 31 I. C. C. 623, 624; *New York Central, etc., R. R. Co.* v. *Interstate Commerce Commission*, 168 Fed. Rep. 131, 138–139; *Dickerson* v. *Louisville & Nashville R. R. Co.*, 187 Fed. Rep. 874, 878; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162

U. S. 197, 215; *Cincinnati, Hamilton & Dayton Ry. Co.* v. *Interstate Commerce Commission*, 206 U. S. 142, 149.

The complaint here under consideration stated clearly that an unfair method of competition had been used by respondents, and specified what it was, namely, refusing to sell cotton ties unless the customer would purchase with each six ties also six yards of bagging. The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the Act to Regulate Commerce imposes. It is unnecessary to set forth why the rate specified was unjust or why the preference specified is undue or unreasonable, because these are matters not of law but of fact to be established by the evidence. *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361. So far as appears neither this nor any other court has ever held that an order entered by the Interstate Commerce Commission may be set aside as void, because the complaint by which the proceeding was initiated, failed to set forth the reasons why the rate or the practice complained of was unjust or unreasonable; and I cannot see why a different rule should be applied to orders of the Federal Trade Commission issued under § 5.[1]

[1] See Report Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 13: "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. And what it is brought to prevent is not the commission of *acts* of unfair competition, but the pursuit of unfair *methods*. Furthermore, the order is not self-executory. Standing alone it is only informative and advisory. The Commission cannot enforce it. If not acquiesced in by the respondents the Commission may apply to the Circuit Court of Appeals to enforce it. But the Commission need not take such action; and it did not do so in respect to the order here in question. Respondents may, if they see fit, become the actors and ask to have the order set aside. That is what was done in the case at bar.

The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some of the States as early as 1889. In 1890 Congress passed the Sherman Law. It was followed by much

legislation in the States [1] and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry and the farm implement industry. A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this court rendered its decision in *Standard Oil Co.* v. *United States*, 221 U. S. 1, and in *United States* v. *American Tobacco Co.*, 221 U. S. 106. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter view prevailed in the Sixty-third Congress.[2]

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[1] See Laws on Trusts and Monopolies. Compiled under direction of the Clerk of the House Committee on the Judiciary, 63d Cong., by Nathan B. Williams. Revised January 10, 1914; also Trust Laws and Unfair Competition (Federal) Bureau of Corporations, March 15, 1915.

[2] See Report of Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 10, reporting the bill:

"Some would found such a Commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. . . .

The Clayton Act (October 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act (September 26, 1914, c. 311, 38 Stat. 717) created an administrative tribunal, largely with a view to regulating competition.

Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by § 5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.[1] As Standard Oil rebates led to the creation of the Interstate Commerce Commission,[2] other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that as the former had substantially eliminated rebates—the latter might put an end to all other unfair trade practices;—and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines; and the machinery employed was substantially similar.

In undertaking to regulate competition through the Trade Commission Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade:

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the

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"The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea."

[1] See "Unfair Competition," by William S. Stevens, Political Science Quarterly (1914), p. 283; "The Morals of Monopoly and Competition" (1916), by H. B. Reed.

[2] See Railway Problems, by William Z. Ripley (1907), p. X.

continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act. And it should do this by filing a complaint with a view to a thorough investigation; and, if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.[1]

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[1] Senator Cummins, chairman of the committee which reported the bill, said (Cong. Rec., vol. 51, p. 11455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the anti-trust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the anti-trust law. The purpose of this bill in this section and in other sections which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last twenty-five years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the anti-trust law and under the decisions of the court in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably

(2) Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission.[1] Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable.[2]

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reached through these methods is an end which is destructive of fair commerce between the states. It is these considerations which, in my judgment, have made it wise, if not necessary to supplement the anti-trust law by additional legislation, not in antagonism to the anti-trust law, but in harmony with the anti-trust law, to more effectively put into the industrial life of America the principle of the anti-trust law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. . . ."

[1] See Report Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 13: "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better. . . ." See also "Unfair Competition," by W. H. S. Stevens (University of Chicago Press, 1916), pp. 1, 2. For laws prohibiting specific acts of unfair competition, see "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 184, 199.

[2] Report of (Federal) Bureau of Corporations on the International Harvester Co., March 3, 1913, p. 30: "In discussing the competitive methods of the company it should be recognized that some practices which might be regarded with indifference if there were a number of competitors of substantially equal size and power may become objectionable when one competitor far outranks not only its nearest rival, but practically all rivals combined, as is true of the International Harvester Co., so far as several of its most important lines are concerned."

The Australian Industries Preservation Act, 1908–1910, expressly

Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when by the Act to Regulate Commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage.[1] See *Pennsylvania Co.* v. *United States, supra,* p. 361; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219, 220. Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court. Compare *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263.

Third. Such a question of law is presented to us for decision; and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer except upon condition that the purchaser will buy from him also his

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declares that "unfair competition means competition which is unfair in the circumstances." "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 552, 747.

[1] See note 1, *ante,* 431.

trade requirements in another article or articles, reasonably be found by the Commission to be an unfair method of competition under the circumstances set forth in the findings of fact? If we were called upon to consider the sufficiency of the complaint, and that merely, the question for our decision would be, whether the particular practice could, under any circumstances, reasonably be deemed an unfair method of competition. But as this suit to set aside the order of the Commission brings before us its findings of fact, we must determine whether these are sufficient to support their conclusion of law that the practice constituted "under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers and distributors . . . in the material known as sugar bag cloth, and against manufacturers, dealers and distributors of the bagging known as rewoven bagging and second hand bagging, in violation of" the statute.

It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in coöperation. Similarly, what approximately equal individual traders may do in honorable rivalry, may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of resources.[1] Without providing for those cases where the method of competition here involved would be unobjectionable,

[1] See "The Morals of Monopoly and Competition," by H. B. Reed (1916), pp. 120–122.

Massachusetts legislated against the practice, as early as 1901, by a statute (c. 478) of general application. Its highest court, in applying the law which it held to be constitutional, described the prohibited method as "unfair competition." *Commonwealth* v. *Strauss*, 188 Massachusetts, 229; 191 Massachusetts, 545. Compare *People* v. *Duke*, 44 N. Y. S. 336. The (Federal) Bureau of Corporations held the practice, which it described as "full-line forcing", to be highly reprehensible.[1] Congress, by § 3 of the Clayton Act, specifically prohibited the practice in a limited field under certain circumstances. An injunction against the practice has been included in several decrees in favor of the Government entered in cases under the Sherman Law.[2] In the decree by which the American Tobacco Company was disintegrated pursuant to the mandate of this court, each of the fourteen companies was enjoined from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it. . . . " *United States* v. *American Tobacco Co.*, 191 Fed. Rep. 371, 429. The practice here in question is merely one form of the so-called "tying clauses" or "conditional requirements" which have been declared in a discerning study of the whole subject to be "perhaps the most interesting of any of the methods of unfair competition." [3]

The following facts found by the Commission, and which the Circuit Court of Appeals held were supported by sufficient evidence, show that the conditions in the

[1] Report of the (Federal) Bureau of Corporations on the International Harvester Company (March 3, 1913), p. 308.

[2] See "Unfair Methods of Competition and their Prevention," by W. H. S. Stevens, Annals, American Academy of Political and Social Science (1916), pp. 42, 43. "Trust Laws and Unfair Competition" (Federal) Bureau of Corporations (March 15, 1915), pp. 484–486, 493.

[3] "Unfair Competition," by W. H. S. Stevens (1916), p. 54.

cotton tie and bagging trade were in 1918 such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition: Cotton, America's chief staple, is marketed in bales. To bale cotton steel ties and jute bagging are essential. The Carnegie Steel Company, a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton tie situation in the United States and is able to fix and control the price of such ties throughout the country. The American Manufacturing Company manufactures about 45 per cent. of all bagging used for cotton baling; one other company about 20 per cent.; and the remaining 35 per cent. is made up of second-hand bagging and a material called sugar-bag cloth. Warren, Jones & Gratz, of St. Louis, are the Carnegie Company's sole agents for selling and distributing steel ties. They are also the American Manufacturing Company's sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Company, Warren, Jones & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby were in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company. A great many merchants, jobbers and dealers in bagging and ties throughout the cotton-growing States were many times unable to procure ties from any other firm than Warren, Jones & Gratz. In many instances Warren, Jones & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Company in order to procure a sufficient supply of steel ties.

These are conditions closely resembling those under which "full-line forcing," "exclusive-dealing requirements" or "shutting off materials, supplies or machines from competitors"—well known methods of competition, have been held to be unfair, when practiced by concerns holding a preponderant position in the trade.[1]

Fourth. The Circuit Court of Appeals set aside the order of the Commission solely on the ground that it was without authority to determine the merits of specific individual grievances, and that the evidence did not support its finding that Warren, Jones & Gratz had "adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging."

The reason assigned by the Circuit Court of Appeals for so holding was that the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their "general practice." But the power of the Trade Commission to prohibit an unfair method of competition found to have been used is not limited to cases where the practice had become general. What § 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair *methods* of competition"; that is, the method or means by which an unfair end might be accomplished. The Commission was directed to act, if it had reason to believe that an "unfair method of competition in commerce" has been or is being used. The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general prac-

[1] See "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 319–323, 328.

tice, that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted. As the Circuit Court of Appeals found that the evidence was sufficient to support the facts set forth above, and since on those facts the Commission could reasonably hold that the method of competition in question was unfair under the circumstances, it had power under the act to issue the order complained of.

In my opinion the judgment of the Circuit Court of Appeals should be reversed.

NADEAU ET AL. *v.* UNION PACIFIC RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 119. Argued January 9, 12, 1920.—Decided June 7, 1920.

The fact that tracts of land forming parts of the reservation set apart for the Pottawatomie Indians by the Treaty of 1846, 9 Stat. 853, became subject to be allotted to individual members of the tribe, under the Treaty of 1861, 12 Stat. 245, in virtue of occupation and improvements by such members, did not divest the United States of the fee to such tracts or prevent the granting of a railroad right of way across them by act of Congress. P. 446.

Such lands remained "public lands" within the meaning of the Act of July 1, 1862, c. 120, 12 Stat. 489, granting to the Union Pacific Railroad Company a right of way 200 feet in width on each side of said railroad where it may pass over the public lands. P. 444. *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582.

Upon the identification of the railroad route, the right of way grant took effect as of the date of the granting act, and was unaffected by intervening allotments under the last named treaty or by the patents issued subsequently thereunder for the lands so allotted. P. 445–446.

Land constituting part of the right of way granted by Congress for the Union Pacific Railroad cannot be acquired by individuals by adverse possession. P. 446.

Affirmed.

THE case is stated in the opinion.

Mr. A. E. Crane, with whom *Mr. Z. T. Hazen* and *Mr. J. B. Larimer* were on the briefs, for plaintiffs in error.

Mr. R. W. Blair and *Mr. N. H. Loomis*, with whom *Mr. H. W. Clark* was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error brought this action to obtain possession of certain lands, formerly part of the Pottawatomie Indian Reservation and now in Pottawatomie County, Kansas, which lie in the margins of the 400-foot strip claimed by it as legal successor to the original grantee. Counsel for plaintiffs in error well say, but one question is presented for our determination—"Were the lands involved in this action 'public lands' within the meaning of the acts of Congress dated July 1, 1862, and July 2, 1864, granting a right of way to the Leavenworth, Pawnee & Western Railway Company and its successors?"

The cause was tried by the court below upon pleadings and Agreed Statement of Facts; and a memorandum states the reasons for judgment favorable to the railroad.

By the Act of July 1, 1862, c. 120, 12 Stat. 489, Congress granted a right of way "two hundred feet in width on each side of said railroad where it may pass over the public lands" (*Stuart* v. *Union Pacific R. R. Co.*, 227 U. S. 342, 345), and declared "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said

right of way and grants hereinafter made." Some amendments added by the Act of July 3, 1866, c. 159, 14 Stat. 79, are not specially important here.

It is said that under treaties of 1846 and 1861 with the United States (9 Stat. 853; 12 Stat. 245) the Pottawatomie Reservation was no part of the "public lands"; moreover, that Congress lacked power to grant rights therein to a railroad company.

In *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 596, lands in the Delaware Diminished Indian Reservation—east of the Pottawatomies—were declared "public lands" within the intendment of the right-of-way clause, Act of 1862, although then actually occupied by individual members of the Tribe under assignments executed as provided by treaty. That case renders clear the definite purpose of Congress to treat Indian Reservations, subject to its control, as public lands within the right-of-way provision. This provision is not to be regarded as bestowing bounty on the railroad; it stands upon a somewhat different footing from private grants and should receive liberal construction favorable to the purposes in view. *United States* v. *Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 8, 14.

Whether Congress had power to make grants in respect of the lands here involved must be determined upon a consideration of their history.

November 14, 1862, the railroad company accepted the Act of 1862, and during 1865 and 1866 duly constructed its road through the Pottawatomie Reservation—so far as appears, without protest or objection.

By the Treaty of 1846—Article 4—the United States agreed to grant to the Pottawatomie Indians possession and title to a district thirty miles square, on the Kansas River, and to guarantee full and complete possession thereof "as their land and home forever." 9 Stat. 854.

In 1861 the same parties entered into another treaty

which stipulated—Articles 1 and 2—that land within the Reservation designated by the Treaty of 1846 should be allotted thereafter in severalty to tribal members who had acquired customs of the whites, and desired separate tracts; that the United States' agent should take an accurate census showing those desiring to hold in severalty and those desiring to hold in common, and "thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs," specified amounts of land "to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of the survey." "When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs."

Article 5, Treaty of 1861, offered certain privileges to the railroad company which were never accepted; the road was not constructed as provided by the treaty, but under the act of Congress.

Subsequent to July 1, 1862, a census was duly taken; commissioners, appointed January 16, 1863, made allotments, and in November, 1863, submitted their report. The Secretary of the Interior, December 12, 1864, approved allotments for the lands now involved to tribal members having improvements thereon before the Treaty of 1861, and who had continued to live there. Patents thereto issued at different dates, the earliest being June 14, 1867, without expressly reserving a right of way for the railroad. Plaintiffs in error claim through mesne conveyances from those who received such allotments and patents.

It seems plain that, at least, until actually allotted in

severalty (1864) the lands were but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. *Beecher* v. *Wetherby*, 95 U. S. 517, 525. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 653; *United States* v. *Rowell*, 243 U. S. 464, 468; *United States* v. *Chase*, 245 U. S. 89.

The grant of the right of way in 1862, was present and absolute and, upon identification of the route, took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right. *Railroad Company* v. *Baldwin*, 103 U. S. 426, 430. Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.

Any claim by plaintiffs in error based upon adverse occupancy or possession is precluded by *Northern Pacific R. R. Co.* v. *Smith*, 171 U. S. 260; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267; *Northern Pacific Ry. Co.* v. *Ely*, 197 U. S. 1; *Kindred* v. *Union Pacific R. R. Co.*, *supra*, 597.

We find no error in the judgment below and it is

Affirmed.

MR. JUSTICE CLARKE dissents.

MR. JUSTICE HOLMES, MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS did not participate in consideration or decision of this case.

BEIDLER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 260. Argued April 27, 28, 1920.—Decided June 7, 1920.

Patent No. 1,057,397, granted to George C. Beidler, March 25, 1913, for an improvement in photographing and developing apparatus, does not contain a description of the claimed discovery adequate to render it useful, and is therefore invalid for failure to disclose a practical invention.
53 Ct. Clms. 636, affirmed.

THE case is stated in the opinion.

Mr. Charles J. Williamson, with whom *Mr. Frank S. Appleman* was on the briefs, for appellant.

Mr. Daniel L. Morris, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Davis* and *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover damages for the infringement of five of the forty-one claims of Letters Patent No. 1,057,-397, applied for March 23, 1907, and granted on March 25, 1913.

The specification describes the claimed invention as an Improvement in Photographing and Developing Apparatus, and as designed primarily for reproducing writings, drawings, pictures or the like,—"novel means being also provided to convey the sensitized film through a series of receptacles containing suitable developing and fixing fluids or through suitable baths according to the requirements."

The patent is for a machine made up of a combination of elements all of which were old, to produce a result which was old but by a method of co-ordination and operation which it is claimed is new and useful. The invention is declared in the specification to consist in "the details of construction and in the arrangement and combination of the parts," as "set forth and claimed" by the inventor.

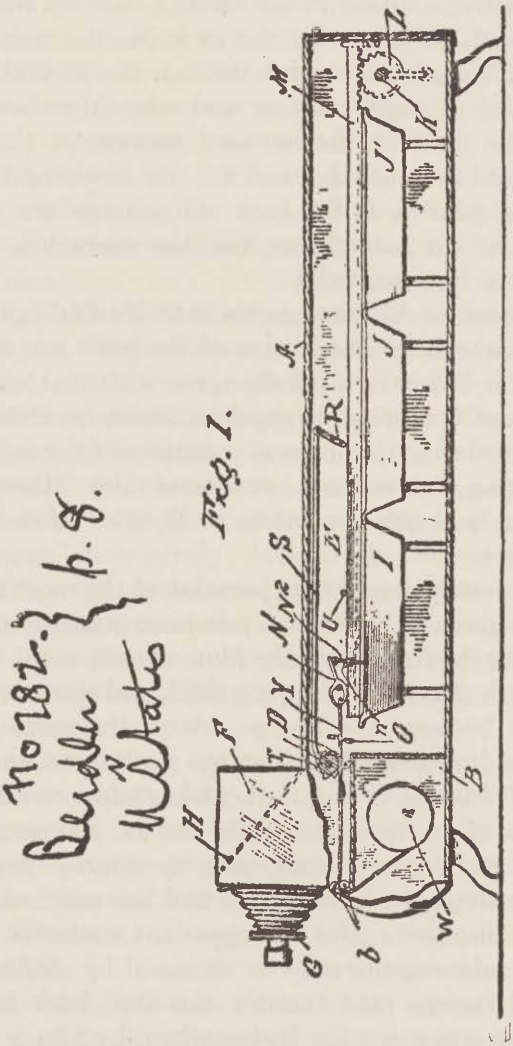
Figure 1 of the drawings, forming a part of the specification, will aid in explaining the construction and function of the invention as claimed and in determining the character and extent of the disclosures of the patent. [See p. 449.]

The described mode of operation is substantially as follows:

W is a roll of sensitized paper or film placed immediately below the exposure chamber F of a camera, with its sensitized surface uppermost to receive the desired image, reflected from the mirror H. This film is fed into the chamber between the rollers b, and thence along the floor thereof to the rollers D where it emerges from the camera and is seized by "clips" or clamps N. These clamps are supported and carried by a rack M, and may be moved to and fro (reciprocated) by turning the pinions L on the shaft K, by means of a crank.

I, J and J′ are shallow pans or "tanks" in which suitable "developing," "fixing," and "washing" solutions or fluids are placed and the whole of the construction to the right of the camera, as we face the print, is enclosed in a light-proof case E, referred to in the patent sometimes as a "compartment" and sometimes as a "chamber." The rack M, and the clamps which hold and support the film, move above the tanks and necessarily above the level of the liquid within them. By turning the pinion L, the rack M is moved outwardly away from the camera, and the clamps draw the film after them until the required length is attained, when it is severed from the roll by a manually operated cutter, O. When the film is thus cut to the

1,057,397.


No 782.
Beidler
U.S. Patents
Fig. 1.
Witnesses
Wroolridge.
Clifford D. Lawson

desired length, obviously only the free end will fall to the surface of the solution in the tank I, and by continuing the outward movement of the rack M, the specification declares, "the film is carried through the several tanks." The "clips" or clamps are set and released automatically and at the limit of the outward movement the film is released and falls into the tank J.' By reversing the turning of the pinions L the rack and clamps are returned inwardly to the camera, so that the operation, just detailed, may be repeated.

The Court of Claims carries into its findings of fact fourteen patents as illustrative of the prior art, and with this exhibit before us we fully agree with that court that the claim of invention of appellant must be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film "through the developing and other solutions or liquids" after it leaves the camera.

In the description of the operation of the machine as we have just given it, there is no provision other than gravity for causing the free end of the film, when it is cut from the roll, to sink into the developing fluid, and the other end of it is held between the clamps, above the surface of the fluid, as it is drawn along from one tank to another. The Court of Claims found that under such conditions of operation all of the film would not be submerged with sufficient rapidity and uniformity to secure a proper and useful development of the image, and this conclusion is not seriously disputed. But the appellant contends that the required submergence may be obtained by oscillating the rack and clamps (and thereby the film) back and forth within the range of a few inches when the film is over the first tank, I, with the result that the free end of the film, first sinking into the fluid, is turned under and over and the exposed side of it wholly submerged and thereby developed.

In reply to this it is contended by the Government that the disclosures of the patent do not contain any suggestion of a short, reciprocating movement of the rack, such as is thus relied upon, and that the drawings provide for a construction of the machine which would be inoperative if such movement were resorted to.

Upon this subject the finding of the Court of Claims is, that the machine can be rendered operative only "by resorting to the new oscillating mode of operation evolved by the claimant . . . for submerging and developing the film," and that such mode of operation is not disclosed in the patent. On the contrary, it is especially found that:

"By the method contemplated and disclosed in the patent, the film with the exposed side up, held at one end by the clamps attached to the rack M and moving in a plane above the pans containing the developing and fixing fluids, is intended, by the outward movement of the rack, to be drawn successively through the developing and fixing fluids, the rack moving in one direction only through its entire course, the end of the film next the knife and away from the clamps falling, when severed by the knife, on the surface of the developer in the first pan and submerging by gravity."

Treating this finding by the court as an interpretation of the patent and therefore as a conclusion of law and subject to review, we are brought to the question whether the short, reciprocating movement of the rack, confessedly necessary to successful operation of the machine, is disclosed in the patent, as it must be to render it valid. Rev. Stats., § 4888.

The only description of the mode of operation of appellant's machine, and the statute requires that this must be the best mode known to the patentee (Rev. Stats., § 4888), is found in the specification and is as follows:

"In order to draw the films through the several compartments, I provide a mechanism consisting of a shaft K,

having toothed wheels L, which mesh with a rack M, the said rack being suitably guided in the compartment E, and being alternately reciprocated through the rotation of the shaft K, in opposite directions. When the shaft is turned to the right, the said rack will be projected from the compartment until the inner end thereof is nearly above the shaft K. When the shaft is rotated in the opposite direction, the said rack will, of course, be retracted and thrust into the compartment. It is the purpose of this invention that the said rack shall carry clips N, which are designed to clamp on the edges of the film Y and as the said rack is moved outwardly, the film is carried through the several tanks as indicated. The clips are automatically released and set through the contact with trips within the casing in the path of travel of said clips."

We agree with the Court of Claims that this language describes a movement of the rack M, carrying the clamps N, in one direction only—outwardly and progressively away from the camera—until the movement is completed and the film is released, and that the reciprocating movement referred to in the patent is the return of the mechanism for clamping and carrying the film to its initial position for the purpose of repeating the operation.

There is nothing in the disclosure or in the claims to suggest the arresting of the outward movement of the clamps as soon as the film is severed from the roll and the initiating thereupon of a short oscillating movement of the mechanism to and fro, until the film shall have been immersed in the developing liquid sufficiently to bring out the image photographed. It is very clear that no such operation can be derived from the disclosure in the patent, and we agree with the further finding of the Court of Claims that in order to permit "this new oscillating mode of operation evolved by the claimant" material changes would be required in the construction of the machine, from that disclosed in the description and drawings.

The statutes, which are the source of all patent rights, provide that a valid patent may be granted for a new and useful machine, or for a new and useful improvement thereof (Rev. Stats., § 4886), but they require that every applicant for a patent shall file a written description of the manner and process of making and using his invention "in such full, clear, concise, and exact" terms as to enable any person skilled in the art to which it relates to make and construct it, and in case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery. Rev. Stats., § 4888.

Ever since *Grant* v. *Raymond,* 6 Pet. 218, 247, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful, must result in the approval of the judgment of the Court of Claims, that the patent is invalid and void, for the reason that it fails to disclose a practical and useful invention.

This result renders it unnecessary to consider the further conclusion of the court below that the use by the

United States of photo-copying machines of a type known as "Photostat," manufactured and sold under warrant of Letters Patent issued to J. S. Green, No. 1,001,019, would not have constituted an infringement of appellant's patent had it proved to be valid. However, for its bearing on future possible controversy, we add that the construction and relation of the two appliances, designed to produce the same result or product, have been fully considered and that we agree with the conclusion of the Court of Claims.

Affirmed.

KWOCK JAN FAT *v.* WHITE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO.

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

No. 313. Argued April 30, 1920.—Decided June 7, 1920.

Upon a demurrer to a petition for *habeas corpus* alleging unlawful detention under the Chinese Exclusion Laws, the testimony and other papers pertaining to the proceedings of the immigration authorities, when added, by reference, to the petition and filed with it and with the respondent's return, are to be considered in interpreting the allegations of the petition. P. 457.

An adverse decision of the Secretary of Labor upon the identity of a Chinese person, claiming to be an American citizen by birth and as such entitled to reënter the United States, is not conclusive upon the courts if the proceedings were manifestly unfair and if it clearly appear that a fair investigation of his rights was thereby prevented. P. 457 *et seq.*

In such cases, the essentials of the evidence produced before the examining inspector by the person seeking to reënter must be preserved in the record of the proceedings, no less for the information of the Commissioner of Immigration and the Secretary of Labor in exercising

their authority than for the information of the courts in determining whether that authority has been abused. P. 464.

255 Fed. Rep. 323, reversed.

THE case is stated in the opinion.

Mr. J. H. Ralston, with whom *Mr. Dion R. Holm* was on the brief, for petitioner.

Mr. Assistant Attorney General Stewart and *Mr. H. S. Ridgely*, for respondent, submitted.

MR. JUSTICE CLARKE delivered the opinion of the court.

In January, 1915, Kwock Jan Fat, the petitioner, intending to leave the United States on a temporary visit to China, filed with the Commissioner of Immigration for the Port of San Francisco an application, as provided for by law, for a "preinvestigation of his claimed status as an American citizen by birth."

He claimed that he was eighteen years of age, was born at Monterey, California, was the son of Ah Tuck Lee, then deceased, who was born in America of Chinese parents and had resided at Monterey for many years; that his mother at the time was living at Monterey; and that there were five children in the family—three girls and two boys.

The Department of Immigration made an elaborate investigation of the case presented by this application, taking the testimony of the petitioner, of his mother, of his brother and one sister and of three white men, of whom the inspector said in his report: "The three white witnesses are representative men of this town and would have no motive in mis-stating the facts." As a result of this inquiry, the original of his application, approved, signed and sealed by the Commissioner of Immigration at San Francisco, was delivered to the petitioner, and

with this evidence in his possession, which he was amply justified in believing would secure his readmission into the United States when he returned, he went to China.

The record shows that during his absence anonymous information reached the San Francisco Immigration Office (in which there had been a change of officials) to the effect that petitioner's name was not Kwock Jan Fat, as claimed, but was Lew Suey Chong, and that he had entered the United States in 1909 as the minor son of a merchant, Lew Wing Tong, of Oakland, California. Thereupon an investigation was conducted, chiefly by the comparison of photographs, for the purpose of determining the truthfulness of this anonymous suggestion, with the result that when the petitioner returned to San Francisco he was not allowed to land, and a few days thereafter was definitely denied entry to the country by the Commissioner of Immigration. Thereafter, this decision of the Commissioner was re-considered, the case re-opened and testimony for and against the petitioner was taken, but the Commissioner adhered to his denial of admission. The only reason given for the decision was "the claimed American citizenship is not established to my satisfaction."

Thereupon an appeal was taken to the Secretary of Labor, who approved the order appealed from.

Promptly thereafter the petition for a writ of *habeas corpus* in this case was filed, which is based chiefly upon two claims, viz:

(1) That the examining inspector reported to the Commissioner of Immigration as evidence, statements purporting to have been obtained from witnesses under promise that their names would not be disclosed, and that when demand was made for the names of such witnesses for purpose of reply, it was refused, with the result that petitioner did not have a fair hearing.

(2) That the examining inspector did not record an

important part of the testimony of three white witnesses called by petitioner, with the result that it was not before the Commissioner of Immigration or the Secretary of Labor when they decided adversely to him, and thereby he was arbitrarily denied a fair hearing.

A general demurrer to this petition was sustained by the District Court and on appeal to the Circuit Court of Appeals that judgment was affirmed. The case is here on writ of certiorari.

With the petition were filed all of the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and since it is prayed that when the copy of the proceedings thereafter had shall become available they may be made a part of the petition, it was proper for the courts below and is proper for this court to interpret the allegations of the petition, giving due effect to the immigration records filed with the petition and with respondent's return. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 469, 472.

It is not disputed that if petitioner is the son of Kwock Tuck Lee and his wife, Tom Ying Shee, he was born to them when they were permanently domiciled in the United States, is a citizen thereof, and is entitled to admission to the country. *United States* v. *Wong Kim Ark*, 169 U. S. 649. But while it is conceded that he is certainly the same person who, upon full investigation was found, in March, 1915, by the then Commissioner of Immigration, to be a natural born American citizen, the claim is that that Commissioner was deceived and that petitioner is really Lew Suey Chong, who was admitted to this country in 1909, as a son of a Chinese merchant, Lew Wing Tong, of Oakland, California.

It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were "such as to pre-

vent a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute, *Low Wah Suey* v. *Backus*, *supra*, or that "their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." *Tang Tun* v. *Edsell*, 223 U. S. 673, 681, 682. The decision must be after a hearing in good faith, however summary, *Chin Yow* v. *United States*, 208 U. S. 8, 12, and it must find adequate support in the evidence. *Zakonaite* v. *Wolf*, 226 U. S. 272, 274.

As to the first ground of complaint in the petition for *habeas corpus:*

After the final decision by the Commissioner of Immigration adverse to petitioner, his counsel requested an opportunity to examine the record on which it was rendered. This request was granted, and promptly, thereafter, demand was made for permission to see the testimony referred to, but not reported, in a designated report of Inspector Wilkinson. Assistant Commissioner Boyce answered this request saying:

"That portion of Inspector Wilkinson's report which was withheld from you contained no evidence whatsoever and nothing which was material to the issue in this case. As a matter of fact this inspector's report in no way influenced my decision, and was useful only in locating other material witnesses, whose testimony appears of record."

This report appears in the record before us and is of a remarkable character. It is dated August 8th and after saying that "only upon the assurance that the identity of the witness would be kept secret" could the information contained in it be obtained, the writer proceeds with much detail to narrate what, if believed, would be evidence of first importance making against the claim of petitioner. The report continues, that after his first visit the inspector

returned to Monterey and learned from his confidential witness that in the interval he had inquired of "an old Chinese resident" who said that "Tuck Lee had no son" and adds "I was unable to ascertain the name of this Chinese person."

On the margin of this letter is written August 8, 1917, "approved, Edward White" (the Immigration Commissioner).

In this manner, with much detail, statements of a person who must remain unknown, and in part derived from another person who must remain unknown, were communicated by the investigating inspector to his superior, who was to dispose of the case on the evidence which was furnished him, and he, in form at least, approved of this report. This approval is explained by the Acting Commissioner as referring to the recommendation contained in it that further investigation should be made, and there is confirmation of this explanation in the fact that the record shows that immediately thereafter evidence of the character suggested in the report was taken in affidavits which were open to the inspection of the petitioner. While we would not give the weight to these affidavits which the Commissioner of Immigration and the Secretary of Labor seem to have given to them, nevertheless, when taken with the statement of the Acting Commissioner that the inspector's report objected to was not allowed to influence his decision, we might not say that the taking and reporting of the testimony objected to of witnesses whose names are not disclosed, rendered the hearing so manifestly unfair as to require reversal,—if there were nothing else objectionable in the record.

There remains the question whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law because an inspector failed to record in its proper place an important part of

the testimony of three white witnesses called by the petitioner.

A discussion of what the record shows and of the character of the witnesses involved will be necessary to an appreciation of the importance, in determining the issue presented, of having a full report of what was said and done by these three witnesses.

When the petitioner, before going to China, applied for a preinvestigation of his claimed status as an American citizen, three white witnesses from Monterey were called in his behalf,—two of whom were notable.

Ernest Michaelis, for twenty-six years a Justice of the Peace and for many years the official collector of fish licenses, testified, making reference, for purpose of identification, to a photograph of the petitioner. He said he had known the parents of the boy since shortly after he himself went to live at Monterey in 1879; that there were two boys and three girls in the family; that he had seen the petitioner frequently as a little fellow when he went to collect fish licenses (the boy's father was a fisherman); and had known him ever since; and, referring to the photograph, he declared positively that he was sure of his identity and that he was born in Monterey. He added that the father of the boy was native born and was a voter in that community.

W. E. Parker testified that he had been agent for the Wells Fargo Company at Monterey for twenty-five years, and was also chief of the fire department and city clerk for many years. He said, referring to a photograph of petitioner, that he had known the parents of the boy for many years and the boy himself since he was five or six years old; that he remembered two boys and at least one girl, but later he stated that he recalled that there were three girls in the family, and his identification of the petitioner by photograph was very definite. He stated that the father of the boy was a fisherman and shipped fish fre-

quently by express so that he came to know him well and his wife also because she often transacted business for her husband. He recalled that after the fire and earthquake the petitioner was sent to school at San Francisco, but returned to Monterey every few months when he saw him.

A third witness, Manuel Ortins, a retired business man, gave similar testimony, but it is not so definite and circumstantial as that of the others and need not be detailed.

The Government Inspector, to whom the case in this preliminary stage was referred, wrote the Commissioner of Immigration at San Francisco that the testimony of petitioner, of his alleged brother, his mother and three credible white witnesses had been taken; that the petitioner gave his testimony mostly in English, presented a good appearance, and "tells his story in a straightforward manner in a way to convince one that he is telling the truth," and that "the three white witnesses are representative men of this town and would have no motive in mis-stating the facts." He concluded with the statement that in his mind there was no doubt that the Chinaman named Kwock Tuck Lee (claimed by applicant to be his father) had lived in Pacific Grove (the Chinatown of Monterey), and was a registered voter there; that he was married and had several children and that the testimony seemed to prove that the petitioner was a member of his family. He added that a sister of the boy lived at a given number in Chicago and suggested that her testimony should be taken. This sister's testimony was taken, as recommended, and then the inspector reported to the Commissioner of Immigration that her testimony did not vary in the main from that of the mother or brother of the petitioner; that "the white witnesses, Judge Michaelis, and chief of the fire department and Wells Fargo agent, and retired grocer, Mr. Ortins, are men of standing in this town" and that he had no reason to doubt their testimony. He added, that, taking the testimony as a whole "he

believed the applicant made a good showing and recommended favorable action." On this record the application was approved and the young man went to China.

When the petitioner returned from China and the investigation was renewed Michaelis, Ortins and another important white witness, Pugh, were examined at San Francisco by an inspector. Michaelis and Ortins testified substantially as they had done a year before, and Pugh, also a business man of Monterey, gave similar testimony and definitely identified the petitioner as the son of Kwock Tuck Lee. The examination of these witnesses, by question and answer, was taken down and is in the record, but no reference whatever was made to the fact that the petitioner was brought into their presence to test their recognition of him and his recognition of them, or of any examination in his presence. The testimony was in this form when it was sent to the Commissioner of Immigration for his consideration and decision, and, acting upon it, on September 6, 1917, he denied the petitioner admission to the country. After this decision, on September 12th, counsel for petitioner wrote the Commissioner that Michaelis, Pugh and Ortins had told him that when they were examined at San Francisco they were confronted with the petitioner and that they recognized him, that he recognized them, and that the examining inspector was present and asked a number of questions, which were answered, and calls this to the attention of the Commissioner "as it may have been an oversight on the part of the official stenographer in not recording everything said and done at the hearing of the case." On the same date affidavits by Michaelis, Pugh and Ortins were filed, in each of which, after referring to his examination at San Francisco, the affiant says in substance, as Michaelis does in form, that "after being questioned by the inspector the affiant was confronted with Kwock Jan Fat who met him while the inspector was present and that said inspector

heard everything said between affiant and Kwock Jan Fat;" and that affiant then told the inspector that the petitioner was the son of Tuck Lee, that he had known him from infancy, and that he was a native of Monterey.

To this letter of counsel for petitioner an Acting Commissioner replied, saying:

"With regard to the identification of the applicant by Messrs. Michaelis, Pugh and Ortins, you are advised that these witnesses were confronted with the applicant with the result that said witnesses mutually recognized and identified the applicant as the person whom they had known as Kwock Jan Fat, and the applicant was equally prompt in recognizing said witnesses. While I was advised of this incident and gave it full consideration in arriving at my decision, it was not made of record in connection with the statements taken from the witnesses. A copy of this letter will be placed with the record as evidence to the fact that there was mutual recognition between said witnesses and the applicant which will thus be available for the consideration of the Secretary on appeal."

This excerpt from the letter of an Acting Commissioner (the decision was rendered by the Commissioner personally) is the only form in which the facts and circumstances of the recognition of the petitioner by these important witnesses and their examination in his presence by the inspector was placed before the Secretary of Labor, and apparently there was no record whatever of either before the Commissioner of Immigration when he decided the case.

Comment cannot add to the impression which this plain statement of facts should make upon every candid mind. Here was testimony being taken which was to become the basis for decision by men who must depend wholly upon the report of what was said and done by the witnesses. The men examined were important, intelligent and very

certainly as dependable as any who were called. All they had said with respect to the identity and nativity of the petitioner when his photograph was exhibited to them was carefully reported, but when their knowledge of him and their acquaintance with him was put to the final test of having him brought before them (he had then been in China for a year), nothing whatever was recorded of what they said and did. Very certainly this must be regarded as such an important part of the testimony of these most important witnesses that it may well have been of such character as to prove sufficient to determine the result in a case even much stronger against a claim of United States citizenship than was made in this record against the claim of petitioner, and a report which suppressed or omitted it was not a fair report and a hearing based upon it was not a fair hearing within the definition of the cases cited.

The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commisioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.

The practice indicated in *Chin Yow* v. *United States*, 208 U. S. 8, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits.

Judgment reversed.

Writ of habeas corpus to issue.

STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 27, Original.—Orders entered June 7, 1920.

Order Instructing Receiver.

UPON consideration of the First Report of Frederick A. Delano, Receiver, in the above-entitled cause and of the supplemental report of June 3, 1920, and the various suggestions of the United States, intervener, and of the State of Texas, and of the several motions, applications, exceptions, and suggestions heretofore filed by parties claiming an interest in the subject-matter of this suit, it is this seventh day of June, A. D. 1920, adjudged and ordered that the action of said Receiver in taking possession of and operating under his own management and control the property described in the order of this court of April 1, 1920 [252 U. S. 372], until the further order of this court, including the oil and gas wells and plants, toll bridges, water plants, tank wagons, pipe lines, storage tanks, and other property located thereon and therein; the arrangements made by said Receiver for guarding and policing said property; the office and field organization created by

him for the operation and development of the property and the resources thereof, and for collecting, conserving, and investing the proceeds of the sale of all oil, gas, gasoline, and other products taken therefrom since April 1, 1920, be, and they are hereby, ratified and approved.

2. So much of the land described in the order of this court of April 1, 1920, in Range 14 west, as lies between the south edge of the present sand-bed of the Red River (marked generally by the border line of vegetation along the edge of the flood plain) and the foot of the Texas bluff, as was on the 1st day of April, 1920, in the possession of persons claiming under patents from the State of Texas, and is not included in the river-bed lands, as hereinafter defined, shall be returned by the Receiver to the several operators or claimants in possession on April 1, 1920, or their assigns, together with all wells, tanks, pipe lines, structures, equipment, and material, upon condition that such operator, claimant, or assigns account for, pay over to, and impound with the Receiver, if not already done, three-sixteenths of the gross proceeds of all oil taken from the respective lands on and since April 1, 1920, and the royalty on commercial gas customary in the Burk-Burnett and Northwest Extension oil fields, and royalty on casing-head gas in accordance with the regulations and schedule of prices promulgated for Indian lands by the Secretary of the Interior August 10, 1917, the proceeds thereof to be either paid in cash, or the payment thereof within ninety days to be secured by good and sufficient surety to be approved by the Receiver, and upon the further condition that said operator or claimant shall enter into an agreement in writing with the Receiver, by the terms of which the operator shall develop and operate said properties in a workmanlike and businesslike manner, subject to the supervision of the Receiver and to the orders of this court, and shall impound with the Receiver three-sixteenths of the gross amount of the proceeds from the sale of oil

thereafter produced, and the royalty on gas and casing-head gas as hereinbefore specified. This agreement to contain such further stipulations as the Receiver may deem proper for regulating the production of gas and oil and to prevent waste or the entrance of water to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits or the damage of wells in the possession of the Receiver; and, provided further, that the Receiver, in his discretion, may agree with any operator or claimant to operate for his benefit and at his expense the lands in said "Big Bend" area. Until the several operators or claimants comply with the foregoing conditions, the Receiver shall retain possession of the respective properties and shall operate the same in accordance with the order of this court of April 1, 1920, as modified by this order.

In the event of failure or refusal of any operator to operate the property as directed by the Receiver, or if any operator shall violate his agreement with the Receiver, the Receiver is authorized to take possession of and operate such property, impound three-sixteenths of the proceeds as provided by this order, and pay out of said proceeds the expenses of operation, keeping a separate account of the expense of production of each well as nearly as practicable.

3. The river-bed lands, for the purposes of this order, shall comprise all lands not hereinbefore excepted, being more specifically that part covered by the receivership of all the broad and approximately flat sandy stretch which extends from the foot of the bluff or the edge of the flood plain, as the case may be, on the south side of the river, to the midchannel of the river as defined in said order of April 1, 1920, and as it then existed including everything within the bounds just described.

4. It is further ordered that said Receiver be and he is hereby authorized and directed, out of the gross proceeds derived from the production of any well in the river-bed

area paid to him since April 1, 1920, (1) to pay to the operator or operators of any such well the actual cost of operating the same since April 1, 1920, inclusive, including in such cost a reasonable allowance for field supervision, but excluding any allowance for general or office supervision; (2) to refund to those operators or drillers who have drilled and brought into production new wells in said area since April 1, 1920, a fair percentage of the entire actual cost of such work, including a reasonable allowance for field supervision, but excluding any allowance for general or office supervision; (3) to pay the just claims of mechanics and materialmen for work done and materials furnished on wells in said area brought in since April 1, 1920, and the claims of persons, associations, and corporations for advancements made in good faith for drilling operations upon such wells, provided satisfactory evidence of the existence of all of such claims be furnished.

5. Said Receiver is further authorized and directed to release and surrender to the lawful owners thereof (1) all oil and gas stored within the receivership area which is shown by evidence satisfactory to him to have been produced by operations outside of said area; (2) all machinery, tools and other equipment stored within the receivership area when the Receiver took possession and not actually used in the production, storage, transportation, etc., of the oil and gas products thereof, and such other machinery, tools, drilling rigs and similar apparatus found within the receivership area as may not be required for the receivership operations; (3) all oil, gas and the products thereof which are shown by evidence satisfactory to the Receiver to have been produced by operations outside of the receivership area, but which were mingled and stored with similar products produced within said area on and subsequent to April 1, 1920.

6. Said Receiver is further authorized and directed (1) to arrange for the sale and disposition of all oil, gas,

gasoline, water, and other products of said property; (2) to take possession and license the operation of all toll bridges within the receivership area, and to regulate and limit the tolls chargeable thereon; (3) to sell at the best price obtainable, properly credit and account for, such derricks, tanks, pipe lines, tools, appliances and materials not claimed by the owners thereof and not required for the Receiver's operations; (4) to purchase at the best price obtainable such tanks, machinery, appliances, tools, motor cars, and equipment, as may be necessary for the operation, protection, and development of the property in his charge; (5) to retain and employ whatever technical or other assistants he may require or may deem necessary to satisfactorily operate, develop and protect the property in his charge, fix the terms of employment and the rate of compensation; (6) to make such banking arrangements as he may deem necessary to properly conserve and safeguard the funds resulting from his operations and to invest the surplus funds in United States Treasury certificates; (7) to make such contracts for fire, tornado, employee and public liability insurance as may be deemed necessary or advisable and take whatever other reasonable precautions are customarily employed in the management, operation, development, and protection of oil and gas properties of similar magnitude.

7. The Receiver is hereby further authorized and directed to drill in the river-bed area described in paragraph 3 hereof, and bring into production whatever new wells he may be advised by his geologist and other experts are necessary for the conservation and development of the river-bed lands as a whole, pay the cost thereof out of the funds in his hands derived from the production of the wells in said river-bed area, keep separate accounts of the costs of drilling and operating and of the proceeds of the production of each well, and make a full report thereof, with his recommendations for the equitable allocation and distribu-

tion of such costs and proceeds, as soon after the court reconvenes in October next as may be practicable.

8. In addition to the specific powers herein contained, the Receiver, until the further order of this court, is hereby given whatever additional administrative powers may be found to be necessary to properly protect, operate, manage and develop the property within the receivership area and the oil and gas deposits therein.

9. The Receiver is directed to report to the court, for such action as it may deem necessary and proper, any interference with the property or operations in his charge and any violation of the orders and directions given by him in the performance of his official duties; and he may apply in vacation to the Chief Justice or any Associate Justice of this court for a writ of injunction in any case where an injunction might be granted by the court.

10. Nothing in the order of this court of April 1, 1920, or in this order shall be construed to prevent or in anywise obstruct the duly constituted authorities of the United States and of the States of Texas and Oklahoma in the exercise of their several and respective jurisdictions, as heretofore, in the prevention, detention and punishment of crime within the area embraced within the orders of this court.

The parties thereto and their respective officers and agents are requested to afford to the Receiver and his agents all reasonable and appropriate assistance in guarding, protecting, and conserving the property within said area.

Order Granting Leave to File Petitions in Intervention.

THE motions of the Judsonia Developing Association, Burk Divide Oil Company No. 2 and others, Burk Divide Oil Company No. 3 and others, and Mellish Consolidated Placer Oil Company, for leave to file petitions in interven-

tion herein, are hereby granted; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the Receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920.

Order Setting Cause down for Hearing upon Certain Questions of Law, Directing the Taking of Testimony and Appointing Commissioner.

On consideration of the motion of the United States and the State of Oklahoma, requesting that this cause be set down for hearing at an early day upon certain questions of law, and of the response of the State of Texas to said motion, this day presented,

It is ordered that this cause be and it is hereby set down for hearing on the fifteenth day of November, 1920, upon the following questions of law, to wit:

(1) Is the decree of this court in *United States* v. *The State of Texas,* 162 U. S. 1, final and conclusive upon the parties to this cause in so far as it declares that the Treaty of 1819 between the United States and Spain fixed the boundary along the south bank of Red River?

(2) If said decree is not conclusive, then did the Treaty of 1819, construed in the light of pertinent public documents and acts, fix the boundary along the mid-channel of Red River or along the south bank of said river?

It is further ordered that the parties be permitted to take and present testimony in respect of the governmental practice on the part of all governments and States, concerned at the time, bearing upon the construction and effect of said Treaty as to the second question above stated.

The evidence in chief of the United States and the State of Oklahoma shall be taken and closed on or before August 15, 1920; the evidence in chief of the State of Texas

shall be taken and closed on or before October 1, 1920; and rebuttal testimony on the part of the United States and the State of Oklahoma shall be taken and closed on or before October 15, 1920. The evidence in each case to be taken on seven days' notice, unless notice is waived.

Ernest Knaebel, Esq., of the District of Columbia, is hereby appointed as Commissioner to take the said evidence and report the same to the court, without findings or conclusions.[1]

[1] Mr. Knaebel could not serve and Frederick S. Tyler, Esq., of the District of Columbia, was appointed by order of the Chief Justice, June 30, 1920.

DECISIONS PER CURIAM, FROM APRIL 20, 1920, TO AND INCLUDING JUNE 7, 1920, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 493. CITY TRUST COMPANY *v.* BANKERS MORTGAGE LOAN COMPANY. Error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted April 19, 1920. Decided April 26, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Sylvester R. Rush* for plaintiff in error. *Mr. Frank H. Gaines* and *Mr. C. J. Baird* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF JAMES J. O'BRIEN, PETITIONER. Submitted April 19, 1920. Decided April 26, 1920. Motion for leave to file petition for writ of mandamus or prohibition denied. *Mr. James J. O'Brien* pro se.

No. 231. EDWARD A. SHEDD ET AL. *v.* GUARDIAN TRUST COMPANY ET AL. Appeal from the District Court of the United States for the Western District of Missouri. Argued April 28, 1920. Decided May 17, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *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, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. J. C. Rosenberger*, with whom *Mr. O. H. Dean* was on the brief, for appellants. *Mr. Charles*

W. German and *Mr. J. D. Bowersock*, with whom *Mr. Delbert J. Haff* was on the brief, for appellees.

No. 437. County of Douglas, in the State of Nebraska, *v.* George Warren Smith. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted May 3, 1920. Decided May 17, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) § 128 of the Judicial Code; *Shulthis* v. *McDougal*, 225 U. S. 561, 568; *Hull* v. *Burr*, 234 U. S. 712, 720; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 302; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. (2) *Brown* v. *Alton Water Co.*, 222 U. S. 325, 332–333; *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 61. *Mr. William C. Lambert* for plaintiff in error. *Mr. Francis A. Brogan* and *Mr. A. G. Ellick* for defendant in error.

No. 324. Robert D. Kinney *v.* Plymouth Rock Squab Company. Error to the District Court of the United States for the District of Massachusetts. Submitted April 30, 1920. Decided May 17, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. (2) *Kinney* v. *Plymouth Rock Squab Company*, 236 U. S. 43, 49. *Mr. Robert D. Kinney* pro se. No appearance for defendant in error.

No. 310. James K. Perrine *v.* State of Oklahoma ex rel. John Embry, County Attorney. Error to the

Supreme Court of the State of Oklahoma. Submitted April 30, 1920. Decided May 17, 1920. *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, etc., Ry. Co.*, 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 24. (2) *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 473; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157. (3) *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 67. *Mr. E. G. McAdams* for plaintiff in error. *Mr. S. P. Freeling* and *Mr. W. C. Hall* for defendant in error.

No. 256. Samuel W. Scott et al. *v.* Ida B. W. Booth. Error to the Supreme Court of the State of Missouri. Argued April 26, 27, 1920. Decided May 17, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255; *Bruce* v. *Tobin*, 245 U. S. 18, 19. *Mr. H. M. Langworthy* and *Mr. Jackson H. Ralston*, with whom *Mr. Bruce Barnett*, *Mr. O. H. Dean*, *Mr. Stanley D. Willis*, *Mr. R. B. Thomson* and *Mr. J. T. Montgomery* were on the brief, for plaintiffs in error. *Mr. C. W. Prince*, with whom *Mr. A. E. Crane* was on the brief, for defendant in error.

No. 633. Fred W. Weitzel *v.* United States. Error to the District Court of the United States for the Eastern District of Kentucky. Motion to dismiss or affirm submitted May 3, 1920. Decided May 17, 1920. *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, etc., Ry. Co.*, 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 24. (2) *Lamar* v. *United States*, 240 U. S. 60; *Lamar* v. *United States*, 241 U. S. 103. *Mr. A. E. Stricklett* for plaintiff in error. *The Solicitor General* for the United States.

No. 570. JOHN F. DONAHUE *v.* HELEN MAY DONAHUE, ALIAS HELEN MAY HUSKEY. Appeal from the District Court of the United States for the District of Nevada. Motion to dismiss submitted May 17, 1920. Decided June 1, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *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, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. George C. Otto* and *Mr. John Gibson Hale* for appellant. *Mr. H. W. Huskey* for appellee.

No. 708. J. D. PURCELL ET AL. *v.* CITY OF LEXINGTON ON RELATION OF THOMAS E. COYNE, BACK TAX ASSESSOR. Error to the Court of Appeals of the State of Kentucky. Motion to dismiss submitted May 17, 1920. Decided June 1, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38, 39; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111; *Bacon* v. *Texas*, 163 U. S. 207, 216; *McCullough* v. *Virginia*, 172 U. S. 102, 116; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe*, 222 U. S. 187, 190. (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, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. George C. Webb* and *Mr. George R. Hunt* for plaintiffs in error. *Mr. Jesse I. Miller* and *Mr. Harry B. Miller* for defendant in error.

No. —. JOHN W. DAVIDGE *v.* LEO SIMMONS. Submitted May 17, 1920. Decided June 1, 1920. Petition for a writ of error in this case to the Court of Appeals of the District of Columbia allowed upon petitioner giving bond in the sum of one thousand dollars. *Mr. Chapin Brown* for petitioner.

No. 810. LINCOLN GAS & ELECTRIC LIGHT COMPANY *v.* CITY OF LINCOLN ET AL. Appeal from the District Court of the United States for the District of Nebraska. Motion to dismiss submitted June 1, 1920. Decided June 7, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Heike* v. *United States*, 217 U. S. 423, 429; *United States* v. *Beatty*, 232 U. S. 463, 466; *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346. And see *Eichel* v. *U. S. Fidelity & Guaranty Co.*, 239 U. S. 629. *Mr. Charles A. Frueauff* and *Mr. Robert Burns* for appellant. *Mr. C. Petrus Peterson* for appellees.

No. 22, Original. STATE OF GEORGIA *v.* STATE OF SOUTH CAROLINA. Motion for an order of reference submitted June 1, 1920. Order entered June 7, 1920. Motion for the appointment of a special master to take such testimony as may be necessary and to receive in evidence such exhibits as may be offered by the parties hereto, granted, and, on the suggestion of counsel for both parties, Mr. Charles S. Douglas, of Washington, D. C., appointed

as such special master and directed to report the testimony and exhibits to the court without conclusions of law or findings of fact.

No. 3. UNITED STATES *v.* READING COMPANY ET AL.; and

No. 4. READING COMPANY ET AL. *v.* UNITED STATES. Appeals from the District Court of the United States for the Eastern District of Pennsylvania. Motions to modify decree submitted June 1, 1920. Denied June 7, 1920. *Mr. Wm. Clarke Mason* and *Mr. Charles Heebner* for Reading Co. *et al.* *Mr. Charles E. Miller* and *Mr. Robert W. de Forest* for Central Railroad Company of New Jersey and Lehigh & Wilkes-Barre Coal Co. *The Solicitor General, Mr. Assistant to the Attorney General Ames,* and *Mr. A. F. Myers,* Special Assistant to the Attorney General, for the United States. [See *ante,* 26.]

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM APRIL 20, 1920, TO AND INCLUDING JUNE 7, 1920.

(A.) PETITIONS GRANTED.[1]

No. 802. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* YORK & WHITNEY COMPANY. Error to the Superior Court of the State of Massachusetts. April 26, 1920. Petition for a writ of certiorari herein granted. *Mr. William L. Parsons,* for plaintiff in error, in support of the petition. *Mr. Amos L. Taylor* for defendant in error, in opposition to the petition.

No. 803. YORK & WHITNEY COMPANY *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. Error

[1] For petitions denied, see *post,* 482.

to the Superior Court of the State of Massachusetts. April 26, 1920. Petition for a writ of certiorari herein granted. *Mr. Amos L. Taylor*, for plaintiff in error, in support of the petition. *Mr. William L. Parsons*, for defendant in error, in opposition to the petition.

No. 805. District of Columbia *v.* R. P. Andrews Paper Company. April 26, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. F. H. Stephens* for petitioner. No appearance for respondent.

No. 806. District of Columbia *v.* Saks & Company. April 26, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. F. H. Stephens* for petitioner. No appearance for respondent.

No. 807. District of Columbia *v.* Abraham Lisner. April 26, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. F. H. Stephens* for petitioner. *M. E. Hilton Jackson* for respondent.

No. 817. Anna Lang, as Administratrix, etc., *v.* New York Central Railroad Company. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Hamilton Ward* for petitioner. *Mr. M. C. Spratt* for respondent.

No. 831. Archie J. McLaren, Administrator, etc., *v.* L. G. Fleischer. April 26, 1920. Petition for a writ

of certiorari to the Supreme Court of the State of California granted. *Mr. Samuel Herrick* for petitioner. No appearance for respondent.

No. 832. ROBERT L. CULPEPPER *v.* JAMES M. OCHELTREE. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of California granted. *Mr. Samuel Herrick* for petitioner. No appearance for respondent.

No. 833. WESTERN UNION TELEGRAPH COMPANY *v.* S. B. POSTON. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted. *Mr. Rush Taggart, Mr. Francis R. Stark, Mr. Henry E. Davis* and *Mr. P. A. Willcox* for petitioner. No appearance for respondent. *The Solicitor General,* by leave of court, suggested reasons for granting the writ, owing to the possible interest of the United States in this and similar controversies arising from federal control under the Joint Resolution of July 16, 1918.

No. 842. PHILADELPHIA & READING RAILWAY COMPANY *v.* MARIA DOMENICA DI DONATO. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. George Gowen Parry* for petitioner. No appearance for respondent.

No. 844. PHILADELPHIA & READING RAILWAY COMPANY *v.* MARIE E. POLK. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of

Pennsylvania granted. *Mr. George Gowen Parry* for petitioner. *Mr. Francis M. McAdams* for respondent.

No. 789. WEBER ELECTRIC COMPANY *v.* E. H. FREEMAN ELECTRIC COMPANY. May 3, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles Neave* for petitioner. *Mr. Livingston Gifford* and *Mr. David P. Wolhaupter* for respondent.

No. 841. UNITED STATES *v.* ÆTNA EXPLOSIVES COMPANY. May 3, 1920. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *The Solicitor General* and *Mr. Assistant Attorney General Hanson* for the United States. *Mr. Addison S. Pratt* for respondent.

No. 847. MICHIGAN CENTRAL RAILROAD COMPANY *v.* MARK OWEN & COMPANY. May 3, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Illinois granted. *Mr. Ralph M. Shaw* for petitioner. *Mr. Fayette B. Dow* for respondent.

No. 871. HENRY ALBERS *v.* UNITED STATES. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles H. Carey* and *Mr. James B. Kerr* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 900. PHILADELPHIA & READING RAILWAY COMPANY *v.* AMY SMITH. June 1, 1920. Petition for a writ of

certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. George Gowen Parry* for petitioner. No appearance for respondent.

No. 916. FEDERAL TRADE COMMISSION *v.* BEECH-NUT PACKING COMPANY. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *The Solicitor General* and *Mr. Claude R. Porter* for petitioner. No appearance for respondent.

No. 926. EUGENE SOL LOUIE *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Robert Early McFarland* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 932. JOHN SIMMONS COMPANY *v.* GRIER BROTHERS COMPANY. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. James Q. Rice* for petitioner. *Mr. Clarence P. Byrnes, Mr. George H. Parmalee* and *Mr. George E. Stebbins* for respondent.

(B.) PETITIONS DENIED.

No. 818. LEHIGH VALLEY RAILROAD COMPANY *v.* FREDERICK W. HOWELL ET AL., ETC., ET AL. April 26, 1920. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Lindley*

M. Garrison, Mr. Edgar H. Boles, Mr. Richard W. Barrett and *Mr. George S. Hobart* for petitioner. *Mr. John O. H. Pitney* and *Mr. Frederick B. Campbell* for respondents.

No. 819. LEHIGH VALLEY RAILROAD COMPANY *v.* ROYAL INDEMNITY COMPANY;

No. 820. LEHIGH VALLEY RAILROAD COMPANY *v.* NEW YORK PLATE GLASS INSURANCE COMPANY;

No. 821. LEHIGH VALLEY RAILROAD COMPANY *v.* CHICAGO BONDING & INSURANCE COMPANY;

No. 822. LEHIGH VALLEY RAILROAD COMPANY *v.* OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD., OF LONDON, ENGLAND;

No. 823. LEHIGH VALLEY RAILROAD COMPANY *v.* LLOYDS PLATE GLASS INSURANCE COMPANY OF NEW YORK;

No. 824. LEHIGH VALLEY RAILROAD COMPANY *v.* METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK;

No. 825. LEHIGH VALLEY RAILROAD COMPANY *v.* FIDELITY & CASUALTY COMPANY;

No. 826. LEHIGH VALLEY RAILROAD COMPANY *v.* COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK;

No. 827. LEHIGH VALLEY RAILROAD COMPANY *v.* CHILDS COMPANY, A CORPORATION;

No. 828. LEHIGH VALLEY RAILROAD COMPANY *v.* TRUSTEES OF ST. PAUL'S EVANGELICAL LUTHERAN CHURCH;

No. 829. LEHIGH VALLEY RAILROAD COMPANY *v.* ELEAZER E. CLARK ET AL.; and

No. 830. LEHIGH VALLEY RAILROAD COMPANY *v.* IRA W. ALLEN. April 26, 1920. Petition for writs of certiorari to the Court of Errors and Appeals of the State

of New Jersey denied. *Mr. Lindley M. Garrison, Mr. Edgar H. Boles, Mr. Richard W. Barrett* and *Mr. George S. Hobart* for petitioner. *Mr. Jeremiah F. Hoover, Mr. M. M. Stallman* and *Mr. Edwin F. Smith* for respondents. *Mr. James D. Carpenter, Jr.*, also filed a brief for respondent in No. 828.

No. 615. DAVID G. WINE *v.* UNITED STATES. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. C. Flansburg* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 767. STATE OF LOUISIANA *v.* WILLIAM T. JOYCE COMPANY ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Winans Wall* for petitioner. *Mr. Robert R. Reid* and *Mr. Henry Fitts* for respondents.

No. 782. HERMAN BLOCH *v.* UNITED STATES. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. B. Hudspeth, Mr. George E. Wallace* and *Mr. St. Clair Adams* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 786. E. A. KING, (AND THOSE WHO WISH ALSO TO INTERVENE FOR THEIR BENEFIT), *v.* ROBERT H. BARR ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Levi Cooke* and *Mr. William C. Bristol* for petitioner. *Mr. C. E. S. Wood* for respondents.

No. 797. CUYAMEL FRUIT COMPANY *v.* JOHNSON IRON WORKS, LIMITED. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter S. Penfield* for petitioner. *Mr. Monte M. Lemann* for respondent.

No. 798. GERHARDT WESSELS *v.* UNITED STATES. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. H. Ward* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 800. DUNKLEY COMPANY ET AL. *v.* PASADENA CANNING COMPANY ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Fred L. Chappell, Mr. Drury W. Cooper* and *Mr. William S. Hodges* for petitioners. *Mr. Kemper B. Campbell, Mr. Francis J. Heney, Mr. Frederick S. Lyon* and *Mr. William J. Carr* for respondents.

No. 812. HERMAN THEDEN ET AL. *v.* UNION PACIFIC RAILROAD COMPANY. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. L. W. Keplinger* for petitioners. *Mr. N. H. Loomis, Mr. R. W. Blair* and *Mr. T. M. Lillard* for respondent.

No. 816. ALBERT F. HOUGHTON ET AL. *v.* EUGENE F. ENSLEN ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit denied. *Mr. Z. T. Rudulph* for petitioners. No appearance for respondents.

No. 843. PHILADELPHIA & READING RAILWAY COMPANY *v.* ANNIE REYNOLDS. April 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. George Gowen Parry* for petitioner. *Mr. Francis M. McAdams* for respondent.

No. 852. FREEMAN-SWEET COMPANY *v.* LUMINOUS UNIT COMPANY. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Paul Bakewell* for petitioner. *Mr. Harry Lea Dodson* for respondent.

No. 856. D. W. RYAN TOWBOAT COMPANY, INC., *v.* CARRIE S. DRAPER ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Charles Harris* for petitioner. No appearance for respondents.

No. 857. BOWERS SOUTHERN DREDGING COMPANY *v.* CARRIE S. DRAPER ET AL. April 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Neethe* and *Mr. J. W. Terry* for petitioner. No appearance for respondents.

No. 781. THOMAS D. THOMAS *v.* SOUTH BUTTE MINING COMPANY. May 3, 1920. Petition for a writ of certiorari

to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles A. Beardsley* for petitioner. *Mr. John A. Shelton* for respondent.

No. 845. EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* NORTHERN TRUST COMPANY ET AL., EXECUTORS, ETC. May 3, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for petitioner. *Mr. Wm. M. Stewart, Jr.*, for respondents.

No. 853. C. T. DOREMUS *v.* UNITED STATES. May 3, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. A. Davies* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 875. GRACE MCMILLAN GIBSON *v.* ETHEL M. GERNAT. May 3, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frederic D. McKenney, Mr. John Spalding Flannery* and *Mr. G. Bowdoin Craighill* for petitioner. *Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for respondent.

No. 840. EMILY DE FOUR *v.* UNITED STATES. May 17, 1920. 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 Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

Nos. 848 and 849. BACKSTAY MACHINE AND LEATHER CO. *v.* HELEN WADE HAMILTON. May 17, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry D. Williams, Mr. Frederic D. McKenney* and *Mr. Wm. E. Dyre* for petitioner. *Mr. W. Orison Underwood* for respondent.

No. 850. TEXAS & GULF STEAMSHIP CO. *v.* CLARENCE PARKER ET AL. May 17, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William B. Lockhart* for petitioner. No appearance for respondents.

No. 860. BECKWITH COMPANY (FORMERLY THE ESTATE OF P. D. BECKWITH, INC.), *v.* MINNESOTA STOVE COMPANY. May 17, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harry C. Howard* and *Mr. Fred L. Chappell* for petitioner. *Mr. Walter H. Chamberlin* for respondent.

No. 861. JEANNETTE W. LEE *v.* RICHARD C. MINOR, AS TRUSTEE, ETC., ET AL. May 17, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel Herrick* and *Mr. F. C. Heffron* for petitioner. *Mr. John H. Miller* for respondents.

No. 865. COMMERCIAL CREDIT COMPANY ET AL. *v.* CONTINENTAL TRUST COMPANY. May 17, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for

the Fifth Circuit denied. *Mr. Alex. W. Smith* for petitioners. *Mr. Warren Grice* and *Mr. Robert C. Alston* for respondent.

No. 868. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* MRS. MINNIE OWENS, ADMINISTRATRIX, ETC. May 17, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Willard R. Bleakmore, Mr. C. O. Blake* and *Mr. T. P. Littlepage* for petitioner. No appearance for respondent.

No. 869. ATLANTIC COAST LINE RAILROAD COMPANY *v.* STATE OF ALABAMA. May 17, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. Richard V. Lindabury* for petitioner. *Mr. Lawrence E. Brown* and *Mr. J. Q. Smith* for respondent.

No. 873. CHARLES KOLLMAN *v.* UNITED STATES. May 17, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Samuel T. Ansell, Mr. Edward S. Bailey* and *Mr. Chester J. Gerkin* for petitioner. No brief filed for the United States.

No. 888. PENNSYLVANIA RAILROAD COMPANY *v.* ALFRED STIEDLER. May 17, 1920. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Frederic D. McKenney, Mr. Albert C. Wall* and *Mr. John A. Hartpence* for petitioner. *Mr. Alex. Simpson* for respondent.

No. 889. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* CHARLES S. CANDEE, JR. June 1, 1920. Petition for a writ of certiorari to the Supreme Court of the State of New Jersey denied. *Mr. Frederic B. Scott* for petitioner. No appearance for respondent.

No. 839. G. W. BOULDIN *v.* UNITED STATES. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George W. Huntress* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 851. NATIONAL SURETY COMPANY *v.* LEFLORE COUNTY, IN THE STATE OF MISSISSIPPI. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. Tyson* for petitioner. *Mr. R. C. McBee* for respondent.

No. 863. SAMUEL L. SNEIERSON *v.* UNITED STATES. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William Shaw McCallum* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. Franklin G. Wixson* for the United States.

No. 872. H. M. WHEELER *v.* CHARLES P. TAFT ET AL. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. P. Bullis* for petitioner. *Mr. Henry J. Livingston* for respondents.

No. 880. F. H. ORCUTT & SON COMPANY ET AL. *v.* NATIONAL TRUST & CREDIT COMPANY. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. Musgrave* and *Mr. William S. Oppenheim* for petitioners. *Mr. James W. Hyde* for respondent.

No. 885. CHESAPEAKE STEAMSHIP COMPANY, OF BALTIMORE CITY, OWNER, ETC., ET AL. *v.* FRANK HAND, MASTER, ETC. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Floyd Hughes* for petitioners. *Mr. R. M. Hughes, Jr.*, for respondent.

No. 891. ANTHONY PHILLIPS *v.* UNITED STATES. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick T. Saussy* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. Franklin G. Wixson* for the United States.

No. 898. HIRAM N. STANCIL ET AL. *v.* FREDERICK LEYLAND & COMPANY, LIMITED, CLAIMANT, ETC., ET AL. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. John D. Grace* for petitioners. No appearance for respondents.

No. 907. ARNOLD JACOB UHL *v.* UNITED STATES. June 1, 1920. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Augustus Denson* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 914. CURACAO TRADING COMPANY (CURACAOSCHE HANDEL MATTSCHAPPIJ), *v.* CARL BJORGE, MASTER AND CLAIMANT, ETC., ET AL. June 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Blanc Monroe* and *Mr. Monte M. Lemann* for petitioner. *Mr. William Waller Young* for respondents.

No. 730. BOSTON WEST AFRICA TRADING COMPANY *v.* QUAKER CITY MOROCCO COMPANY. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Lee M. Friedman* for petitioner. *Mr. William L. Putnam* for respondent.

No. 854. R. L. MAYFIELD *v.* STATE OF TENNESSEE EX REL. F. M. GERARD. June 7, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. James A. Cobb* for petitioner. No appearance for respondent.

No. 874. FRED B. SULLIVAN *v.* P. SANFORD ROSS, INC. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry J. Bigham* for petitioner. *Mr. A. Leo Everett* for respondent.

No. 882. ANGEL VARGAS *v.* F. M. YAPTICO & COMPANY. June 7, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Ernest Wilkinson* for petitioner. No appearance for respondent.

No. 884. HARMON P. MACKNIGHT *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harmon P. MacKnight* pro se. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 893. MISSOURI PACIFIC RAILROAD COMPANY *v.* R. L. BLOCK. June 7, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Troy Pace* for petitioner. No appearance for respondent.

No. 894. GEORGE W. CANFIELD ET AL. *v.* LUSANNA BRINK. June 7, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. John Devereux, Mr. Bird McGuire, Mr. Charles W. Grimes* and *Mr. William J. Hughes* for petitioners. *Mr. D. A. McDougal* and *Mr. W. V. Pryor* for respondent.

No. 895. GEORGE W. CANFIELD ET AL. *v.* IRA E. CORNELIUS ET AL. June 7, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. John Devereux, Mr. Bird McGuire, Mr. Charles W. Grimes* and *Mr. William J. Hughes* for petitioners. *Mr. Joseph C. Stone, Mr. George S. Ramsey,*

Mr. M. C. Rosser, Mr. Charles A. Moon, Mr. L. O. Lytle and *Mr. Francis Stewart* for respondents.

No. 902. C. B. SCHOBERG *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sherman T. McPherson* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 903. HENRY KRUSE *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sherman T. McPherson* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 904. HENRY FELTMAN *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sherman T. McPherson* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 905. PETER WIMMER *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick M. Schmidt* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 908. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* WALLACE L. SCHAMBS, TRUSTEE, ETC. June 7,

1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Wilmer Latimer* for petitioner. *Mr. Newton D. Baker* for respondent.

No. 912. JOSEPH BIVENS, SR., *v.* UNITED TIMBER CORPORATION. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hugh H. Obear, Mr. Julian Mitchell* and *Mr. Charles A. Douglas* for petitioner. *Mr. Legaré Walker* for respondent.

No. 913. JOSEPH BIVENS, SR., *v.* UNITED TIMBER CORPORATION. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hugh H. Obear, Mr. Julian Mitchell* and *Mr. Charles A. Douglas* for petitioner. *Mr. Legaré Walker* for respondent.

No. 919. ORVILLE ANDERSON *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joe Kirby* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 925. DAY AMMERMAN *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert S. Morrison* for petitioner. *Mr. Assistant Attorney General Stewart* for the United States.

No. 928. COMMERCIAL CREDIT COMPANY *v.* SPONGE EXCHANGE BANK, OF TARPON SPRINGS. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. B. Macfarlane, Mr. N. B. K. Pettingill* and *Mr. Leo Oppenheimer* for petitioner. *Mr. James F. Glen* for respondent.

No. 940. JOHN WHITE *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick S. Tyler* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 942. ÆTNA LIFE INSURANCE COMPANY *v.* WALTER N. BRAND. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. Foster* for petitioner. *Mr. Louis L. Waters* for respondent.

No. 945. W. B. TREDWELL *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Harry K. Wolcott* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 946. MARY L. GREER CONKLIN *v.* AUGUSTA CHRONICLE PUBLISHING COMPANY. Appeal from the District Court of the United States for the Southern District of Georgia. June 7, 1920. Petition for a writ of certiorari herein denied. *Mr. Frederick S. Tyler* and *Mary*

L. Greer Conklin for appellant, in support of the petition. *Mr. Benj. E. Pierce,* for appellee, in opposition to the petition.

No. 947. GEORGE E. VANDENBURG *v.* ELECTRIC WELDING COMPANY. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Carlos P. Griffin* for petitioner. *Mr. Frederick W. Winter* for respondent.

No. 949. G. SANDAA, MASTER AND CLAIMANT, ETC., ET AL. *v.* UNITED STATES ET AL. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry H. Little* for petitioners. *Mr. Assistant Attorney General Spellacy, Mr. J. Frank Staley* and *Mr. James W. Ryan* for respondents.

No. 957. PECK, STOW & WILCOX COMPANY *v.* H. D. SMITH & COMPANY. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick P. Fish* for petitioner. *Mr. Archibald Cox* for respondent.

No. 959. THOMAS PENNACCHIO *v.* UNITED STATES. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John B. Golden* for petitioner. No brief filed for the United States.

No. 960. ST. PAUL FIRE & MARINE INSURANCE COMPANY *v.* HAGEMEYER TRADING COMPANY; and

No. 961. St. Paul Fire & Marine Insurance Company *v.* Hugo A. Thomsen et al. June 7, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for petitioner. *Mr. Van Vechten Veeder* for respondents.

No. 965. Roxford Knitting Company *v.* Moore & Tierney, Inc. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter S. Hilborn* and *Mr. David J. Gallert* for petitioner. *Mr. Thomas O'Connor* for respondent.

No. 966. Roxford Knitting Company *v.* William Moore Knitting Company. June 7, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter S. Hilborn* and *Mr. David J. Gallert* for petitioner. *Mr. Thomas O'Connor* for respondent.

No. 971. Pete Morgan *v.* State of Louisiana. June 7, 1920. Petition for writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. R. E. Milling, Mr. Allan Sholars* and *Mr. J. B. Roberts* for petitioner. No appearance for respondent.

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No. 846. INTER-URBAN RAILWAY COMPANY ET AL. *v.* MRS. FRED SMITH. On petition for a writ of certiorari to the Supreme Court of the State of Iowa. April 26, 1920. Dismissed, on motion of counsel for petitioners. *Mr. Frank J. Hogan* and *Mr. J. L. Parrish* for petitioners. No appearance for respondent.

No. 625. LILLIAN B. PEMBLETON *v.* ILLINOIS COMMERCIAL MEN'S ASSOCIATION. On writ of certiorari to the Supreme Court of the State of Illinois. April 29, 1920. Dismissed with costs, on motion of counsel for petitioner. *Mr. Harrison Musgrave* and *Mr. William S. Oppenheim* for petitioner. *Mr. James G. Condon* for respondent.

No. 346. JOHN S. RANDOLPH *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of New York. May 17, 1920. Dismissed, on motion of counsel for plaintiff in error. *Mr. Frederick A. Mohr* for plaintiff in error. *The Attorney General* for the United States.

No. 14. UNITED STATES *v.* QUAKER OATS COMPANY ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. June 1, 1920. Dismissed, on motion of *Mr. Assistant to the Attorney General Ames* for the United States. *Mr. Frank F. Reed, Mr. James Martin Gray* and *Mr. Elmer H. Adams* for appellees.

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5. *Id. Income Tax.* Tax upon net income of District Judge, assessed under Act of 1919 (passed since he took office) by including official salary in computation, is invalid. *Id.*

II. **Admiralty.**

1. *Congressional and State Powers.* The Constitution adopted, as part of laws of United States, approved rules of general maritime law, and empowered Congress to legislate in respect of them and other matters within admiralty jurisdiction. *Knickerbocker Ice Co.* v. *Stewart* 149

2. *Id.* It deprived States of all power to contravene essential purposes or characteristic features of that law, or to interfere with its proper harmony and uniformity in its international and interstate relations. *Id.*

3. *Id.* Distinction between situation created relative to maritime affairs and one resulting from grant of power to regulate commerce. *Id.*

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4. *Id. Jud. Code, §§ 24, 256.* Clause of provision granting exclusive admiralty jurisdiction to federal courts which saves right of common-law remedy, refers to remedies for enforcement of maritime law, and does not create substantive rights or assent to their creation by the States. *Id.*

5. *Id. Act of Oct. 6, 1917,* saving rights and remedies under state workmen's compensation laws, construed as intending to obviate objections pointed out in *Southern Pac. Co.* v. *Jensen,* 244 U. S. 205, and as seeking to sanction action by States in prescribing and enforcing rights and remedies for personal injuries suffered in maritime work. *Id.*

6. *Id. Delegation of Power.* Act is delegation of legislative power of Congress and defeats purpose of Constitution respecting harmony and uniformity of maritime law, and is invalid. *Id.*

III. **Commerce Clause.** See II, 3, *supra;* XI, 5, 6, *infra.*

Tax on Interstate Railroad; Track Mileage and Property Beyond State. North Dakota law, as administered, *held* an interference with interstate commerce. *Wallace* v. *Hines*... 66

IV. **War Power; Army.**

Selective Service Act. Constitutionality settled since writ of error herein was sued out. *O'Connell* v. *United States*..... 142

V. **Amendment; Power and Manner of.** See XI, *infra.*

1. *Proposal; Vote Necessary.* Adoption by both houses of Congress, by two-thirds vote, of joint resolution proposing amendment sufficiently shows that proposal was deemed necessary by all who voted for it; express declaration that they regarded it as necessary is not essential. *National Prohibition Cases*..... 350

2. *Id.* Two-thirds vote which is required is a vote of two-thirds of members present—assuming presence of a quorum—and not a vote of two-thirds of entire membership, present and absent. *Id.*

3. *State Constitutions; Referendum* provisions cannot be applied, consistently with Federal Constitution, in ratification or rejection of federal amendments. *Id.*

4. *Intoxicating Liquors.* Prohibition of manufacture, sale,

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etc., for beverage purposes, as embodied in Eighteenth Amendment, is within power to amend reserved by Art. V. *Id.*

5. *Ratification.* May be by legislatures of or by conventions in three-fourths of States; method left to Congress. *Hawke* v. *Smith*. 221

6. *Id.* "*Legislatures,*" in Constitution, means the deliberative, representative bodies that make laws for people of the States; Constitution makes no provision for action upon such proposals by people directly. *Id.*

7. *Id.* Ratification by state legislature is a federal function, derived not from people of the State but from the Constitution. *Id.*

8. *Id.* It is not an act of legislation, but the expression of the assent of the State to the proposed amendment. *Id.*

9. *Id. Referendum.* Ratification by legislature of Ohio of Eighteenth and Nineteenth Amendments cannot be referred to electors of State; Ohio constitution requiring referendum is inconsistent with Federal Constitution. *Id.*
Hawke v. *Smith,* No. 2 231

VI. **First Amendment; Freedom of Speech.**

Espionage Act. Constitutionality settled since writ of error herein was sued out. *O'Connell* v. *United States*. 142

VII. **Fifth Amendment; Due Process.** See XI, 7, *infra.*

1. *Contract Rights; Attorneys' Fees.* In appropriating for payment of claims against United States, Congress may limit amount payable to attorneys for services rendered in connection with claim, notwithstanding contract made and performed before act was passed. *Calhoun* v. *Massie*. 170
Newman v. *Moyers*. 182

2. *Hearing; Due Process.* Adverse decision of Secretary of Labor, upon identity of Chinese claiming to be citizen by birth and entitled to reënter, is not conclusive upon courts if proceedings were unfair and fair investigation of rights was prevented. *Kwock Jan Fat* v. *White*. 454

3. *Private Land; Taking; Suit in Court of Claims.* Right to sue for land taken without condemnation proceedings, not

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founded on Fifth Amendment but on implied contract to pay value as of date of taking. *United States* v. *North American Co.* 330

VIII. **Seventh Amendment; Jury.**

Auditors. Employment of auditors, at law, to examine papers and hear testimony, and report, etc., does not violate Amendment; it works no obstruction of right of trial by jury, and Amendment does not require that old forms of practice and procedure be retained. *Ex parte Peterson.* 300

IX. **Fourteenth Amendment.**

(1) *Notice and Hearing.*

1. *Water Rates.* In fixing maximum future rates, state law must provide opportunity for submission of question whether rates are confiscatory to determination of judicial tribunal upon its own independent judgment as to both law and fact. *Ohio Valley Water Co.* v. *Ben Avon Borough* 287

2. *Id. Pennsylvania Public Service Commission Law,* as construed by Supreme Court of State, fails to provide such opportunity. *Id.*

(2) *Liberty and Property; Police Power; Taxation.* See (3) *infra.*

3. *Railroads; Facilities.* When order of state commission requiring installation of cattle scales violates due process. *Great Northern Ry.* v. *Cahill.* 71

4. *Interstate Railroad; Track Mileage and Property Beyond State.* North Dakota law, as administered, *held* a taking of property without due process. *Wallace* v. *Hines.* 66

5. *Domestic Corporations; Intangible Property.* Subject to tax although corporation does no business within State and has there no tangible property nor any papers by which intangible property is customarily evidenced; immaterial whether tax be considered a franchise or property tax. *Cream of Wheat Co.* v. *Grand Forks.* 325

6. *Id. Situs.* Limitation upon power of State to tax property of residents which has acquired permanent situs outside the State does not apply to intangible property even

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though it has acquired a business situs and is taxable in another State. *Id.*

7. *Id.* Amendment does not prevent double taxation. *Id.*

8. *Public or Private Purpose.* Legislation which provides for engaging State in businesses of manufacturing and marketing farm products, and of providing homes for the people, and which appropriates money, creates a state banking system and authorizes bond issues and taxation for carrying scheme into effect, *held* not unconstitutional as respects taxpayers. *Green* v. *Frazier*. 233

9. *Income Tax.* Income of beneficiary from trust estate held and administered in another State, is taxable by State of beneficiary's domicile. *Maguire* v. *Trefry*. 12

(3) *Equal Protection of the Laws.*

10. *Income Tax; Domestic Corporations.* State tax on all income of local corporations from business done outside and within State, which exempts entirely income derived from outside the State by local corporations which do no local business, is arbitrary. *Royster Guano Co.* v. *Virginia*. 412

X. **Sixteenth Amendment; Income Tax.**

1. *Purpose.* Not to extend taxing power to new or excepted subjects, but to remove occasion for apportionment of taxes laid on income, whether derived from one source or another. *Evans* v. *Gore*. 245

2. *District Judges; Diminishing Compensation.* Tax on net income, assessed under Act of 1919 (passed since he took office) by including official salary in computation, is invalid. *Id.*

XI. **Eighteenth Amendment; Intoxicating Liquors.** See V, 9, *supra.*

1. *Amending Power; Art. V.* Prohibition of manufacture, sale, etc., for beverage purposes, as embodied in Eighteenth Amendment, is within power to amend reserved by Art. V. *National Prohibition Cases*. 350

2. *Id. Ratification.* By lawful proposal and ratification, Amendment has become part of Constitution, and must be given effect the same as other provisions of that instrument. *Id.*

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3. *Section 1*, embodying the prohibition, is operative throughout territorial limits of United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which sanctions what the section prohibits. *Id.*

4. *Section 2; Concurrent Power.* Congress or States may not defeat prohibition but only enforce it by appropriate means. *Id.*

5. *Id.* "Concurrent power" does not mean joint power, or that legislation by Congress, to be effective, shall be approved by the States; nor does it mean that power to enforce is divided between Congress and States along lines which distinguish foreign and interstate commerce from intrastate affairs. *Id.*

6. *Id.* Power of Congress, while not exclusive, is territorially coextensive with prohibition of § 1, embraces manufacture and other intrastate transactions as well as interstate traffic, and is unaffected by action or inaction on part of the States. *Id.*

7. *Id. Liquors Manufactured Before Amendment.* Power may be exerted against disposal of such liquors just as it may be against subsequent manufacture. In either case it is a constitutional mandate or prohibition that is being enforced. *Id.*

8. *National Prohibition Act, Tit. II*, § *1*, prohibiting liquors containing one-half of one per cent. of alcohol for beverage purposes, is within enforcement power of Congress. *Id.*

XII. **Nineteenth Amendment; Suffrage.** See V, 9, *supra.*

XIII. **Testing Constitutionality.**

Presumption, that purpose of state tax is public; judgments of people, legislature and court of State accepted unless clearly unfounded. *Green* v. *Frazier*. 233

CONSTRUCTION. See **Anti-Trust Act; Army; Attorneys; Bankruptcy Act; Chinese Exclusion Acts; Claims; Constitutional Law; Contracts; Criminal Law; Em-**

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ployers' Liability Act; Fees; Indians; Interstate Commerce Acts; Jurisdiction; Limitations; Patents for Inventions; Pennsylvania; Pleading, 2, 3; **Public Lands; Statutes; Taxation; Unfair Competition.**

CONTRACTS. See **Bail Bonds; Constitutional Law,** VII, 1, 3; **Damages,** 1; **Franchises; Unfair Competition.**

Lease. See **Anti-Trust Act,** 3, 4.

Illegal attorneys' fees. See **Attorneys.**

United States; implied contract to pay for private land taken for public use without condemnation proceedings. See **Claims.**

Action in. See **Equity,** 2.

Demurrage charges. See **Interstate Commerce Acts,** II, 2, 3.

1. *Government Works; Misrepresentation; Rescission.* Right of contractor to rescind and recover difference between cost of work done and returns, under dredging contract, for misrepresentations made through specifications and maps, on which contractor relied, as to results of test borings made by government officers and their belief concerning the character of materials to be encountered. *United States* v. *Atlantic Dredging Co* .....

2. *Id. Waiver.* Proceeding with work and entering into supplementary contract does not waive right to rescind when misrepresentation discovered. *Id.*

3. *Id.* Right of action not *ex delicto*. *Id.*

4. *United States; Royalties.* Where patentee averred that it granted Government permission to purchase from another torpedoes containing patentee's device, upon royalty "to be settled later," that Government purchased but negotiations to settle amount failed, and that patentee never consented to use of device without payment of a royalty which Government refused to pay, *held*, that no express or implied contract to pay any royalty could be derived from facts. *Bliss Co.* v. *United States*. 187

5. *Id. Assignment or License.* Grant of "sole and exclusive license," to use invention for term of patents to be procured, on designated articles, only when sold to United States, the grantee undertaking to pay royalty on each such article fitted with invention, *held* a mere license. *Id.*

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6. *Telegraph Companies; Negligence; Damages.* One who sends telegram to stop payment of his draft due under contract, cannot recover amount from telegraph company for failure to deliver telegram in time. *Western Union Tel. Co.* v. *Brown*. 101

7. *Option or Absolute Sale.* Contract for sale, on installment, of mining stock, *held* not an option terminable at will of vendees by failure to meet deferred payments, but an absolute agreement on their part to buy. *Id.*

8. *Id.* Provision that upon non-payment of installments rights of each of parties shall cease and determine is for benefit of vendor, like a provision that in case of such default contract shall be " null and void." *Id.*

CONVICTION. See **Criminal Law**, 9.

COPYRIGHT. See **Jurisdiction**, III, 7.

CORPORATIONS. See **Anti-Trust Act; Franchises; Interstate Commerce Acts**, I; **Taxation**, II, 2–9; **Telegraph Companies.**

1. *Stock Control of Subsidiaries.* Acquisition, by holding company, of properties and domination through stock control of railroad and coal companies, *held* violative of Anti-trust Act and Commodities Clause. *United States* v. *Reading Co.* 26

2. *Id.* Looking through corporate forms to discover violation of commodities clause, through stock-holding device. *Id.*

COSTS. See **Auditors**, 4, 5; **Fees; Procedure**, III; IV, 2.

COUNTIES. See **Taxation**, II, 13, 14.

COURT OF CLAIMS. See **Claims; Indians**, 5; **Jurisdiction**, III (5); VII.

COURTS. See **Bankruptcy Act; Claims; Constitutional Law**, II; **Criminal Law; Equity; Jurisdiction; Mandamus; Pleading**, 2, 3; **Procedure; Statutes.**

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Compensation of judges. See **Constitutional Law**, I.

Power over administrative decisions. See **Chinese Exclusion Acts; Indians**, 1–3; **Interstate Commerce Acts**, IV; **Unfair Competition.**

CRIMINAL CODE. See **Criminal Law**, 8.

CRIMINAL LAW:

1. *Conspiracy; Selective Service and Espionage Acts.* Criminality of conspiracies to obstruct recruiting and enlistment by persuasion settled since writ of error herein was sued out. *O'Connell* v. *United States*. 142

2. *Selective Service Act; Section 6*, applies to persons who are not officers charged with duty of carrying act into effect. *Id.*

3. *Fugitives; Arrest; Removal.* Fugitive under indictment in one federal district may be arrested without warrant in another and detained pending initiation of removal proceedings. *Stallings* v. *Splain*. 339

4. *Id. Probable Cause.* Warrant issued upon indictment in first district will serve as probable cause for arrest. *Id.*

5. *Id. Habeas Corpus.* When person so arrested and detained procures *habeas corpus* and is bailed to await hearing, pendency of *habeas corpus* proceedings does not prevent initiation of removal proceedings based on such indictment by affidavit before United States Commissioner and issuance of warrant thereon. *Id.*

6. *Id. Bail for Appearance*, in foreign district, given voluntarily before commissioner, does away with basis for *habeas corpus*, since restraint is terminated and validity of arrest and detention and right of removal are immaterial. *Id.*

7. *Id. Indictment; Construction.* In removal, doubts as to whether indictment states an offense should be left to court in which it was found. *Id.*

8. *Embezzlement; United States Commissioner.* Under Rev. Stats., § 2294, and rules of General Land Office, commissioner who in taking proofs of applicants under public land laws collects fees, etc., for transmission to register and re-

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ceiver, receives money as commissioner and is indictable, if he embezzle it, under Penal Code, § 97. *Id.*

9. *Verdict; Form.* In trial on two counts verdict, written on printed form, declared defendants "guilty on the — count of the Indictment, and — on the — count of the Indictment." No objection was made until after case came to this court. *Held*, that all parties evidently understood it as a general verdict and that informality did not make it fatally defective or the sentence, on both counts, invalid. *O'Connell* v. *United States*. 142

CUMMINS AMENDMENT. See **Damages**, 1.

DAMAGES. See **Claims; Contracts**, 1, 6.
Amount involved. See **Jurisdiction**, III, 8; V, 1.
Reparation; excessive rates. See **Interstate Commerce Acts**, IV, 2–11.

1. *Carriers; Limited Liability; Cummins Amendment of 1915*, providing liability for actual loss and declaring any limitation of liability void, entitles shipper to damages on basis of value at destination at time when property should have been delivered if that is greater than value at place and time of shipment, notwithstanding Uniform Bill of Lading provides for computing damages on latter basis. *Chicago, M. & St. P. Ry.* v. *McCaull-Dinsmore Co.* 97

2. *Shame and Humiliation.* Under Federal Employers' Liability Act, damages may be allowed for shame and humiliation resulting from injury and personal disfigurement due to negligence. *Erie R. R.* v. *Collins*. 77

3. *Government Officers; Personal Liability.* Writ of error to review judgment dismissing petition for mandamus against Secretary of Treasury dismissed if, after respondent's resignation, his successor has not been substituted within 12 months; in default of substitution, petition cannot be retained to charge respondent personally in damages, since damages are only incident to allowance of writ. *Le Crone* v. *McAdoo*. 217

DECLARATION. See **Pleading**, 1.

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DEMURRAGE. See **Interstate Commerce Acts,** II, 2, 3.

DEMURRER. See **Pleading,** 2.

DEPORTATION. See **Chinese Exclusion Acts.**

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DIRECT TAXES. See **Constitutional Law,** X.

DISMISSAL. See **Jurisdiction,** III, 15, 16; **Procedure,** V.

DISTRICT COURT. See **Clerks; Exceptions, Bills of,** 1; **Jurisdiction,** II; III, 5, 6, 10–13; IV; V; VI.

DISTRICT JUDGES:
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DOMESTIC CORPORATIONS. See **Taxation,** II, 2–5.

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DOUBLE TAXATION. See **Constitutional Law,** IX, 7.

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DURESS. See **Taxation,** II, 13, 14.

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EMPLOYER AND EMPLOYEE. See **Employers' Liability Act.**

Workmen's compensation laws. See **Constitutional Law,** II, 5, 6.

Adamson Law; Wages and Hours of Labor. Act *held* inapplicable to insolvent railroad operating at a loss under agreement with its men, allowing them less wages than act prescribed. *Ft. Smith & Western R. R.* v. *Mills*..... 206

EMPLOYERS' LIABILITY ACT:

1. *Employment in Interstate Commerce.* Employee whose duties were to attend signal tower and switches and, in nearby building, to run gasoline engine to pump water for use of intrastate and interstate locomotives, injured while engaged in latter employment. *Erie R. R.* v. *Collins*..... 77

2. *Id.* Employee whose duty it was to dry sand in stoves in building near tracks and supply it to intrastate and interstate locomotives, injured while returning from ash-pit whither he had gone to dump ashes. *Erie R. R.* v. *Szary*... 86

3. *Id. Damages; Shame and Humiliation.* Allowable when resulting from injury and personal disfigurement due to negligence. *Erie R. R.* v. *Collins*..... 77

4. *Id. Interstate Movement of Cars.* Cars of coal destined beyond State, were moving from mine to a yard, where they were to be gathered into a train and thence moved some miles to weighing station, there to be weighed and billed to specific consignees in another State. *Held,* that first movement was part of an interstate movement. *Phila. & Read. Ry.* v. *Hancock*..... 284

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EQUITY. See **Bankruptcy Act,** 2; **Injunction; Trusts and Trustees.**

1. *Adequate Remedy.* Jurisdiction to restrain state officials from enforcing illegal tax, clouding plaintiff's title and subjecting him to penalties. *Wallace* v. *Hines*. 66

2. *Id.* North Dakota law permitting actions against State respecting title to property or arising upon contract, does not allow adequate remedy; action for money wrongfully extorted is a case in contract only in an artificial sense. *Id.*

3. *Assignee; Right to Sue.* Assignment of legal title enables assignee of reparation claim to sue upon award in his own name, for benefit of equitable owner. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*. 117

ERROR AND APPEAL. See **Jurisdiction; Parties,** 6; **Procedure.**

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EVIDENCE. See **Chinese Exclusion Acts; Criminal Law,** 5.
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Presumption. See **Constitutional Law,** XIII.

1. *Auditor's Report.* Appointment at law, without consent of parties, of auditor to examine papers and hear testimony, and whose report shall separate disputed from undisputed items, express opinion on former and, while leaving parties free to call and examine witnesses, shall function as *prima facie* evidence of facts found and conclusions reached, unless rejected by court. *Ex parte Peterson*. 300

2. *Decree in Another Circuit.* Upon appeal under Jud. Code, § 129, final decree for plaintiff may not be granted by Circuit Court of Appeals upon proof by affidavit of recent decree in another circuit, claimed to work estoppel in plain-

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tiff's favor; defendant must have opportunity to set up and establish defenses. *Meccano, Ltd.*, v. *John Wanamaker*. . . . 136

3. *Before Interstate Commerce Commission.* As to findings in reparation hearing and sufficiency of evidence to sustain award. *Spiller* v. *Atchison, Topeka & Santa Fe Ry*. 117

4. *Id. Expert Witnesses.* Decision by Commission that witness is qualified; when accepted by courts. *Id.*

5. *Id. Hearsay.* When order of Commission, based in part on hearsay, is not to be rejected. *Id.*

6. *Id. Admissibility.* Commission should not be narrowly constrained as to evidence it may receive in reparation hearings. *Id.*

7. *Id. Excessive Rate; Damage.* Payment of published rate afterwards decided to have been excessive is evidence that party who paid freight sustained damage to extent of excess. *Id.*

8. *Id. Assignments; Proof.* When proof of handwriting of assignors of reparation claims is unnecessary. *Id.*

9. *Original Cases.* Order setting cause down for hearing upon questions of law, directing taking of testimony and appointing commissioner. *Oklahoma* v. *Texas*. 465

EXCEPTIONS, BILLS OF:

1. *Extension of Time.* Power of District Court, after having granted period beyond term prescribed by rules for settling bills of exceptions, to grant further extension. *O'Connell* v. *United States*. 142

2. *Id.* When bill not considered by this court as part of record on writ of error. *Id.*

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FEDERAL QUESTION. See **Jurisdiction,** III, 11, 13, 17; V, 1.

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FEES. See **Attorneys; Auditors,** 4, 5; **Public Lands,** III.
1. *Clerk of Court; Poundage; Rev. Stats.,* § *828.* In allowing surety, out of fund impounded for indemnification, amount paid on judgment on bail bond, with interest, District Court properly deducted clerk's poundage. *Leary* v. *United States.* 94

2. *Clerk of District Court, Northern Illinois; Public Moneys.* Under legislation providing for salary, etc., fees and emoluments of office when collected do not become public moneys of United States. *United States* v. *MacMillan.* 195

3. *Id. Interest,* received upon average daily balances of bank deposits made up of fees and emoluments earned or of moneys deposited by litigants to meet future costs, is not public moneys of United States and clerk need not account therefor to Government. *Id.*

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1. *Fugitives; Arrest and Removal.* When fugitive under indictment in one federal district is arrested without warrant and detained in another pending initiation of removal proceedings, and procures *habeas corpus* and is bailed to await hearing, pendency of *habeas corpus* proceedings does not prevent initiation of removal proceedings based on such indictment by affidavit before United States Commissioner and issuance of warrant thereon. *Stallings* v. *Splain*..... 339

2. *Id. Bail for Appearance,* in foreign district, given voluntarily before commissioner, does away with basis for *habeas*

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corpus, since restraint is terminated and validity of arrest and detention and right of removal are immaterial. *Id.*

3. *Petition; Matters Considered on Demurrer.* When testimony and papers pertaining to proceedings of immigration authorities considered, upon demurrer to petition alleging unlawful detention under Chinese Exclusion Laws, in interpreting allegations of petition. *Kwock Jan Fat* v. *White*. . . . 454
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1. *Five Civilized Tribes; Enrollment; Jurisdiction of Secretary of Interior,* in completing rolls, to revoke without notice approval of report of commissioner in favor of applicants for enrollment. *Johnson* v. *Payne*. 209

2. *Id. Mandamus; Mistake.* Such applicants cannot secure enrollment through mandamus upon suggestion that revocation was due to mistake. *Id.*

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3. *Omaha Tribe; Claims under Jurisdictional Act of 1910; Treaties 1854, 1865; Hostile Tribes.* United States not liable for horses stolen and Omahas killed by the Sioux, in absence of finding that protection was deemed by President to be necessary. *United States* v. *Omaha Indians*. 275

4. *Id. Expenditures for Indians' Benefit; Cattle.* Treaty not complied with by supplying cattle which died after reaching reservation as result of bad condition when purchased. *Id.*

5. *Id. Improvements.* Finding that building constructed as infirmary was not used and was not such as was contemplated by treaty, interpreted as meaning that it was not suitable for its purpose and was not accepted by Indians. *Id.*

6. *Id. Misappropriation of Funds.* Indians not obliged to accept such building, and expenditure was a misappropriation of funds. *Id.*

7. *Id. Cessions of Lands,* by Treaty of 1854, for fixed consideration to be paid in future; passing of title not conditioned upon payment of consideration; interest upon amount to be paid not allowable. *Id.*

8. *Id. Interest.* Fact that Act of 1910 authorized determination of equitable as well as legal claims of tribe, did not take case out of rule denying interest on claims against Government. *Id.*

9. *Pottawatomie Reservation; Railroad Rights of Way.* Fact that tracts forming parts of reservation set apart by Treaty of 1846 became subject to allotment, under Treaty of 1861, in virtue of occupation and improvements by members, did not divest United States of fee or prevent granting of right of way across tracts. *Nadeau* v. *Union Pac. R. R*. 442

10. *Id. "Public Lands."* Such lands remained "public lands," within Act of 1862, granting to Union Pacific R. R. Co. right of way on each side of railroad where it may pass over public lands. *Id.*

11. *Id.* Upon identification of railroad route, right of way grant took effect as of date of granting act, and was unaffected by intervening allotments under Treaty of 1861 or by patents issued subsequently thereunder for lands so allotted. *Id.*

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12. *Tax-exempt Allotments.* Right to refund of county taxes, paid under protest to avoid sales and imposition of penalties, in absence of statutory authority. *Ward* v. *Love County* 17
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13. *Id.* Obligation not affected by fact that part of money paid over to State and absence of statute making county liable for taxes so paid. *Id.*

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through holding company and transportation thereunder by railway of coal produced by coal company *held* unlawful. *United States* v. *Reading Co*. 26

2. *Id. Identity of Interest.* Where ownership by railway of shares of capital stock of coal company resorted to for purpose of making coal company mere agent or instrumentality of railway, courts will look through forms to realities of relation as if corporate agency did not exist. *Id.*

3. *Id.* Where railway owned 11/12 of capital stock of coal company and used latter as its coal mining department, *held* that relation violates commodities clause. *Id.*

II. **Shipper and Carrier.** See also IV, *infra.*

1. *Limited Liability; Cummins Amendment,* of 1915, providing liability for actual loss and declaring any limitation of liability void, entitles shipper to damages on basis of value at destination at time when property should have been delivered if that is greater than value at place and time of shipment, notwithstanding Uniform Bill of Lading provides for computing damages on latter basis. *Chicago, M. & St. P. Ry.* v. *McCaull-Dinsmore Co*. 97

2. *Cars; Demurrage.* Policy of "Uniform Demurrage Code" is to treat car as unit and fix standard of diligence in releasing cars independent of circumstances of particular consignee. *Pennsylvania R. R.* v. *Kittanning Co*. 319

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III. **Wages and Hours of Labor.**

Adamson Law, held inapplicable to insolvent railroad operating at a loss under agreement with its men, allowing them less wages than act prescribed. *Ft. Smith & Western R. R.* v. *Mills*. 206

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certain forms of bills of lading in domestic and export transportation, for want of authority, *held*, that, since Act of 1920, passed pending interlocutory appeal, contained provisions which would necessitate changes in both forms of bills, the case had become moot. *United States* v. *Alaska S. S. Co.* 113

2. *Reparation Orders; Enforcement by Courts*, cannot be refused on ground that evidence before Commission was insufficient, when substantial documentary evidence that was before Commission is not produced at trial. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.* 117

3. *Id. Findings of Commission*, and order, may not be rejected for errors in procedure not amounting to denial of fair hearing, so long as essential facts found are based on substantial evidence. *Id.*

4. *Id. Evidence; Payment of Overcharge by Shipper.* Evidence of details of shipments of cattle to commission companies, gathered mainly from latters' books (received without objection), and summaries thereof approved by carriers after comparison with their books, *held* sufficient to justify finding that shipments were made as claimed and overcharges paid ultimately by shippers. *Id.*

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6. *Hearsay.* When order of Commission, based in part on hearsay, is not to be rejected. *Id.*

7. *Admissibility of Evidence.* Commission should not be narrowly constrained as to evidence it may receive in reparation hearings. *Id.*

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9. *Overcharges; Evidence of Damage.* Payment of published rate afterwards decided to have been excessive is evidence that party who paid freight sustained damage to extent of excess. *Id.*

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11. *Id. Ruling of Commission,* declaring assignment to stranger to transportation records will not be recognized, is erroneous as a construction of act, and, treated as administrative regulation, did not limit Commission's jurisdiction to recognize such assignments. *Id.*

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2. *Id. Ratification,* by legislature of Ohio cannot be referred to electors of State; Ohio constitution requiring referendum is inconsistent with Federal Constitution. *Hawke* v. *Smith*. 221

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3. *Auditors; Appointment.* Power of District Court, at law, to appoint, without consent of parties, auditor to examine papers and hear testimony, and report, etc. *Ex parte Peterson*. 300

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Citizens and Aliens. In provision of Act of 1917, giving jurisdiction " where all parties on either side of controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico," the clause " not domiciled in Porto Rico " relates to both preceding clauses, so that jurisdiction is not conferred over action by alien domiciled in Porto Rico against local corporation. *Porto Rico Ry.* v. *Mor*. 345

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1. *Patent Infringement; Act June 25, 1910.* Where patentee averred that it granted Government permission to purchase from another torpedoes containing patentee's device, upon royalty " to be settled later," and that Government purchased but negotiations to settle amount failed, and that patentee never consented to use of device without payment of royalty, which Government refused to pay, *held*, that no express or implied contract to pay any royalty, cognizable by Court of Claims under Jud. Code, § 145, could be derived from the facts. *Bliss Co.* v. *United States*. 187

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3. *Private Land; Taking.* Right to sue in Court of Claims for land taken without condemnation proceedings, is not founded on Fifth Amendment but on implied contract to pay value as of date of taking, and interest may not be

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2. *Id.* One who creates and continues dangerous conditions of which he alone knows, cannot escape responsibility for resulting injury by stepping out of control before injury occurs. *Id.*

3. *Id.* One who by request undertook to hang a banner across a public street and to later take it down, assuming full control, and who suspended it between opposite buildings by a cable negligently attached to a weakly constructed chimney, is liable where the banner dragged chimney over in a storm and resulted in injury to a pedestrian in street below. *Id.*

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V. **Scope of Review and Disposition of Case.**

1. *Certiorari; Examining Merits.* In reversing judgment on verdict in action at law for damages, Circuit Court of Ap-

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peals should order new trial; where it fails to do so this court, on certiorari, may inquire whether that court was wrong on merits and, finding it so, affirm judgment of District Court. *Fidelity Title & Trust Co.* v. *Dubois Elec. Co.* . . 212

2. *Preliminary Injunction.* Order of Circuit Court of Appeals reversing order of District Court awarding injunction will not be reversed unless clearly erroneous. *Meccano, Ltd.*, v. *John Wanamaker*. 136

3. *Interlocutory Appeal; Conflict between Circuit Courts of Appeals.* Conflict of views in suit over same subject and between same parties in interest, *held* not to justify this court in deciding merits. *Id.*

4. *Court of Claims; Findings* of fact, or of mixed fact and law, not reviewable on appeal. *United States* v. *Omaha Indians*. 275

5. *Question not Raised Below.* In action for refund of taxes on tax-exempt Indian allotments, paid to county under protest to avoid sales and imposition of penalties, state statute of limitations, not having been discussed by state court, not dealt with here or affected by decision. *Ward* v. *Love County*. 17

6. *Presumption Favoring Legislation.* In passing upon constitutionality of state taxation, united judgments of people, legislature and court of State that purposes are public accepted unless clearly unfounded. *Green* v. *Frazier*. 233

7. *Legislative Policy*, not considered by this court in passing upon constitutionality. *Id.*

8. *Illegal Contract.* Power of court to open record and reverse decree to prevent itself from being used as instrument of illegality. *Newman* v. *Moyers*. 182

9. *Moot Cases.* Court determines only matters actually in controversy, essential to decision of particular case before it. *United States* v. *Alaska S. S. Co* 113

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11. *Erroneous Assumption of Jurisdiction.* When Circuit Court of Appeals assumes jurisdiction of case in which District Court's jurisdiction is based wholly on constitutional grounds, and makes an erroneous final order, this court may reverse with directions to dismiss appeal. *City of New York* v. *Consolidated Gas Co.* 219

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1. *Pottawatomie Reservation.* Fact that tracts forming parts of reservation set apart by Treaty of 1846 became subject to allotment, under Treaty of 1861, in virtue of occupation and improvements by members, did not divest United States of fee or prevent granting of right of way across tracts. *Nadeau* v. *Union Pac. R. R.* 442

2. *Id.* "*Public Lands.*" Such lands remained "public lands," within Act of 1862, granting to Union Pacific R. R. Co. right of way on each side of railroad where it may pass over public lands. *Id.*

3. *Right of Way Grant.* Upon identification of railroad route, right of way grant took effect as of date of granting

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act, and was unaffected by intervening allotments under Treaty of 1861 or by patents issued subsequently thereunder for lands so allotted. *Id.*

4. *Id. Adverse Possession.* Lands constituting part of such right of way cannot be acquired by individuals by adverse possession. *Id.*

III. **Fees.**

Embezzlement. Under Rev. Stats., § 2294, and rules of General Land Office, United States commissioner who in taking proofs of applicants collects fees, etc. for transmission to register and receiver, receives money as commissioner and is indictable, if he embezzle it, under Penal Code, § 97. *Stallings* v. *Splain*..... 339

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2. *Saving Clause.* Function is to preserve something from immediate interference—not to create. *Id.*

3. *Opinion of Legislature.* Legislature does not alter law by expressing erroneous opinion of it. *Id.*

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5. *Presumption.* In passing upon constitutionality of state taxation, alleged to be for non-public purpose, every presumption must be indulged in its favor, and judgments of people, legislature and court of State that purposes are public accepted unless clearly unfounded. *Green* v. *Frazier*.... 233

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2. *Id. Domestic Corporations.* State tax on all income of local corporations from business done outside and within State, which exempts entirely income derived from outside the State by local corporations which do no local business, violates equal protection clause. *Royster Guano Co.* v. *Virginia*. 412

3. *Domestic Corporations; Intangible Property.* Subject to tax although corporation does no business within State and has there no tangible property nor any papers by which intangible property is customarily evidenced; immaterial whether tax be considered a franchise or property tax. *Cream of Wheat Co.* v. *Grand Forks* 325

4. *Id. Situs.* Limitation of Fourteenth Amendment upon power of State to tax property of residents which has acquired permanent situs outside the State does not apply to intangible property even though it has acquired a business situs and is taxable in another State. *Id.*

5. *Id. Double Taxation.* Fourteenth Amendment does not prevent double taxation. *Id.*

6. *Interstate Railroads; Assessment,* upon track mileage basis, invalid where cost of construction per mile is less within than without taxing State. *Wallace* v. *Hines*. 66

7. *Id. Property Beyond State,* cannot be taken into account unless it adds to value of road and rights exercised within taxing State. *Id.*

8. *Id.* Hence, possession of bonds secured by mortgage of lands in other States, or of a land grant elsewhere, affords no ground for increasing tax in taxing State, whether tax be a property or excise tax. *Id.*

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9. *Id.* North Dakota law, as administered, *held* an interference with interstate commerce and a taking of property without due process of law. *Id.*

10. *Public or Private Purpose.* Legislation which provides for engaging State in businesses of manufacturing and marketing farm products, and of providing homes for the people, and which appropriates money, creates a state banking system and authorizes bond issues and taxation for carrying scheme into effect, *held* not unconstitutional as respects taxpayers. *Green* v. *Frazier*. 233

11. *Id. Presumption* that purpose of tax is public; judgments of people, legislature and court of State accepted unless clearly unfounded. *Id.*

12. *Id. Policy of State*, or wisdom of legislation, not considered by this court in passing on constitutionality. *Id.*

13. *Tax-exempt Indian Allotments.* Right to refund of county taxes, paid under protest to avoid sales and imposition of penalties, in absence of statutory authority. *Ward* v. *Love County*. 17
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3. *Id. Clerk's Poundage; Rev. Stats.*, § *828.* In allowing surety amount paid on judgment on bail bond, with interest, District Court properly deducted clerk's poundage. *Id.*

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1. *Federal Trade Commission; Act Sept. 26, 1914; Sufficiency of Complaint.* Order to desist from unfair competition must correspond with complaint which Commission is required to issue and serve as basis for proceedings. *Federal Trade Comm.* v. *Gratz*. 421

2. *Id.* Where complaint, liberally construed, is plainly insufficient to show unfair competition, order will be annulled by the court. *Id.*

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3. *Id.* Commission's complaint, alleging sale in interstate commerce of steel ties for binding bales of cotton and of bagging, and refusal to sell ties unless purchaser bought from respondents bagging to be used with ties proposed to be bought, *held* insufficient to show unfair method of competition. *Id.*

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