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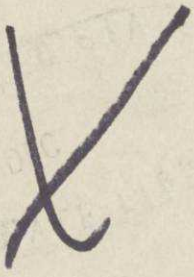


PRO
OF
U. S.

UNITED STATES REPORTS

VOLUME 255

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1920

FROM JANUARY 25, 1921, TO (AND PARTLY INCLUDING) APRIL 11, 1921

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1921

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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.
HARRY M. DAUGHERTY, ATTORNEY GENERAL.[2]
WILLIAM L. FRIERSON, SOLICITOR GENERAL.
JAMES D. MAHER, CLERK.
FRANK KEY GREEN, MARSHAL.

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

[2] On March 4, 1921, President Harding nominated Mr. Daugherty, of Ohio, as Attorney General, to succeed Mr. Palmer, resigned. The nomination was confirmed by the Senate on the same day and Mr. Daugherty took the oath on March 5.

SUPREME COURT OF THE UNITED STATES.

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

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

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

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

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

For the Third Circuit, MAHLON PITNEY, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1920.

KAHN ET AL *v.* ANDERSON, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS.

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

No. 421. Argued December 7, 8, 1920.—Decided January 31, 1921.

1. Under the 5th Article of War, which provides that a court-martial shall be composed of not less than five officers and must be composed of thirteen when so many may be convened without manifest injury to the service, the fixing of the number within those limits with reference to the condition of the service is an act of executive discretion not subject to judicial review. P. 6.
2. Retired officers and officers of the United States Guards, *held* competent under the 4th Article of War to sit on a court-martial as officers "in the military service of the United States," the former in virtue of their status as retired officers and because the Act of April 23, 1904, authorized their assignment by the Secretary of War; the latter by § 2 of the Selective Service Act of May 18, 1917, and regulations of the President thereunder. *Id.*
3. A person held as a military prisoner in punishment for a military offense of which he has been convicted, is subject to military law and to trial by court-martial for offenses committed during such

imprisonment, even if the prior sentence resulted in his discharge as a soldier. P. 7.

4. This application of the military power is consistent with the Fifth Amendment. P. 8.
5. Nor is the trial of such prisoners by court-martial at variance with the constitutional guarantees as to jury trial and presentment or indictment by grand jury. *Id.*
6. In providing that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace," the 92nd Article of the Articles of War, (1916), contemplates a complete peace, officially proclaimed. P. 9.
7. Such a peace was not brought about by the armistice and the cessation of hostilities in the War with Germany and Austria. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Martin J. O'Donnell, with whom *Mr. Isaac B. Kimbrell* was on the brief, for appellants:

Notwithstanding Congress by express constitutional provision has the power to prescribe rules for the government and regulation of the army, those rules must be interpreted consistently with the provision that the trial of all crimes, except in cases of impeachment, shall be by jury, and that in all criminal prosecutions the accused shall enjoy the right to a trial by jury, and that no person shall be deprived of life or liberty without due process of law.

The provisions of the Constitution concerning jury trial refer to the right as it was enjoyed by Englishmen in England at common law. The common law knew no distinction between citizen and soldier. The provision of the Fifth Amendment permitting the accusation of persons in the land and naval forces by methods other than by presentment or indictment of a grand jury involves a matter of procedure rather than of substantial right. That provision did not operate to deprive a citizen conscripted into the army of his right to a trial by a jury

(after having been accused) such as a soldier or citizen was entitled to at common law.

The express recognition in the first Articles of War adopted by the Continental Congress of the right of a soldier charged with a capital crime, during time of war, to a trial by jury, and the executive, legislative and judicial recognition of that right during all the wars in which this country was engaged until 1863, was merely a recognition of the right in that respect enjoyed by soldiers at common law, and from the rule that the provisions of the Constitution concerning the right to trial by jury will be interpreted with reference to the common law and previously existing legislation, in connection with this practical interpretation by all the departments of the Government for a long series of years, it results that the Constitution itself preserves a soldier's right to be tried by a jury when charged with a capital crime, and that Congress, under the guise of making rules for the government and regulation of the land forces, can never take it away.

The words "but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace," prohibited courts-martial from trying appellants for the reason that on July 29, 1918, the courts were open in the State and District of Kansas and within the geographical limits of the States of the Union and the District of Columbia, and hence it was a time of peace within the meaning of the 92d Article of War.

The law recognizes a distinction between domestic and foreign war, and the question as to whether or not a state or time of war existed, in so far as personal rights are involved, is to be determined by the records and judges of the courts of justice and not by the records, officers or acts of any other department of the Government.

With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to take from them the jurisdiction which they had always exercised with respect to soldiers and citizens should be ascribed to Congress, in the absence of clear and direct language to that effect; hence, the prohibition denying jurisdiction to courts-martial to try soldiers for murder or rape in time of peace prevents such courts from trying such persons, except at a time when martial law is in force and applicable alike to soldier and citizen.

The armistice of November 11, 1918, ended the war with Germany as a fact, and also ended the power, existence and jurisdiction of a tribunal which was called into being only by the actual existence of a state of actual war. The 92d Article of War in the nature of things must be transposed to read, "No person shall be tried (in time of peace) by court-martial for murder," etc. As the trial did not end until two weeks after the war ended, the sentence could not be promulgated by a moribund tribunal.

The order detailing the general court-martial shows that two members of the detail were retired from the army and therefore not eligible. It also shows that three members were designated as United States Guards, but does not disclose what kind of guards, or whether in the military service of the United States, and therefore the tribunal was not constituted as required by the 4th Article of War.

The court-martial was not constituted as required by the 5th Article of War, for the reason that, notwithstanding it was known of all men and is demonstrated by the records of the War Department that thirteen members could have been detailed without manifest injury to the service, yet only eight were detailed.

Appellants were not in or members of the army of the

United States on July 29, 1918; hence, they could not be tried for a civil crime by a court-martial. Their original sentences discharged them.

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

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

The petition for *habeas corpus* filed by the appellants on April 14, 1920, to obtain their release from confinement in the United States Disciplinary Barracks at Leavenworth, having, on motion of the United States, been dismissed on the face of the petition and documents annexed, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation.

It was charged in the petition that on November 4, 1918, the petitioners were placed on trial before a general court-martial for violation of the 96th Article of War, in having conspired to murder a named fellow prisoner, and of the 92d Article in having committed the murder, and that at the time of the alleged commission of the crimes stated they were undergoing imprisonment in the barracks in question under sentences which had been imposed upon them by courts-martial for military offenses. It was averred that the legality of the organization of the court and its jurisdiction were at once challenged, and, on the challenge being overruled, each of the petitioners was, on November 25, 1918, found guilty of the murder charged, and, as the result of the action of the President in mitigating and approving the sentences, they were each liable for a long term of imprisonment.

The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution

of the court; (2) an assertion that the petitioners did not possess the military status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial. We come to consider whether the court erred in overruling these contentions.

The 5th Article of War exacts that in any event a court-martial shall be composed of not less than five officers and must be composed of thirteen when that number can be convened without manifest injury to the service. The court in this case was composed of eight members, the order certifying that more than that number could not be convened without manifest injury to the service. The argument is that because the court was composed of less than thirteen officers it was unlawfully constituted. But it has long been settled that the exercise of discretion as to fixing the number of the court with reference to the condition of the service, within the minimum and maximum limits, is executive and not subject to judicial review. *Martin* v. *Mott*, 12 Wheat. 19, 34, 35; *Bishop* v. *United States*, 197 U. S. 334, 340. The objection is therefore without merit.

Of the eight members of the court two were described in the order as retired officers and three as officers of the United States Guards. The contention is that, as by the 4th Article of War one must be an officer in the military service of the United States to be competent to sit on a court-martial, and as retired officers and officers of the United States Guards are not within that requirement, the constitution of the court was void. But both contentions, we are of opinion, are untenable; as to the retired officers, because it is not open to question, in view of the ruling in *United States* v. *Tyler*, 105 U. S. 244, that such

officers are officers in the military service of the United States, and because it is equally certain that the order assigning the retired officers to the court was within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that: "The Secretary of War may assign retired officers of the Army, with their consent, to active duty . . . upon courts-martial . . ." As to the United States Guards officers, there can also be no doubt that the President was fully empowered by § 2 of the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 77, to exert the power which he did by Special Regulations, No. 101, organizing the military force known as the United States Guards, and that such force, under the express terms of § 1 of the same act, was a part of the Army of the United States, and that these officers were therefore competent to be assigned to court-martial duty.

As we have seen, the pleadings disclose that the alleged crimes were charged to have been committed by the accused while they were confined in a United States military prison undergoing punishment inflicted upon them, and upon this it is contended that, either by implications resulting from the length of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law. But, as the allegations of the petition and the contention based upon them concede that the petitioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such im-

prisonment. Thus, in dealing with that question, in *Carter* v. *McClaughry*, 183 U. S. 365, 383, it was said:

"The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

"He was a military prisoner though he had ceased to be a soldier; and for offences committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war. Rev. Stat. § 1361."

See in addition, Act of March 4, 1915, c. 143, 38 Stat. 1084; 2d Article of War, par. "e"; 16 Ops. Atty. Gen. 292; *In re Craig*, 70 Fed. Rep. 969; *Ex parte Wildman*, Fed. Cas. 17,653a.

And, as the authorities just referred to and the principles upon which they rest adequately demonstrate the unsubstantial character of the contention, that to give effect to the power thus long established and recognized would be repugnant to the Fifth Amendment, we deem it unnnecessary to notice the question further.

In connection with this subject we observe that a further contention, that, conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury, respectively secured by Art. I, § 8, [Art. III, § 2,] of the Constitution, and Art. V, [and Art. VI,] of the Amendments,—is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained,—a situation which was so

obvious more than forty years ago as to lead the court to say in *Ex parte Reed*, 100 U. S. 13, 21:

"The constitutionality of the acts of Congress touching army and navy courts martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const., art. 1, sect. 8, and amendment 5. In *Dynes* v. *Hoover*, (20 How. 65) the subject was fully considered and their validity affirmed."

This brings us to the final contention, that because when the trial occurred it was time of peace no jurisdiction existed to try for murder, as Article 92 provided that ". . . no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. It is therefore difficult to appreciate the reasoning upon which it is insisted that, although the Government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its army is concerned, it was at peace. Nor is it any less difficult to understand why reliance to sustain that proposition is placed on *Caldwell* v. *Parker*, 252 U. S. 376, since that case involved no question of the want of jurisdiction of a court-martial over a crime committed by a soldier, but solely whether the jurisdiction which it was conceded such a court possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declaration of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty; and moreover in that case the question here raised was expressly reserved from decision.

Coming now to consider that question in the light (1)

of the rulings in *Ex parte Milligan*, 4 Wall. 2; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Mason*, 105 U. S. 696, and *Caldwell* v. *Parker*, 252 U. S. 376; (2) of the differences between the Articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74), and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the Articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the limitation, "except in time of peace," contained in Article 92. See *McElrath* v. *United States*, 102 U. S. 426, 438, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

Affirmed.

GIVENS *v.* ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GA.

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

No. 285. Argued October 13, 1920.—Decided January 31, 1921.

1. The authority to convene a general court-martial may be conferred upon the commander of a military camp by an order of the President under the 8th Article of War, which provides that "the commanding officer of any district or of any force or body of troops," may appoint such courts-martial when empowered by the President. P. 18.
2. A general order of the President lodging this power in the commander of designated military camps is judicially noticed as part of the law of the land, and the legality of a court-martial established under it is not affected by omission to refer to it in the order convening the court-martial. *Id.*
3. A general court-martial, so convened by a camp commander, has jurisdiction to try an officer of the rank of captain. P. 19.
4. The judgment of a court-martial is open to collateral attack for want of jurisdiction, and to sustain such a judgment it must appear that the facts essential to the jurisdiction existed when the jurisdiction was exercised. *Id.*
5. Where the due convocation of a court-martial with jurisdiction to try offenses of the class in question is established on the face of its record, the existence of a particular fact not so shown but acted upon by the court-martial, and necessary to its jurisdiction over the particular case, may be proven in support of its judgment upon a collateral attack. P. 20.
6. *Held*, that evidence was admissible in a *habeas corpus* proceeding to prove the military status of the relator at the time of his trial and conviction, where the record of the court-martial was silent on the subject beyond showing that he was charged as a captain in the army. *Id.*
7. Upon an appeal from a judgment in *habeas corpus*, evidence upon which the lower court's decision depended must be brought up in the record, though it need not be in the form of a bill of exceptions. *Id.*
8. In providing that "no person shall be tried by court-martial for

murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace," the 92nd Article of the Articles of War (1916), contemplates a complete peace, officially proclaimed. P. 21. *Kahn* v. *Anderson*, *ante*, 1.

9. An erroneous designation of the place for executing a sentence of imprisonment imposed by a court-martial does not go to the jurisdiction to sentence and does not entitle the accused to his discharge on *habeas corpus;* but he should be retained for a new designation. *Id.*

262 Fed. Rep. 702, affirmed.

THE case is stated in the opinion.

Mr. John S. Strahorn, with whom *Mr. Robert R. Carman* was on the brief, for appellant:

The authority to appoint general courts-martial is defined in the 8th Article of War. Camp commanders are not so authorized. They can only appoint, under Article 9, special courts-martial, which can not, under Article 13, try an officer. It was alleged, though not proven, that appellant was, if anything in the service, a captain of infantry. On its face, then, the record is deficient. To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted. *McClaughry* v. *Deming*, 186 U. S. 49, 63. If the jurisdiction does not appear on the face of the proceedings, the presumption of law is that the court has not jurisdiction. *Ex parte Watkins*, 3 Pet. 193, 204.

The introduction in evidence in the *habeas corpus* proceeding of the general order of the War Department did not cure the deficiency of the court-martial record. Davis, Military Law, 96, 139; *Dynes* v. *Hoover*, 20 How. 65, 81; *In re Grimley*, 137 U. S. 147, 150; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Galpin* v. *Page*, 18 Wall. 350.

Neither the petitioner nor the Government can go outside the court-martial record, since any change in it would be in the nature of a review of the case.

11. Argument for Appellant.

The general order limited the jurisdiction it conferred on the commanding officers of camps to appoint general courts-martial, to cases of "persons subject to military law who are serving at camps commanded by them and who do not belong to tactical divisions serving thereat," etc. The Government has not attempted to show that the appellant was even stationed at this camp, or whether, as might have been the case, he happened there on the night of the crime. So far as this record shows, all we know about him is that he was alleged to be a captain in the United States Army. This was an essential and fatal omission.

The right to authorize the appointment is not questioned because of the manner in which the general order was issued; the right of the Secretary of War to act for the President is not denied. The questions here raised are based on statutory provisions. The right is claimed under the 8th Article of War. The action was not taken by the President under his inherent power to appoint such courts, (*Swaim* v. *United States*, 165 U. S. 553), but is claimed, by express language, under this statute. The President acting under the statute has no power to authorize a camp commander to appoint a general court-martial. The terms used in Article 8 do not include him, while Article 9, on the other hand, expressly specifies his authority—to appoint *special* courts-martial.

Whether "district" has or has not a technical meaning, Congress, by including the term with others such as "garrison," "fort," and "camp," has shown that it is not the same as a camp. Article 9. There is no proof in this record—nor is it a fact—that Camp Sevier is a "permanent military camp." Nor will it suffice to say that "the troops at the camp are ordinarily under the command of its commanding officer."

No doubt the President intended to confer the larger authority, but here the legal constitution of the court

depends upon the statute. *McClaughry* v. *Deming*, 186 U. S. 49, 65; *Swaim* v. *United States*, 165 U. S. 553; *Keyes* v. *United States*, 109 U. S. 336; *Ex parte Watkins*, *supra*, 204.

No jurisdiction was shown over the person of the accused, because it was not proved that he was an officer. *Hamilton* v. *McClaughry*, 136 Fed. Rep. 445, 447, 448; *Ex parte Watkins*, *supra*, 204. Even the evidence offered in the present proceeding fails to show that he was an officer when the crime was committed. The time of the commission of the crime, not the date of the trial, determines amenability, *vel non*. The general finding is not sufficient. *In re Grimley*, 38 Fed. Rep. 84, 85; *Grignon's Lessee* v. *Astor*, 2 How. 319. Until and unless it appear, affirmatively, that he took the oath of allegiance (or at least that the court-martial formally found that he was in the service), he was not, in so far as this case is concerned, a soldier, and, if not (shown to be) a soldier, he was not amenable to military law.

Under the 92nd Article of War the court-martial had no jurisdiction over the crime because it was committed in time of peace. See Article 58 (old code), Act of March 3, 1863, 12 Stat. 736; *Coleman* v. *Tennessee*, 97 U. S. 509, 513, 514; Davis, Military Law, 456; *Dow* v. *Johnson*, 100 U. S. 158, 169; *Ex parte Milligan*, 4 Wall. 2.

What did Congress mean when it said in Article 92, that no person subject to military law should be tried by court-martial for murder committed "in time of peace"? That, because we might be at war with some enemy three thousand miles overseas, when all the courts of the State in which the crime was committed were open, a murder committed in such State should not be tried, *exclusively*, by the courts of that State? Suppose, for example, that we were technically at war with, say, the Republic of Andora, with less than two hundred square miles of territory, and a total population of six thousand souls;

would all murders committed in the United States by persons subject to military law be triable by court-martial? If this were so, thousands might be deprived of a great common-law privilege, without semblance of necessity. See *Coleman* v. *Tennessee, supra.*

There should, indeed, be a terrible necessity confronting us before the great majority of officers in our army should be permitted to sit in judgment in a case of life or death. *Ex parte Milligan,* 4 Wall. 140. "When the King's courts are opened, it is a time of peace, in judgment of law." First Parliament, Edw. III; *Ex parte Milligan,* 4 Wall. 128; Winthrop, Abridgment Military Law (1899), 277.

In the Act of 1916, Article 92 evinces the purpose of Congress to limit the jurisdiction to a time of actual warfare, insurrection or rebellion,—as theretofore was the fact by express language of statute. Since the revision of 1874, the United States had become a world power; our armies were spreading out into "foreign parts," (Article 57, old code)—where, as in the United States during "war, insurrection and rebellion," we had no civil courts, and it was necessary that some jurisdiction over these serious crimes follow our armies. Hence the Article gives unlimited jurisdiction to courts-martial over these two crimes, except when committed by soldiers in the United States or in the District of Columbia. Congress, appreciating their seriousness placed them, for the first time, in a separate Article; and knowing the difficulties of law and fact involved in their trial, and the antipathy of the American people to any interference by the military with civil jurisdiction, was reluctant to give to these inferior courts the right to sit in judgment in these superior cases, except when and where necessity compelled. Winthrop, Military Law, 2nd ed., 1032, 1033, 1038, 1039.

The pleadings do not negative peace.

The confinement was unlawful, because the place was not properly designated, the case was not properly referred to the President, and—Could the President act while in Europe?

The Solicitor General and *Mr. R. P. Frierson*, for appellee, submitted.

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

In his return to a writ of *habeas corpus*, which was allowed on the petition of appellant averring that he was restrained of his liberty in violation of his constitutional rights, the warden of the penitentiary at Atlanta, asserting the lawfulness of his custody of the petitioner, annexed as part of his return the following documents:

(1) A copy of General Orders, No. 56, issued by the President on June 13, 1918, conferring upon the commanders of designated camps, among them Camp Sevier, S. C., the authority to convene a general court-martial.

(2) General Court-Martial Orders, No. 139, issued by the War Department under date of April 29, 1919, announcing that under Special Orders, No. 172, dated "October 10, 1918, Headquarters, Camp Sevier, S. C.," (issued by the commanding officer of that camp) a general court-martial had convened at Camp Sevier on October 30, 1918, and before it there was arraigned and tried "Captain William J. Givens, Infantry, United States Army," under the charge of having murdered at or near Camp Sevier a named private soldier; that at the trial the accused officer had pleaded not guilty and, although acquitted of the charge of murder, had been found guilty of manslaughter and had been sentenced to dismissal from the Army and to ten years at hard labor at a place to be designated by the reviewing authority. The order

further recited the approval of the sentence by the reviewing authority (the commander at Camp Sevier) and a like approval, with direction that the sentence be executed, made by the President on April 14, 1919, and concluded by announcing the dismissal of the convicted officer from the Army as of the date of April 30, 1919.

(3) A telegram from the War Department to the commander at Camp Sevier announcing the approval of the sentence by the President; the dismissal of the officer from the Army; that the United States penitentiary at Atlanta, Ga., was designated as the place of confinement, and directing the said commander to deliver the officer to that penitentiary.

(4) A letter from the Adjutant General of the Army of date April 29, 1919, directed to the warden of the penitentiary at Atlanta, transmitting him a copy of the telegram sent to the commanding officer at Camp Sevier, as previously stated, and informing him that in due season a copy of the official order promulgating the trial, conviction and approval of the sentence would be sent to him.

Upon a traverse of the return and the pleadings the case was heard, and in a careful opinion the court, maintaining the sufficiency of the return, discharged the writ and remanded the petitioner to custody, and as the result of an appeal the correctness of its action is here for decision.

The grounds relied upon for reversal relate to three subjects: (1) the alleged illegality of the court, because of want of power in the officer by whom it was called to convene it; (2) the failure of the record to show that the accused was an officer in the Army or was in any way amenable to trial by court-martial, and the absence of jurisdiction in the court, in any event, to try a charge of murder, because by law no person could be tried by court-martial for murder committed within the United

States in time of peace, and there was no averment negativing a time of peace, and, in fact, peace prevailed at the time of the trial; (3) the asserted unlawfulness of the confinement of the petitioner in the penitentiary at Atlanta, because the record failed to establish that that place had been designated by the President, the final reviewing authority.

We come to test these grounds in the order stated. The court was undoubtedly a general court-martial and was convened by the commander of Camp Sevier. The power to convoke it, however, is not to be solely measured by the authority possessed by a camp commander, but in the light of the authority given to the President by the 8th Article of War, to empower "the commanding officer of any district or of any force or body of troops" to appoint general courts-martial, and by the exertion of that power by the President manifested by General Orders, No. 56, conferring upon the commanding officer at Camp Sevier the authority to call a general court-martial. True, it is insisted that the words, "the commanding officer of any district or of any force or body of troops," are not broad enough to embrace the commanding officer at Camp Sevier; that, in issuing Order No. 56, the President therefore exceeded the power conferred upon him, and hence that Order No. 56, in so far as it gave the power stated to camp commanders, was void. But the text of Article 8 so clearly demonstrates the unsoundness of the contention that we deem it unnecessary to refer further to it. And as General Orders No. 56 was a part of the law of the land, which we judicially notice without averment or proof (*Gratiot* v. *United States*, 4 How. 80, 117; *Jenkins* v. *Collard*, 145 U. S. 546, 560; *Caha* v. *United States*, 152 U. S. 211, 221), we think the contention that that law should not have been enforced because it was not referred to by the camp commander in exerting the power which he possessed in virtue of that order is also without merit.

These conclusions render no longer applicable the contention that the court-martial was without jurisdiction because a special court appointed by a camp commander had no jurisdiction to try an officer with the rank of captain, but they do not dispose of the proposition that the record failed to show that the accused belonged to the Army without reference to his rank and was therefore subject to trial by a military court.

Conceding that the possession by the accused of a status essential to the exercise by the court-martial of its power was jurisdictional and therefore may not be held to have existed merely because of an estoppel, and conceding further that, except for the form of the charge, the record failed to establish such status, we are brought to determine, as was the lower court, whether evidence was admissible to show such capacity at the time of the trial and conviction and thus make clear the precise condition upon which the court acted.

Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack. True, also, is it that in consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record. *Wise* v. *Withers*, 3 Cranch, 331; *Ex parte Watkins*, 3 Pet. 193, 209; *Dynes* v. *Hoover*, 20 How. 65; *Runkle* v. *United States*, 122 U. S. 543, 555; *McClaughry* v. *Deming*, 186 U. S. 49, 62–63.

The question before us is thus a narrow one, since it comes only to this: In a case, such as that before us, where the power to convoke a court-martial is established

on the face of the record and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?

Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record but simply met the collateral attack by showing that at the time of the trial the basis existed for the exertion by the court of the authority conferred upon it.

It is true that general expressions will be found in some of the reported cases to the effect that wherever a fact upon which the jurisdiction of a court-martial or other court of limited jurisdiction depends is questioned it must appear in the record that such fact was established. But these expressions should be limited in accordance with the ruling which we now make. We so conclude because the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive. Indeed, some of the leading cases make clear the incongruity of any other conclusion and serve to indicate that the expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. *Galpin* v. *Page*, 18 Wall. 350; *Runkle* v. *United States*, 122 U. S. 543.

Although there is no bill of exceptions, as the case is

here on appeal the evidence upon which the court below acted is open for our consideration and would seem to be in the record, although a compliance with the præcipe of the appellant would have required the clerk to exclude it. Under these conditions we content ourselves with saying that, if as a consequence of the action of the appellant the proof is not in the record, the means of examining the conclusion of the court in that respect would be wanting and we could not disturb the decree appealed from. If on the other hand the documents in the record, not referred to by the præcipe of the appellant, embraced the proof which the court admitted and upon which it acted, we are of opinion that they abundantly sustain the conclusion which the court based upon them and therefore make clear the existence at the time of the trial of a military status in the accused officer adequate to sustain the jurisdiction of the court-martial.

The contention that the court was without jurisdiction because the trial occurred in a time of peace and that under that condition Article of War 92 deprived courts-martial of jurisdiction to try for murder, has been held to be without merit in *Kahn* v. *Anderson*, No. 421, this day decided, *ante*, 1, which therefore disposes of that question as presented here. This renders it unnecessary to consider the Government's insistence that, as the conviction was for manslaughter, the trial was for that crime, although the charge was murder.

As respects the designation of the penitentiary at Atlanta as the place for executing the sentence at hard labor which was imposed, we are of opinion that, if effect be given to documents which are in the record and to which the lower court referred, it would clearly result that the court rightly held that, under the conditions disclosed, the order for confinement at Atlanta was virtually the order of the President, and the contention to the contrary now made is devoid of merit. *United States* v.

Page, 137 U. S. 673, 678–682; *United States* v. *Fletcher*, 148 U. S. 84, 88–91; *Ide* v. *United States*, 150 U. S. 517; *Bishop* v. *United States*, 197 U. S. 334, 341–342. But, as pointed out by the court below, the mere designation of the place for carrying out the sentence did not involve the jurisdiction of the court (*Schwab* v. *Berggren*, 143 U. S. 442, 451; *In re Cross*, 146 U. S. 271, 277–278), and if erroneous would only lead to retaining the accused for a new designation of place of confinement, and we see no reason under the condition of the record to reverse the action of the court below on that subject.

What we have said disposes of every material contention in the case, although we have not expressly noticed the many suggestions based upon the supposed duty on the trial, before the court-martial, to negative every possible condition the existence of which might have prevented that court from trying the case, among which was the possibility that the officer under trial might have belonged to a command which did not come within the power to call a court-martial conferred upon the camp commander by General Orders, No. 56, particularly since the suggestion now made on that subject seems to have been an afterthought and not to have been called to the attention of the court below in any way.

Affirmed.

BERGER ET AL. *v.* UNITED STATES.

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

No. 460. Argued December 9, 1920.—Decided January 31, 1921.

1. Upon the filing of an affidavit of a party to a case in the District Court, in conformity with Jud. Code, § 21, averring the affiant's belief that the judge before whom the case is to be tried has a per-

sonal bias or prejudice against him, and stating facts and reasons, substantial in character and which, if true, fairly establish a mental attitude of the judge against the affiant which may prevent impartiality of judgment, it becomes the duty of the judge to retire from the case. P. 30.

2. The judge may pass upon the sufficiency of the affidavit, but not upon the truth or falsity of the facts alleged. *Id.*
3. The facts may be alleged upon the affiant's information and belief. P. 34.
4. *Held*, that the affidavit filed in this case was sufficient.

THE case is stated in the opinion.

Mr. Seymour Stedman and *Mr. Henry F. Cochems* for Berger *et al.*

The Solicitor General for the United States:

Unless the affidavit complies with the requirements of § 21, Jud. Code, it can have no effect, and the judge against whom it is directed can properly proceed with the trial.

Glasgow v. *Moyer*, 225 U. S. 420, and *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 45, establish that when a judge holds that the affidavit is not filed in time, or is insufficient in law, or, for any reason, overrules the application and continues in the case, his action is subject to review and, if improper, to reversal by an appellate court, but that, unless his acts are so reviewed and reversed, they are not void. The latter case shows, moreover, very clearly, what must appear before the judge can be disqualified.

It is believed that the following cases, viz: *Henry* v. *Speer*, 201 Fed. Rep. 869, 872; *Ex parte N. K. Fairbank Co.*, 194 Fed. Rep. 978; *Ex parte Glasgow*, 195 Fed. Rep. 780; and *In re Equitable Trust Co.*, 232 Fed. Rep. 836—are all in which the lower federal courts have construed this section. There is unanimity in holding: (1) That upon the filing of the affidavit the trial judge must deter-

mine whether it is filed in time and whether its statements are sufficient in law to comply with the statute; (2) that his action in this regard is judicial and subject to review upon writ of error or appeal, but not to collateral attack as being void; (3) that § 21 applies only to those cases in which the affiant can state facts which tend to show personal prejudice or bias; (4) that the prejudice or bias which will disqualify a judge is prejudice or bias personal to the litigants and not merely arising out of a prejudgment of their case. Only one district judge has considered whether the judge may, under any circumstances, inquire into the truth or falsity of the statements made, and he held that, if the act denied this power under all circumstances, it would be unconstitutional.

A mere charge of bias and prejudice is a mere expression of an opinion. Bias or prejudice is a state of mind which can be proved only by facts and declarations from which it can be inferred. The act therefore requires that the facts and the reasons for the litigant's belief shall be stated. Whether the judge is disqualified depends, then, not upon the mere fact that prejudice has been charged, but upon the facts which it is alleged tend to show such prejudice. Unless the facts so alleged were intended to be considered and decided, by some authority, to have a tendency to prove prejudice, the requirement that they should be stated was an idle ceremony. Congress having excluded every other judge from doing so, the judge against whom the charge is made must pass upon the sufficiency of the affidavit before he retires from the case.

The affiant must state the facts of his own knowledge and not on information and belief. The statute requires that the *facts* shall be stated, so that action may not be based on mere belief. Obviously, it would be insufficient to allege that the affiant believes prejudice exists, because there is a rumor that the judge has done or said such and

such thing. This would not be a statement of fact except the bare fact that there is a prevalent rumor, and it is made no more a fact by adding that affiant believes the rumor to be true. A statement that some unnamed person has told him something about the judge's words or conduct would be equally insufficient. Nor would it be made any more sufficient by giving the name of his informant. The only fact which he would then state would be the fact that some third party had made a statement.

It was not contemplated or intended that the act would have very wide application. It could not have been intended that the judge should be disqualified upon a belief on the part of a litigant based upon rumor or mere idle gossip. Since it is only prejudice that is personal to the litigant, and therefore ordinarily grows out of some previous relations, dealings, or contact with the judge, the facts may well be supposed to be within the knowledge of the litigant. This is evidently the view taken of the statute in *Ex parte American Steel Barrel Co.*, *supra*. If any purpose is to be served by requiring a statement of facts, these must be facts which the litigant is able to state as of his own knowledge. Many of the facts upon which a person's civil rights depend are not within his personal knowledge. He has learned of them through others, and he knows witnesses by whose testimony he can prove them. He has the right to make an issue in court in order that he may prove the facts and have his rights determined. No judgment, however, can be predicated on any fact which he states merely on information and belief unless the fact is admitted by the opposite party or established by competent testimony. We are dealing now, however, with a case in which he is required to state facts, and not merely belief. It is not expected that any issue will be made or witnesses called to prove anything stated in the affidavit. The court is expected to act on the affidavit itself.

Even the facts stated in this affidavit on information and belief do not tend to show personal prejudice.

In the present case it is not necessary to determine whether a judge is bound in all circumstances to accept as true the statement of facts contained in an affidavit of prejudice, for in this case the judge apparently overruled the application because of the manifest insufficiency of the affidavit, without reference to its falsity, known to the judge and clearly proven by a stenographic report of his remarks in another case, excerpts from which were professedly quoted but in fact grossly distorted by the affidavit. But if the statute means this, there is a question for serious consideration whether it be not, as held by Jones, J., in *Ex parte N. K. Fairbank Co.*, 194 Fed. Rep. 978, unconstitutional. For it is a serious thing to say that a judge must practically brand himself in the records of his own court as unworthy and unfit merely because some litigant who, it may be, is utterly unscrupulous, has seen fit to file an affidavit falsely charging that he has done and said things which he has not done or said. To say this would put it in the power of every conscienceless litigant to insult and humiliate an honorable and high-minded judge at will, and leave that judge powerless to protect himself from the disgrace of a record showing that he is so prejudiced as to be unfit to hold his office.

Mr. Justice McKenna delivered the opinion of the court.

Section 21 of the Judicial Code provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge

shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, . . . No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, an indictment against plaintiffs in error (it will be convenient to refer to them as defendants), charging them with a violation of the Act of Congress of June 15, 1917, known as the Espionage Act, c. 30, 40 Stat. 217.[1] In due time they invoked § 21 by filing an affidavit charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge to preside at the trial. The motion was denied and upon the trial defendants were convicted and each sentenced to twenty years' imprisonment. From the judgment and sentence they took

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[1] "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished . . . ."

the case to the United States Circuit Court of Appeals for the Seventh Circuit. That court, reciting that certain questions of law under § 21 have arisen upon the affidavit and motion upon which the court is in doubt and upon which it desires the advice and instructions of this court, certifies questions of the sufficiency of the affidavit and of the duty of the judge thereunder, and also certifies the affidavit and other proceedings upon such motion.

The affidavit, omitting formal and unnecessary parts, is as follows: Petitioners (defendants) represent "that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not be to prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Ger-

mans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.'

"These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, National Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

"Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said

Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case."

The affidavit was accompanied by the certificate of Seymour Stedman, attorney for defendants, that the affidavit and application were made in good faith.

The questions certified are as follows:

(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?

(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

The basis of the questions is § 21, and the primary question under it is the duty and power of the judge,—whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

These alternatives present the contentions in the case. Defendants contend for the first; the United States contends for the second. The assertion of defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of the judicial judgment upon them. In other words, the action of the affidavit is not "automatic," to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has

jurisdiction to pass. The issue is, therefore, precise, and while not in broad compass is practically of first impression as now presented.

In *Glasgow* v. *Moyer*, 225 U. S. 420, the section was referred to but not passed upon. In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, the phase of the section presented here was not presented. There proceedings in bankruptcy had progressed to a decree of adjudication, and the judge who had conducted them was charged by certain creditors with bias and prejudice based on his rulings in the case. Such use of § 21 was disapproved. "It was never intended," it was said, "to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause." As pertinent to the comment and to the meaning of § 21, we may say, that Judge Chatfield, against whom the affidavit was directed, said that he felt that the intention of § 21 was "to cause a transfer of the case, without reference to the merits of the charge of bias," and he did so immediately, in order, as he said, "that the application of the creditors" might "be considered as speedily as possible by such Judge as" might "be designated." Another judge was designated and to restrain action by the latter and vacate the orders that he had made, and to command Judge Chatfield to resume jurisdiction, mandamus was sought. It was denied. The case establishes that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The cases at circuit in which § 21 was considered have not much guidance. They, however, deserve attention. *Ex parte N. K. Fairbank Co.*, 194 Fed. Rep. 978, may be considered as expressing power in the presiding judge to pass upon the sufficiency of the facts affirmed. In *Ex parte Glasgow*, 195 Fed. Rep. 780, the question came up

upon an application for a writ of *habeas corpus* and it appeared that the affidavit of bias was not filed until after trial of the case and when the court was about to pass upon a motion in arrest of judgment and new trial. It was held that § 21 was not applicable at such stage of the proceedings. *Henry* v. *Speer*, 201 Fed. Rep. 869, was a petition for mandamus to require an affidavit of bias against District Judge Speer to be certified to the senior circuit judge that the latter might determine its sufficiency, and to restrain Judge Speer from exercising jurisdiction of the case. The writ was refused on the ground that the affidavit did not conform to § 21 in that it omitted to charge "personal" bias, a charge of such bias, it was held, being a necessary condition. The court, (Circuit Court of Appeals for the Fifth Circuit), by Judge Meek, said, "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification." This comment sustains defendants' view of § 21 and marks a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statements, a distinction to which we shall presently advert.

The cases (one being excepted) to the extent they go, militate against the contention of the Government and they have confirmation in the words of the section. Their declaration is that "whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prej-

udice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter." There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.

But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the "affidavit shall state the facts and the reasons for the belief" of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use as pointed out by Judge Meek in *Henry* v. *Speer, supra.* It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or im-

pede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants.

It is, however, said, that the assertion and the facts are stated on information and belief and that hence the affidavit is wholly insufficient, § 21 requiring facts to be stated "and not merely belief." The contention is that "the court is expected to act on the affidavit itself" and that, therefore "the act of Congress requires facts—not opinions, beliefs, rumors, or gossip." *Ex parte American Steel Barrel Co., supra,* is cited for the contention. We do not know what counsel means by "opinions, beliefs, rumors, or gossip." The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct, and it is not strange that § 21 should so regard them.

We may concede that § 21 is not fulfilled by the assertion of "rumors or gossip" but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to § 21 would be arbitrary and make its remedy unavailable in many, if not in most, cases. The section permits only the affidavit of a party, and *Ex parte American Steel Barrel Co., supra,* decides, that it must be based upon facts antedating the trial, not those occurring during the trial. In the present case the information was of a definite incident, and its time and place were given. Besides, it cannot be the assumption of § 21 that the bias or prejudice of a judge in a particular case would be known by everybody, and necessarily, therefore, to deny to a party

the use of information received from others is to deny to him at times the benefit of the section.

We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? And any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of § 21 has therefore no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury restrain from that—perjury in him who makes the affidavit, connivance therein of counsel thereby subjecting him to disbarment. And upon what inducement and for what achievement? No other than trying the case by one judge rather than another, neither party nor counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the

country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

After overruling the motion of defendants for his displacement, Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of § 21 it is excluded from consideration.

We come then to the questions certified, and to the first we answer, Yes, that is, that the affidavit of prejudice is sufficient to invoke the operation of the act. To the second we answer that, to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer, No, that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment.

So ordered.

MR. JUSTICE DAY, dissenting.

As this case is to settle the practice for this and similar cases which may arise in the federal courts, and as the opinion does not consider some aspects of the record, I venture to state the reasons which impel me to reach a different conclusion than that announced by the majority.

An examination shows that statutes exist in a number of States covering the subject under consideration. These statutes vary in character, and in the requirements for establishing the bias or prejudice of the judge which may require him to abstain from sitting at the trial of a particular case. In some of them an affidavit of belief of prejudice, or that a fair trial cannot be had before a particular judge, is sufficient to disqualify him. Other statutes require supporting affidavits and the certificate of counsel, and provide for a hearing on the matter of disqualification. In some States the matter is required to be heard before another judge.

The federal statute, now under consideration, had its origin in an amendment to the Judicial Code, introduced in the House of Representatives when the adoption of the Code was under consideration. As adopted in the House, the affidavit was required to set forth the reasons for the belief that personal bias or prejudice existed against the party, or in favor of the opposite party to the suit. (See Cong. Rec., vol. 46, part 3, p. 2626, *et seq.*)

When the bill came before the Senate the section was amended so as to require the facts, and the reasons for the belief that bias or prejudice existed, to be set forth, and the affidavit is required to be accompanied by a certificate of counsel of record that it and the application are made in good faith. (Sen. Doc., No. 848, 61st Cong., 3d sess.) It is thus apparent that the section in the form in which it finally became part of the Judicial Code intended that the bias or prejudice which should disqualify

a judge should be personal against the objecting party, and that it should be established by an affidavit which should set forth the reasons and facts upon which the charge of bias or prejudice was based. The evident purpose of this requirement was to require a showing of such reasons and facts as should prevent imposition upon the court, and establish the propriety of the affidavit of disqualification. "It is not sufficient," said the late Mr. Justice Brewer, when a member of the Supreme Court of Kansas, in *City of Emporia* v. *Volmer*, 12 Kansas, 627, "that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial-judge's integrity, and of the clearness of his perceptions."

I accept the opinion of the majority that the judge under the requirements of this statute may pass upon the sufficiency of the affidavit, subject to a review of his decision by an appellate court, and, if it be sufficient to show personal bias and prejudice, the judge should not try the case. But I am unable to agree that in cases of the character now under consideration the statement of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainties and inadequacy of a prosecution for perjury if it should appear that the affidavit contains known misstatements.

Notwithstanding the filing of the affidavit purporting compliance with the statute, the court has a right to use all reasonable means to protect itself from imposition. *Davis* v. *Rivers*, 49 Iowa, 435. The personal bias or prejudice of the judge against the defendants in this case is said to be established by language imputed to the judge as his utterances concerning the attitude of the German people during the progress of the war.

22. DAY and PITNEY, JJ., dissenting.

The affidavit filed contained a statement of alleged language of the judge, concerning a German who was "charged" with making the statements set forth. Upon receiving the affidavit the Judge at once inquired of counsel whether the language ascribed to him was not in fact uttered in connection with the disposition of the case of United States against one Weissensel in sentencing him after conviction by a jury of a violation of the Espionage Act in the same court. Counsel informed the Judge that such was the fact. The Judge asked counsel for Berger whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the court. Counsel replied that he had not. It would seem incredible that any judge could have made such statements concerning a defendant not yet tried in his court, in advance of trial and upon a mere charge of an offense. Counsel in open court admitted that the offending language was used in passing sentence after conviction in Weissensel's case.

Moreover, upon the affidavit being filed, and after this admission of counsel, the District Attorney offered in evidence a transcript of what took place and what was in fact said upon the sentencing of Weissensel. The Judge permitted this stenographic report, sworn to by an experienced stenographer, who made it, to be a true and correct report of the statements made and the proceedings had, to be put into the record, saying that the truth should be shown of record in connection with the falsity, although he was of opinion that the facts stated in the affidavit failed to establish bias or prejudice against the defendants which would disqualify him from sitting at the trial.

This stenographic report, sent up with the certificate and made part of it, and which there is no reason to believe fails to state accurately what took place, is in marked contrast with statements of the affidavit which the defendants made when seeking the disqualification of the

Judge. It shows, as we have already stated, that the utterances of the Judge were after conviction of Weissensel, and were made when he was passing sentence. It shows that the statement of the Judge concerning German-Americans was quite different from that stated in the affidavit, and referred to the type of man who had been convicted and was before him for sentence. The Judge in speaking of the convicted defendant said that he was of the type of man who branded almost the whole German-American population, and that one German-American, such as the defendant, talking such stuff did more damage to his people than thousands of them could overcome by being good and loyal citizens; and that he, the defendant, was an illustration of the occasional American of German birth whose conduct had done so much to damn the whole ten million in America. While this language might have been more temperate, there does not appear to be in it anything fairly establishing that the Judge directed his observations at the German people in general, but rather that his remarks were aimed at one convicted as was the defendant, of violation of law.

As I understand the opinion of the court, notwithstanding the admissions of counsel, and the sworn stenographic report of what took place, the affidavit must be accepted, and, if it discloses matters, which if true, would tend to establish bias and prejudice, the same must be given effect and the judge be disqualified. It does not seem to me that this conclusion comports with the requirements of the statute that reasons and facts must be set forth for the consideration of the judge. It places the federal courts at the mercy of defendants who are willing to make affidavits as to what took place at previous trials in the court, which the knowledge of the judge, and the uncontradicted testimony of an official report may show to be untrue, and in many districts may greatly retard the trial of criminal causes.

While, as I have said, in sentencing Weissensel the Judge might have been more temperate in his observations, I am unable to find that the statements of the affidavit, when read in connection with the admissions of counsel and the established facts as to what took place as gathered from the stenographic report, showed such evidence of personal bias or prejudice against the defendants as required the Judge upon the mere filing of this affidavit to permit its misleading statements to be placed of record, and to proceed no further with the case.

It does not appear that the trial judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial. To permit an *ex parte* affidavit to become in effect a final adjudication of the disqualification of a judge when facts are shown, such as are here established, seems to me to be fraught with much danger to the independent discharge of duties by federal judges, and to open a door to the abuse of the privilege which is intended to be conferred by the statute in question.

In my judgment the questions propounded, in the light of the disclosures of this record, should be answered as to the first: That the affidavit of prejudice, when read in the light of the other disclosures in the record, was insufficient to meet the requirements of the act. As to the second: That while the judge might have called upon another judge to pass upon the sufficiency of the affidavit, he had jurisdiction to pass upon it himself if he saw fit to do so. As to the third: That the mere filing of the affidavit did not require the judge to proceed no further with the trial of the defendants upon the accusation against them.

MR. JUSTICE PITNEY concurs in this dissent.

Mr. Justice McReynolds, dissenting.

I am unable to follow the reasoning of the opinion approved by the majority or to feel fairly certain of its scope and consequence. If an admitted anarchist charged with murder should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

The conclusion announced gives effect to the statute which seems unwarranted by its terms and beyond the probable intent of Congress. Bias and prejudice are synonymous words and denote "an opinion or leaning adverse to anything without just grounds or before sufficient knowledge"—a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisement of a class, *e. g.*, revolutionists, assassins, traitors.

To claim personal bias without more is insufficient; "the facts and the reasons for the belief that such bias or prejudice exists" must be set out, and plainly, I think, this must be done in order that the judge or any reviewing tribunal may determine whether they suffice to support honest belief in the disqualifying state of mind.

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives who, unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as show-

ing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.

Of course, no judge should preside if he entertains actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances. Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while "An overspeaking judge is no well tuned cymbal" neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power. It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. The personal concern of the judge in matters of this kind is indeed small, but the concern of the public is very great.

In my view the trial judge committed no error when he considered the affidavit, held it insufficient, and refused to retire.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY *v.* SMITH.

ERROR TO THE DISTRICT COURT, DIVISION NO. 1, OF THE TERRITORY OF ALASKA.

No. 166. Argued January 20, 21, 1921.—Decided January 31, 1921.

1. In imposing license taxes upon the manufacture of oil and fertilizer from fish, the legislature of Alaska, having in view the value of herring as a food supply for men and for salmon, constitutionally may discriminate against those persons who consume herring in the manufacture, as compared with those who use other fish or salmon offal. P. 48.
2. A license tax, otherwise valid, is not unconstitutional because it destroys a business without compensation. *Id.*
3. *Held*, that the purpose of the legislature in enacting the tax laws involved in this case must be gathered from the statutes and not from the allegations in the bill attacking them, admitted by demurrer. P. 49.
4. The Act of August 24, 1912, c. 387, § 3, 37 Stat. 512, creating the Alaskan legislative assembly and granting it power to alter, amend, modify and repeal laws in force in Alaska, declared that such power should not extend to the "fish laws" of the United States there applicable, or to laws of the United States providing for taxes on business or trade, and further declared that "this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." *Held:* (a) That certain acts of Congress imposing taxes on fish oil and fertilizer works based on output, (Alaska Comp. Laws, §§ 2569, 259), are not "fish laws" within the meaning of this limitation. P. 49. (b) That subjection of a particular industry to this congressional tax does not imply a license to continue in business and thus prevent additional, even prohibitory, taxation by Alaska under the broad power granted. *Id.* (c) That an additional tax by Alaska, being thus authorized, is not objectionable as double taxation. P. 50.
5. A discriminatory license tax *ut sup.*, par. 1, *held* consistent with the command of § 9 of the said Act of August 24, 1912, that all taxes shall be uniform on the same class of subjects. P. 49 .
6. The provision of the same act, § 9, that no tax shall be levied for

territorial purposes in excess of one per cent. of the assessed valuation of property, does not apply to license taxes. P. 50.

Affirmed.

THE case is stated in the opinion.

Mr. R. E. Robertson for plaintiff in error:

The allegations of the complaint relating to the taxes must be taken as true, because the case was decided upon demurrer. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 234; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 103; *St. Louis* v. *Knapp Co.*, 104 U. S. 658, 661.

The Constitution is in force in Alaska, and inconsistent local legislation is void.

It is the duty of the judiciary to consider the real nature and effect of legislation depriving citizens of constitutional rights.

There is a gross and patent inequality in the amount of the tax levied on the particular line of business carried on by plaintiff in error as compared with the tax levied on other lines of business.

The territorial legislation and the taxes imposed by it are in violation of the Constitution, because the legislature has plainly abused its taxing power by exercising it, not for revenue, but for the purpose of destroying rights and privileges accorded to the plaintiff in error by the Constitution and the Alaska Organic Act. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563; *Alaska Pacific Fisheries* v. *Alaska*, 236 Fed. Rep. 52; *McCray* v. *United States*, 195 U. S. 27; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24.

The legislation and the taxes imposed thereunder are unreasonable, arbitrary, confiscatory and prohibitory, and unjustly discriminate against plaintiff in error and its business, and are in violation of the Constitution because plaintiff in error is denied the equal protection of

the laws. *Tanner* v. *Little*, 240 U. S. 369, 382; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 109, 111, 112; Cooley, Const. Lim., 5th ed., 484, 486; *State* v. *Haun*, 61 Kansas, 146; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Yot Sang*, 75 Fed. Rep. 983; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *State* v. *Wright*, 53 Oregon, 344; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 104; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 159; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. And its property is taken without due process of law. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370, 373, 374 (and many other authorities); *Sallsbury* v. *Equitable Purchasing Co.*, 177 Kentucky, 348.

It being illogical to believe that plaintiff in error can pay such a tax and continue its business, it will come to pass that, although Congress has legalized the business by the Acts of June 6, 1900, and June 26, 1906, under which taxes are paid into the National Treasury to be expended in the Territory (*Binns* v. *United States*, 194 U. S. 486, 491), yet the local legislature, under an assumption of delegated power, has deprived the Federal Government of the revenue it would otherwise have received, and has virtually repealed the congressional acts. See *Alaska Pacific Fisheries* v. *Alaska*, 236 Fed. Rep. 52, 57.

Congress by the Act of June 26, 1906, authorized plaintiff in error to carry on its business in the Territory of Alaska. *License Tax Cases*, 5 Wall. 462, 471.

The territorial legislation and taxes imposed thereby are also contrary to the Alaska Organic Act; because their effect is to amend, alter, modify and repeal the Acts of June 6, 1900, and June 26, 1906; because they are not uniform upon the same class of subjects and are not levied and collected under general laws; because the assessments are not according to actual value,—in fact no assessments

were made; and because the taxes, although levied for territorial purposes, are in excess of one per centum per annum of any possible valuation which could be lawfully assessed upon the actual value of the property on which they are levied.

Mr. J. C. Murphy, Attorney General of the Territory of Alaska, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action to recover the amount of taxes levied under statutes of Alaska which the plaintiff alleges to be contrary to the Act of Congress of August 24, 1912, c. 387, § 3, 37 Stat. 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. Judgment was given for the defendant upon demurrer to the complaint, the parties agreeing that the foregoing grounds of recovery were the only matters in dispute. The statutes attacked, viz: May 1, 1913, April 29, 1915, and May 3, 1917, levy license taxes of two dollars a barrel and two dollars a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. The act of Congress after giving effect to the Constitution and laws of the United States in the Territory provides that the authority therein granted to the legislature "to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the . . . fish . . . laws . . . of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, . . . *Provided further*, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." Some reliance is placed also upon § 9 that all taxes shall be uniform upon the same class of subjects, &c., and that no tax shall be levied for terri-

torial purposes in excess of one per centum upon the assessed valuation of property therein in any one year.

The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, &c., from other fish, and is otherwise extortionate; and that it contravenes the act of Congress in lack of uniformity and in exceeding one per centum of the actual value of the plaintiff's property. The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the Attorney General for Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content however to assume for the purposes of decision that, not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. *McCray* v. *United States*, 195 U. S. 27. See *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Mugler* v. *Kansas*, 123 U. S. 623; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482. We need not consider whether abuses of the power might go to

such a point as to transcend it, for we have not such a case before us. The acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like, as in *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64, 72.

But it is said that however it may be with regard to the Constitution taken by itself, the statutes brought into question are contrary to the act of Congress from which the local legislature derives its power. In the first place they are said to be an attempt to modify or repeal the fish laws of the United States. The Act of Congress of June 6, 1900, c. 786, § 29, 31 Stat. 321, 331; Alaska Compiled Laws, § 2569; imposes a tax on fish oil works of ten cents per barrel and on fertilizer works of twenty cents per ton, repeated in slightly different words by the Act of June 26, 1906, c. 3547, 34 Stat. 478; Alaska Compiled Laws, § 259. But these are not fish laws as we understand the phrase. It is argued, however, that at least they import a license, *License Tax Cases*, 5 Wall. 462, 470, and that a tax alleged to be prohibitory flies in their teeth. It would be going far to say that a tax on fish oil works in general terms imported a license to a specific kind of works deemed undesirable by the local powers, and when we take into account the express and unlimited authority to impose additional taxes and licenses we are satisfied that the objection should not prevail. We confine our decision to the statutes before us, repeating in this connection that they must be judged by their contents not by the characterization of them in the complaint.

The requirement of uniformity in § 9 is disposed of by what we have said of the classification when considered with reference to the Constitution. The legislature was

warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal. The provisions against taxing in excess of one per centum of the assessed valuation of property does not apply to a license tax like this. This is not a property tax. *Alaska Pacific Fisheries* v. *Alaska*, 236 Fed. Rep. 52, 61. The objection that the plaintiff in error is doubly taxed, first by the United States and then by the Territory, is answered by the express authority to levy additional taxes to which we have referred heretofore. Without going into more detail we are of opinion that the tax must be sustained.

Judgment affirmed.

STARK BROS. NURSERIES & ORCHARDS COMPANY *v.* STARK ET AL., TRUSTEES, DOING BUSINESS UNDER THE NAME AND STYLE OF WILLIAM P. STARK NURSERIES.

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

No. 171. Argued January 21, 1921.—Decided January 31, 1921.

1. The damages recoverable under the Trade-Mark Act for infringement of a registered trade-mark are limited to those inflicted after the registration, and, if the notice of registration has not been attached to the mark, as prescribed by the act (§ 28), to those arising after the defendant was notified of infringement. P. 52.
2. Where the action arises wholly under the Trade-Mark Act, diversity of citizenship being absent, the District Court is without jurisdiction to require an accounting for profits resulting from unfair competition before the registration, or (*semble*) before the notice conditioning liability to damages, *ut supra*. *Id.*

257 Fed. Rep. 9, affirmed.

THE case is stated in the opinion.

Mr. Andrew B. Remick for petitioner.

Mr. Xenophon P. Wilfley for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought September 11, 1916, in the District Court of the United States, by the petitioner, a Missouri corporation, against citizens of Missouri, for an infringement of a trade-mark, "Stark Trees," registered under the Act of Congress of February 20, 1905, c. 592, 33 Stat. 724, and amendments. The District Court found infringement and unfair competition, granted an injunction, and made a decree for an account of profits from March 11, 1914, when the infringement began, limiting the damages, however, to those suffered after August 26, 1916, that being the date when the plaintiff gave the defendant notice of the registration of the mark. The Circuit Court of Appeals concurred with the District Court as to the facts but limited the account as well as the damages to the date when notice was given of the registered mark, a few days before the bringing of this suit. 248 Fed. Rep. 154. 257 Fed. Rep. 9. This limitation is the only question here.

By § 28 of the Trade-Mark Act it is made the duty of the registrant to give notice to the public by attaching certain specified words or abbreviations to the trade-mark or to the receptacle wherein the article is enclosed; "and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice." 33 Stat. 730. The infringement that is sued for is infringement of a registered trade-mark, not infringement

of a trade-mark. That is the plain meaning of the above words and the necessary scope of this suit since that is the scope of the jurisdiction of the District Court. *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 172. It seems very plain that the plaintiff had a cause of action outside the statute, but that would have to be asserted elsewhere, as the suit was between citizens of the same State. The statute alone gave the right to come into this Court of the United States. Coming in to assert its statutory rights, we will assume in the plaintiff's favor that it could recover for unfair competition that was inseparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source.

The plaintiff argues that a notice of March 11, 1914, calling on the defendants "to discontinue the unfair competition and infringement on our rights" coupled with the wilful character of the defendants' wrongdoing ought to lead to a different result, and the District Judge seems to have had a similar notion. But that is to forget the origin and necessary limit of the jurisdiction in this case.

Decree affirmed.

HOGAN *v.* O'NEILL, CHIEF OF POLICE OF THE CITY OF EAST ORANGE, NEW JERSEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 120. Submitted November 8, 1920.—Decided January 31, 1921.

1. For the purposes of interstate rendition (Rev. Stats., § 5278), an indictment which omits otherwise to allege the place of the offense lays it sufficiently in the demanding State if its caption designates a

court and county of that State and a law of that State (Mass. Rev. Laws, c. 218, § 20) makes such designation equivalent to an allegation that the act was committed within the territorial jurisdiction of such court. P. 54.

2. Laws of a demanding State affecting the right to rendition are noticed by federal courts and may be noticed by the Governor of the State upon whom demand is made. P. 55.
3. In Massachusetts, as at common law, a conspiracy to commit a crime is itself a criminal offense, although no overt act be done in pursuance of it. *Id.*
4. A person duly charged in the demanding State who was present there when the offense is alleged to have been committed and afterwards departed, although not for the purpose of escaping prosecution, to another State, is a fugitive from justice, under Rev. Stats., § 5278; Constitution, Art. IV, § 2. *Id.*
5. Whether the person demanded is in fact a fugitive is for determination by the Governor of the State upon which demand is made, whose conclusion, evinced by the warrant of arrest, must stand, in *habeas corpus*, unless clearly overthrown. P. 56.

Affirmed.

THE case is stated in the opinion.

Mr. Reuben D. Silliman for appellant.

Mr. Joseph C. Pelletier for appellee. *Mr. William S. Kinney* was also on the brief.

MR JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a final order of the District Court discharging a writ of *habeas corpus* and remanding appellant to the custody of appellee for rendition to a representative of the Commonwealth of Massachusetts, pursuant to a warrant issued by the Governor of New Jersey under § 5278, Rev. Stats.

Upon the hearing before the District Court on return of the *habeas corpus*, it appeared that a demand for appellant's apprehension and extradition to Massachusetts

had been made by the Governor of that Commonwealth upon the Governor of New Jersey, accompanied with a copy of an indictment found by the grand jury of Suffolk County, certified as authentic by the Governor of Massachusetts, and an affidavit to the effect that appellant was in the Commonwealth for some time previous to and at the time of the commission of the alleged crime, and afterwards fled therefrom.

The following is a copy of the indictment (signatures omitted):

"Commonwealth of Massachusetts, Suffolk, ss:

"At the Superior Court Begun and Holden at the City of Boston, within and for the County of Suffolk, for the Transaction of Criminal Business, on the First Monday of February, in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

"The Jurors for the Commonwealth of Massachusetts, on their oath present that Charles K. Hogan and Luther R. Hanson on the eighteenth day of August in the year of our Lord one thousand nine hundred and sixteen conspired together to steal the property, moneys, goods and chattels of the Market Trust Company, a banking corporation legally established and existing."

It appeared that since the month of May, 1915, appellant had resided continuously at East Orange, New Jersey; but he admitted that in the summer of 1916—he said he could not remember the date—he visited Boston and spent some time in the company of Hanson, the alleged co-conspirator.

It is objected that the indictment does not charge appellant with the commission of a crime in Massachusetts; but when it is read in the light of the laws of that Commonwealth, the difficulty disappears. Revised Laws of Massachusetts, c. 218, § 20, reads thus: "The time and place of the commission of the crime need not be alleged unless it is an essential element of the crime. The allega-

tion of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations. The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court. All allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place." Of course the courts of the United States will take notice of the laws of the demanding State, as the Governor of New Jersey was at liberty to do. *Roberts* v. *Reilly*, 116 U. S. 80, 96.

Were there any doubt of the sufficiency of the indictment, as a pleading, it would not be open to inquiry on *habeas corpus*. *Munsey* v. *Clough*, 196 U. S. 364, 373.

The suggestion that there is neither allegation nor proof of an overt act done by appellant in Massachusetts pursuant to the alleged conspiracy is without weight. By the law of Massachusetts, as by the common law, a conspiracy to commit a crime is itself a criminal offense, although no overt act be done in pursuance of it; such acts, however important as evidence of conspiracy or as matters of aggravation, not being of the essence of the offense, since there is no statute making criminality dependent upon the commission of an overt act. *Commonwealth* v. *Judd*, 2 Massachusetts, 329, 337; *Commonwealth* v. *Tibbetts*, 2 Massachusetts, 536, 538; *Commonwealth* v. *Warren*, 6 Massachusetts, 74; *Commonwealth* v. *Hunt*, 4 Metc. 111, 125.

Appellant being charged by authentic indictment with a criminal offense committed in Massachusetts on or about August 18, 1916, and having, by his own admission, been personally present there and in communication with the alleged co-conspirator at or about that time, and being afterwards found in the State of New Jersey, there

is adequate ground for his return as a fugitive from justice under § 5278, Rev. Stats., enacted to give effect to Art. IV, § 2, of the Constitution. Whether in fact he was a fugitive from justice was for the determination of the Governor of New Jersey. The warrant of arrest issued in compliance with the demand of the Governor of Massachusetts shows that he found appellant to be a fugitive; and this conclusion must stand unless clearly overthrown, which appellant has not succeeded in doing. To be regarded as a fugitive from justice it is not necessary that one shall have left the State in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the State constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another State. *Roberts* v. *Reilly*, 116 U. S. 80, 95–97; *Munsey* v. *Clough*, 196 U. S. 364, 372–375; *Appleyard* v. *Massachusetts*, 203 U. S. 222, 227, *et seq.*; *McNichols* v. *Pease*, 207 U. S. 100, 108–109; *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 133–134.

Final order affirmed.

PORT OF SEATTLE *v.* OREGON & WASHINGTON RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 107. Argued December 6, 1920.—Decided January 31, 1921.

1. The navigable waters in Washington, and the lands under them, passed to the State, upon its creation, in full proprietary ownership, subject to the federal control over navigation. P. 63.
2. In conveying tide lands, the State is free to grant them with rights

in the adjoining water area, or to withhold such rights completely; the effect of the conveyance in this regard is determined by the local law. P. 63.

3. Under the Washington law, a grantee from the State of uplands on a natural, navigable waterway, takes only to high-water mark, without riparian or littoral rights. P. 64.
4. So, too, a grant by the State of a described parcel of tide land, conveys no rights in or over adjoining tide land or water, these being withheld in order that the State may not be hampered in developing waterways and harbors in the public interest. P. 65.
5. The same rule applies to a conveyance of tide lands reclaimed by the State by filling, and abutting on a natural waterway confined by such reclamation and deepened by dredging. P. 67.
6. The State of Washington, through the Port of Seattle, filled in a large area of tide land up to bulkheads confining a waterway; dredged a channel in the waterway leaving shoals on either side of it; divided the land into numbered blocks and lots, and conveyed lots abutting on the waterway by a deed describing them by their numbers, without mention of the waterway or of water rights, but referring to a plat on which the boundaries of the lots were set forth, with lineal measurements, and on which the waterway was also shown, and within it, on each side and some distance from the bulkheads, a line marked "Pierhead Line." *Held:* (1) That, in view of the policy of the State to retain control over navigable waters, an intention to convey with the lots a right to wharf out to the line and thus gain access to the fairway, could not be implied, even assuming that there was no law at the time under which permission to do so could be granted by the state harbor commissioners. (2) That the establishment of the pierhead line by the United States did not create a right to wharf out, as against the State; and, *semble*, under the state law, its presence on a plat had no other effect than as a publication of the federal action. P. 67.
7. A municipal corporation of a State is a citizen of that State, within the rules governing removal of causes to the District Court. P. 70.
8. The right to remove a suit brought by a municipality to quiet the title of the State to a navigable waterway against an abutting land owner claiming a right to wharf out, cannot be denied on the ground that the State is the real party in interest, where the municipality has an independent financial interest in the controversy. *Id.*

Reversed.

THE case is stated in the opinion.

Mr. Leander T. Turner, with whom *Mr. Harold Preston* and *Mr. O. B. Thorgrimson* were on the briefs, for appellant.

Mr. W. H. Bogle, with whom *Mr. F. T. Merritt* and *Mr. Lawrence Bogle* were on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

The main question in this case is whether the Oregon & Washington Railroad Company acquired, as owner of land adjoining East Waterway in the Port of Seattle, the right to build in the waterway piers, wharves and other structures over which it would secure access from its land to the navigable channel. The question arises in a suit to quiet the title of the State which was brought against the Railroad in a state court of Washington, in 1917, by the Port, a municipal corporation,[1] created by the laws of Washington. J. F. Duthie & Co., lessees of the Railroad's land, were joined as defendants; but they have no substantial interest in the controversy; and their peculiar rights do not require consideration. The case

[1] C. 92, of the Laws of 1911, p. 412, as amended by Laws of 1913, c. 62, p. 202. It has power, among other things, to improve navigable and non-navigable waters of the United States and of the State within the port district; "to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters within the limits of such port district so far and to the full extent that this state can and hereby does grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters; . . . to execute leases of all lands, wharves, docks and property owned and controlled by said port district upon such terms as the port commission may deem proper." It exercises also powers similar to those exercised by counties including the power to sue and be sued. *State* v. *Bridges*, 87 Wash. 260. The State did not transfer to the port districts its ownership in the beds and shores of navigable waters.

was removed to the District Court of the United States by petition of the Railroad which is an Oregon corporation; and a motion to remand was denied. Upon full hearing on the merits a decree was rendered dismissing the bill. The case comes here by direct appeal of the Port under § 238 of the Judicial Code, it having been contended by the Railroad and held by the lower court that the validity of c. 168 of the Laws of Washington of 1913, p. 582, is involved, and that its provisions violate the contract clause and the due process clause of the Federal Constitution. The following facts are material:

When the State of Washington was admitted into the Union there lay in front of the City of Seattle extensive tide lands in the area now comprised within the limits of the municipal corporation known as Port of Seattle. Under appropriate legislation of the State this area has been developed as a port. Waterways have been established and in part dredged; tide lands abutting upon the waterways have been filled, platted as city blocks and laid out with streets; and lots therein have been sold for business and other purposes. Among the waterways so established is that known as East Waterway, which connects Duwamish River with Elliott Bay, an arm of Puget Sound. East Waterway, as established, has at the point in question, a width of 1,000 feet. The bed of the waterway was in its natural state tide land. The 750 feet of the waterway which lie in the centre have been dredged to a depth at mean low tide of from 26 to 30 feet. The rest of the waterway, being that portion which extends on either side for a distance of 125 feet from the bulkhead of the filled land to the fairway, is of varying depth and is not navigable by large vessels. The bed of the waterway within these 125 feet areas slopes from the bulkhead to the line of the fairway. It is exposed at low tide ordinarily at points about thirty-six feet from the bulkhead.

The Railroad's parcel here in question is filled land adjoining the west side of this waterway. The tract is a part of Block 393, Seattle Tide Lands, shown on a plat duly filed with the County Auditor in 1895, and was acquired from the State by the Railroad's predecessors in title prior to 1907. The deeds by which the State conveyed the land do not in words purport to grant any right in the waterway; nor is mention made of East Waterway either in the granting clause or elsewhere in the deed.[1] On the plat, by which the land was sold, the boundaries of the block, and of the several lots comprised within it, are set forth clearly and lineal measurements are given. East Waterway is shown on the plat and, on each side of the waterway, a broken line called "Pierhead line," is marked at a distance of 250 feet from the bulkhead. It is alleged by the Railroad that this pierhead line, established by the War Department as prescribing the limits beyond which structures obstructing navigation would not be permitted in the waterway, had been adopted also by the state authorities. In 1914, by joint action of the War Department and of the state authorities,

[1] The form of the deed is as follows:

First party does hereby grant, bargain, sell and convey unto the second party, and to his heirs and assigns, the following described tide lands of the first class, situated in front of the City of Seattle, King County, Washington, to-wit:

Lots one to nine, inclusive, block 393, as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of an act of the Legislature of the State of Washington, entitled "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the State, granting rights of way across lands belonging to the State," approved March 9, 1893.

Witness the seal of the state affixed. HENRY MCBRIDE,
Governor.

and with the assent of abutting owners, the pierhead line was moved back to a point 125 feet from the bulkhead, leaving the fairway in the centre 750 feet, as above stated, instead of 500 feet as originally indicated on the plat. The rights claimed by the Railroad are limited to this 125-feet area.

Chapter 168 of the Laws of Washington 1913, p. 582, provides that:

"Whenever, in any waterways created under the laws of the State of Washington, the government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the state, no structure shall be allowed in the strip of waterway between the boundary and the nearest pierhead line except by the consent of the state land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty (30) years: *Provided, however,* That the owner of land abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90) days following the date when this act shall go into effect, to obtain . . . " a permit authorizing the improvement and use of such area under conditions to be prescribed by the state authorities upon the payment of an annual rental dependent in amount upon the assessed value of an equal area of the abutting land.

The Railroad failed to apply for such a permit. Asserting the rights above stated, it leased a part of its land to J. F. Duthie & Co. for a shipbuilding and manufacturing plant, and purported to authorize the construction of wharves, piers and other structures upon the adjoining water area up to the 125-foot pierhead line. By the Act of 1913 the control over the waterways therein conferred upon land commissioners is to be exercised in port dis-

tricts by the port commissioners. This bill to enjoin such use of the waterway by the Railroad and its lessees and to quiet title was, therefore, brought by the Port of Seattle.

The decree entered by the lower court declared in substance (1) that the State has no proprietary interest in the water area between the bulkhead and the pierhead line; (2) that it is not entitled to lease the same or otherwise to deprive the Railroad of access to the fairway; (3) that c. 168 of the laws of 1913 in so far as it provides for such leasing violates the Federal Constitution; (4) that the Railroad has no proprietary interest in the waterway, but as owner of the abutting lots is entitled to access to the deep or navigable waters "subject to proper governmental supervision." The decree declared further that the State had never established harbor lines in the waterway, and expressly recited that the court does not determine whether or not the State now has power to establish harbor lines, nor what the effect might be of hereafter establishing them.

The main question presented for our decision is whether the Railroad acquired, in connection with the lots of filled land abutting on the waterway, a private riparian or littoral right to construct wharves, docks and piers on this 125-feet area, in order to provide for itself, as owner of the land, and for those claiming under it, convenient access to the fairway for purposes of navigation and commerce. The Port contends that the Railroad acquired no such right, nor any private right whatsoever, in any part of the adjoining waterway; and that the State is free either to use this portion of East Waterway directly for purposes of navigation, as the present fairway is used, or to use it as a part of the harbor; and that, since it is also the proprietor of the tide land, under this water area, it has the full right to develop it, or authorize its development by others, through the erection of wharves,

piers, docks or other structures in aid of navigation and commerce; and to charge a rental for the privilege.

First. The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same. *Weber* v. *Board of Harbor Commissioners,* 18 Wall. 57. By § 1 of Article XVII of its constitution the State asserted its ownership in the bed and shore "up to and including the line of ordinary high tide in waters where the tide ebbs and flows." The extent of the State's ownership of the land is more accurately defined by the decisions of the highest court, as being the land below highwater mark or the meander line, whichever of these lines is the lower.[1] The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively* v. *Bowlby,* 152 U. S. 1. Upon such questions the provisions of the constitution and statutes of the State and the decisions of its highest court are accepted by us as conclusive. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners,* 168 U. S. 349. The precise question presented here is whether the

[1] See *Scurry* v. *Jones,* 4 Wash. 468; *Cogswell* v. *Forrest,* 14 Wash. 1; *Washougal & La Camas Transportation Co.* v. *Dalles, Portland & Astoria Navigation Co.,* 27 Wash. 490; *Johnson* v. *Brown,* 33 Wash. 588; *Van Siclen* v. *Muir,* 46 Wash. 38, 40; *Brace & Hergert Mill Co.* v. *State,* 49 Wash. 326, 331.

State by executing the deed of the land, which in fact adjoined East Waterway, conveyed rights in that waterway. That question is, in essence, one of construction of the deed taken in connection with the plat therein referred to.

Second. Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind either in land below highwater mark, *Eisenbach* v. *Hatfield*, 2 Washington, 236; or in, to, or over the water, *Van Siclen* v. *Muir*, 46 Washington, 38, 41; except the limited preferential right conferred by statute upon the owner of the upland, to purchase the shoreland, if the State concludes to sell the same. Act of March 26, 1890, §§ 11 and 12, Laws of Washington 1889-1890, p. 505. The grantee of the upland cannot complain of another who erects a structure below highwater mark, *Muir* v. *Johnson*, 49 Washington, 66. He does not acquire any right of access over the intervening land and water area to the navigable channel, *Lownsdale* v. *Grays Harbor Boom Co.*, 54 Washington, 542, 550, 551. So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. *Newell* v. *Loeb*, 77 Washington, 182, 193–194; *Hill* v. *Newell*, 86 Washington, 227, 228.[1]

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[1] In some States the shore between the high and the low water mark belongs to the private owner of the upland and as such owner he has all rights not inconsistent with the public's rights incident to navigation. In other States, although the land below high water mark belongs to the State, the private owner of the upland has the right of access over it to the navigable channel and the right to use the State's land in connection therewith. See 27 R. C. L., §§ 273–279, 284. But, in

Third. The Railroad admits that such are the rights of a grantee from the State, where it is the upland which is conveyed. But it contends that a different rule applies where the sale is of tide lands. No basis for the distinction can be found either in the decisions of the highest court of the State or in reason. Since the upland owner has been denied riparian rights in deference to the asserted right of the State to control unhampered the course and development of navigable waters, the State's right must be superior also to the claim of the tide land owner. For the assertion of title in the State was obviously made in order that it might not be hampered in developing waterways and harbors in the manner and to the extent that the public interest should from time to time demand. Such development obviously includes harbor facilities, like piers, docks and wharves, as well as adequate channels. Compare *State* v. *Bridges*, 87 Washington, 260. The proprietary right of the State over navigable waters and of the soil thereunder is neither exhausted nor impaired by making a sale of a tract of tide land, be it the parcel nearest the upland or some other. The State may in one year fill and sell the hundred feet of tide lands nearest the upland and in the next year fill and sell the parcel beyond.

Washington, it is "uniformly held that there is no riparian right in the owner of lands bordering on the navigable waters of the state," and that the State retains the proprietary right to the soil below high water mark. *State* v. *Sturtevant*, 76 Wash. 158, 163; *Brace & Hergert Mill Co.* v. *State*, 49 Wash. 326, 331. The language of some earlier cases, apparently in conflict with these views, was explained in *Hulet* v. *Wishkah Boom Co.*, 54 Wash. 510, 517. The cases referred to go no further than to hold that the owner of uplands has a right in common with the public to use the stream for navigation, as it flows past his land; and that others conducting operations upon the river may not wilfully or negligently destroy his upland. *Dawson* v. *McMillan*, 34 Wash. 269; *Monroe Mill Co.* v. *Menzel*, 35 Wash. 487; *Burrows* v. *Grays Harbor Boom Co.*, 44 Wash. 630; see also *Judson* v. *Tide Water Lumber* Co., 51 Wash. 164.

Compare *State* v. *Scott*, 89 Washington, 63, 70, 72. Or it may sell first the parcel more remote from the upland and later the one immediately adjoining it, or any other. In every case it may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit. When land washed by the ebb and flow of the tide is conveyed by the State with clearly defined boundaries, no rights of any kind beyond those boundaries ordinarily pass under the deed. *Pearl Oyster Co.* v. *Heuston*, 57 Washington, 533. Where a tide land owner acquires rights of access to deep water it is by arrangement with the owner of the intervening land. Compare *Pioneer Sand & Gravel Co.* v. *Seattle Construction & Dry Dock Co.*, 102 Washington, 608.

The cases most strongly relied upon by the Railroad do not relate to tide lands. They deal with the rights of shoreland owners on an inland lake, the level of which had been lowered by the Government. *State* v. *Sturtevant*, 76 Washington, 158; *Puget Mill Co.* v. *State*, 93 Washington, 128. Shore lands differ from tide lands not only in their situation, which in many cases makes an almost indefinite filling in of the latter a possibility, but also in legal definition. Tide lands have a definite boundary at the line of mean low tide; or, by later legislation, of extreme low tide. *State* v. *Scott*, *supra*, pp. 68, 69. The shore lands, on the other hand, were those "below the line of ordinary high water and not subject to tidal flow." They had no defined outer boundary. Accordingly when the waters of the lake there in question were lowered, it became necessary to determine the ownership both of the lands exposed and those below the new line of ordinary high water. The court held that the outer boundary of the shore land was the line of navigability and that grantees were entitled to follow that line out when it was moved by act of their grantor. The considerations which brought the court to this result were, it is true, largely the

same which in other jurisdictions led to the recognition of riparian rights, that is, the claim of the shore land owner to access to deep water. But the court did not secure this interest to the shore land owner by granting him extraterritorial rights—*i. e.* riparian or littoral rights. It did so by construing the outer boundary of his land to be the line of navigability; holding that since the legislature had not limited the outer boundary of shore lands, as it had done in the case of tide lands, it must have intended that the shore lands granted should extend to the line of navigable water, in the absence of legislation to the contrary. Compare *Bilger* v. *State*, 63 Washington, 457. The legislature confirmed this boundary, expressly restricting it to the lands to which the court had applied it; that is shore lands not within city limits. This doctrine can have no application to shore lands where the property line is fixed in the deed. And it cannot apply to tide lands, the dissimilarity of which to shore lands furnished the ground for enunciating the rule.

It appears, therefore, that the law of Washington does not recognize as appurtenant to upland, tide land or shore land in its natural condition, rights of any sort beyond the boundaries of the property. A right of access to the navigable channel over intervening land, above or below low water, must arise from a grant by the owner of the intervening property.

Fourth. The Railroad contends that a different rule should be applied here where we are dealing with made land abutting on an artificial waterway. East Waterway is not properly described as such. It is a natural waterway deepened and confined. Compare *Fox River Flour & Paper Co.* v. *Kelley*, 70 Wisconsin, 287, 300. And obviously the mere fact that tide land conveyed has been filled would not, by the law of Washington, confer upon the grantee, as appurtenant to the land, riparian rights in adjoining navigable waters. But the Railroad insists

that even if the right of access to the navigable channel is not appurtenant to its land as a matter of riparian law, its predecessor in title received the right by implied grant from the State. The right, it says, "depends in the last analysis upon a proper construction of the grant by the State of the abutting lots" in the light of all the circumstances. Among the most important of those, is the fact that the whole development project was an artificial creation. Land, it is urged, was artificially made up to a bulkhead. At some distance beyond a navigable channel was artificially created out of an unnavigable stream. Between the bulkhead and the channel are shoals which prevent full use of waterside lots in connection with navigation unless wharves are erected. When the original grant was made no provision in the law authorized leasing these shoals for docking purposes, but on the contrary the whole waterway was reserved by the statute forever from sale or lease. And, finally, the plat, by reference to which all lots were sold, showed a pierhead line at the point of navigable water. This situation, it is urged, indicates that the lots were sold as part of a completed project, that it was intended they should have full shipping facilities, and that since the State could not lease the shoals under then existing legislation, it must have been the intention that abutting owners should have the right of access to the pierhead line. This argument of the Railroad rests, however, upon an assumption which is at least open to serious doubt. It asserts that under then existing legislation no state official was authorized to permit the grantee to construct a wharf in East Waterway. By the constitution (Article XV, § 1, and by Act of March 28, 1890, p. 668) provision had been made for the establishment of harbor lines in navigable waters. It appears from *Wilson* v. *Oregon-Washington Railroad & Navigation Co.*, 71 Washington, 102, 107, to have been the practice to permit parts of the

harbor area so created to be used for the erection of piers and wharves. East Waterway was and is one of the navigable waters of the State. Our attention has not been called to any statute or decision which indicates that at the time of the original grant power to create harbor areas in it and to grant permits to erect wharves therein would not have been possessed by the harbor commissioners.

Even if the assumptions upon which the arguments rest were all true, the conclusion contended for would not follow. Ever since the organization of the State it has been the clearly defined policy of Washington not to grant riparian rights in navigable waters. This policy, declared in its constitution and expressed in careful legislation, has been consistently enforced by its courts. A grant by implication of the riparian right here asserted might perhaps be inferred in other jurisdictions from the circumstances stated. But in Washington such an implication seems wholly inadmissible. If in the development in question it had been the intention of the State to make such a radical departure as that for which the Railroad contends, the intention would doubtless have been expressed by appropriate language in the deed. But East Waterway was not even mentioned in it. Until we are so informed by the Supreme Court of Washington, we cannot, in the light of the waterway history of the State, believe that there were implications in the situation described which without more are sufficient to indicate an intention to depart from the settled policy of the State.

So far as the pierhead lines are concerned, the Railroad concedes that their establishment by the United States did not create as against the State a right to wharf out. They merely fixed the line beyond which piers might not extend. Compare *Wilson* v. *Oregon-Washington Railroad & Navigation Co.*, *supra*, pp. 107, 108. And the power of the United States in this respect was not exhausted by

its first exercise. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 638. The lines so fixed, although acted upon by the erection of piers, could be changed by the United States at any time. *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251. From the authorities to which we have been directed it appears that under the laws of the State the presence of pierhead lines on the plat could have no effect other than as a publication of action taken by the Federal Government. In *Puget Mill Co.* v. *State*, 93 Washington, 128, decided in 1916, the power of state officials to establish such lines is expressly denied by Judge Chadwick, who said:

"The use of the words 'pierhead line' on the plat prepared by the state, and in the decree, is an unfortunate misuse of terms. The words mean nothing under our constitution and statutes. In some of the eastern states, we understand that 'pierhead lines' are defined, but the constitution makers in this state were careful to avoid the confusion that may result from the drawing of an arbitrary line beyond which piers and docks should not be erected, by providing for an inner and an outer harbor line with an intervening area subject to state ownership and control."

It is unnecessary, therefore, for us to consider whether on this record it is open to the Port to contend that pierhead lines were in fact never fixed by any state official.

Fifth. The Port renews here the objection that the case was improperly removed from the state court, *Germania Insurance Co.* v. *Wisconsin*, 119 U. S. 473; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482; insisting that since the State is the owner of the bed of East Waterway, it is the real party in interest, *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151; *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461; and that it has not merely a governmental interest, as in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, and in *Missouri, Kansas & Texas*

Ry. Co. v. *Missouri Railroad & Warehouse Commissioners,* 183 U. S. 53, 60. The objection to the jurisdiction of the District Court is clearly unsound. The Port being a municipal corporation under the laws of Washington is a citizen of that State and could have been sued in the federal court. *Lincoln County* v. *Luning,* 133 U. S. 529; *Chicot County* v. *Sherwood,* 148 U. S. 529. It had both the power and the duty to bring suit to protect the interests here involved; and it had a direct financial interest in the result. For c. 168 of the Laws of 1913 provides for a payment by abutting owners, in the nature of a rental, for the permit to use parts of the waterways in the erection of wharves, docks or other structures; and that 75% of such rental shall be paid to the county "for the use of said port district." The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment. What effect the judgment in this case will have upon the State's interest we have no occasion to consider. Compare *Tindal* v. *Wesley,* 167 U. S. 204; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636.

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

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., *v.* WILCOX.

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

No. 91. Argued November 12, 1920.—Decided February 28, 1921.

1. The Act of January 28, 1915, c. 22, 38 Stat. 803, amending the Judicial Code so as to provide review of judgments of the United States Court of Porto Rico partly in this court and partly in the Circuit Court of Appeals for the First Circuit, should be construed with reference to the principles of distributing appellate jurisdiction established by the Judiciary Act of 1891. P. 74.
2. *Held*, that a judgment which previously would have been reviewable in this court only because of pecuniary amount (Jud. Code, § 244) but which, under the Act of 1915, went directly to the Circuit Court of Appeals, could not be brought here by appeal from that court, although not among those enumerated as final by Jud. Code, § 128. *Id.*

Appeal to review 255 Fed. Rep. 442, dismissed for want of jurisdiction.

THIS was an appeal from a decree of the Circuit Court of Appeals for the First Circuit reversing a decision of the United States District Court for Porto Rico, which required the appellee to pay the appellant $9,631.92, the amount due on certain mortgages of real estate in Porto Rico, the unpaid principal of which amounted to $6,300.00, and, in default of such payment, directed a foreclosure. The plaintiff bank was a Porto Rico corporation, and the defendant a citizen of the United States.

Mr. Boyd B. Jones, with whom *Mr. Philip N. Jones* was on the briefs, for appellant:

The decree of the Circuit Court of Appeals in the present case is not final, first, because the jurisdiction of the District Court was not "dependent entirely upon the *opposite* parties to the suit or controversy being aliens and citizens

of the United States or citizens of different States" in that, by the Act of March 2, 1901, its jurisdiction existed by the mere fact of the defendant's being a citizen of the United States, and, second, because the parties to this suit are not an alien on the one side and a citizen of the United States on the other, inasmuch as the plaintiff was a citizen of Porto Rico, *Martinez* v. *La Asociacion De Senoras*, 213 U. S. 20; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100; and was neither a citizen of a foreign country, *De Lima* v. *Bidwell*, 182 U. S. 1; *Porto Rico* v. *Castillo*, 227 U. S. 270; nor a citizen of a State, *Barney* v. *Baltimore*, 6 Wall. 280.

It therefore follows that this court has jurisdiction of the appeal under Jud. Code, § 241.

The contention that, under §§ 128 and 241, Jud. Code, appeals to the Supreme Court are authorized only in those cases which might have been appealed directly from the District Court, is untenable. *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330.

The question is purely one of construction, and the plain language of the statutes is not controlled by any of the considerations urged against it.

Mr. Ben A. Matthews, with whom *Mr. Jose R. F. Savage* was on the briefs, for appellee.

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

In a suit in the United States District Court for Porto Rico, where the appellant, a bank incorporated in Porto Rico, was plaintiff, and the appellee, a citizen of the United States, was defendant, a final decree in favor of the bank was rendered, and from that decree the defendant took the case to the Circuit Court of Appeals for the First Circuit.

Upon a reversal of the decree in that court, the bank brought this appeal, and, upon a motion to dismiss for want of jurisdiction, we are required to determine its right to do so. The appellant, not denying that the jurisdiction of this court to review judgments or decrees of the District Court for Porto Rico in cases such as the present one was taken away by the act conferring upon the Circuit Court of Appeals of the First Circuit appellate power over that subject (Act of January 28, 1915, c. 22, § 1; *id.*, § 2, amending §§ 128 and 238, Jud. Code; *id.*, § 3, repealing § 244, Jud. Code; 38 Stat. 803, 804), nevertheless insists that, by virtue of the jurisdiction of this court to review judgments and decrees of the circuit courts of appeals, the power taken away is in substance preserved if only successive appeals be resorted to. This rests upon the proposition that, as the act transferring the jurisdiction from this to the circuit court of appeals brought this case within the jurisdiction of the latter court, it hence subjected the decree in this case to the test of finality and the right of review provided in § 128 of the Judicial Code controlling those subjects. While, if the section be considered superficially, the argument is plausible, its unsoundness becomes apparent by the briefest examination of the context and genesis of the section. Virtually every word of the section relied upon to establish that the decree was not final and to justify the asserted right to review it in this court depends upon limitations expressed in the Judiciary Act of 1891 and which were intended to carry out the great purposes of that act, to distribute the appellate power of the courts of the United States in the proper sense, and were therefore inapplicable to the Porto Rican court. To illustrate, one of the broad distinctions made in the distribution of appellate power under the Act of 1891 depended upon whether the jurisdiction of the federal court as fixed by law was exclusively called into play because of diverse

citizenship, in the constitutional sense, or whether the jurisdiction was invoked because, aside from diverse citizenship, there existed a federal right or question; a judgment being in one case made final in one court where it was not in the other, and also being subject to one method of review in the one and a different in the other. Thus the proposition is, that, because by act of Congress jurisdiction was conferred upon the circuit court of appeals to review a judgment of the Porto Rican court, therefore by the mere exertion of that jurisdiction the Porto Rican judgment was brought under the control, as to finality and review, of provisions having no possible application or relation to it.

The act of Congress by which jurisdiction was conferred upon the Circuit Court of Appeals for the First Circuit additionally makes clear the misconception upon which the argument rests. At the time that act was passed the jurisdiction of this court to review the Porto Rican court embraced two classes of cases, the one involving enumerated federal questions, in the true sense, and the other where the power depended upon the amount involved. § 244, Jud. Code. But the transferring act did not divest this court of appellate jurisdiction over the Porto Rican court, but on the contrary preserved its authority, although in some respects limiting and in others enlarging it, and transferred to the circuit court of appeals appellate jurisdiction in all cases other than those in which jurisdiction by direct appeal was conferred upon this court, unless otherwise provided by law,—a result which clearly negates that it was contemplated that a right to successive appeals should exist, and which moreover indisputably shows that it was the purpose of Congress not to give the circuit court of appeals an authority which it would not exert compatibly with the distribution of federal appellate judicial power made by the Act of 1891.

Indeed, we might well have spared ourselves the duty of expressing the considerations we have stated since the proposition relied upon is virtually foreclosed by the ruling in *Inter-Island Steam Navigation Co.* v. *Ward*, 242 U. S. 1. There a judgment of the Circuit Court of Appeals of the Ninth Circuit, affirming a judgment of the Supreme Court of Hawaii, was brought here by appeal on the theory of the right to successive appeals now relied upon. Coming to consider whether there was jurisdiction to entertain the appeal, and pointing out a reservation of jurisdiction in this court made by the act transferring authority to the Circuit Court of Appeals of the Ninth Circuit to review the Hawaiian court, similar in character to that made with reference to the Porto Rican court which we have previously noticed, it was held that there was no jurisdiction in this court, (a) because of the inferences properly to be drawn from the reservation in the act of Congress just referred to; (b) because of the impossibility of supposing that jurisdiction was taken away from this court and yet virtually restored by successive appeals, and (c) because of the difference between the systems of judicature obtaining as to the courts of the United States under the Constitution and those of Hawaii, making the right to review in the one depend upon legislative limitations not governing as to the other.

It follows from what we have said and from the principles sustained by the ruling in the case just stated that we are without jurisdiction to entertain the appeal which is before us, and it must be and is, therefore,

Dismissed for want of jurisdiction.

T. M. DUCHE & SONS, LIMITED, *v.* AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE, &c., CUMMINS ET AL., CLAIMANTS.

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

No. 84. Argued November 9, 1920.—Decided February 28, 1921.

1. The rule that an appeal in admiralty by either party opens the case to both parties for a trial *de novo*, is established practice in the Third Circuit. P. 79.
2. Where a party relies on this rule and on his opponent's appeal, the court should not deprive him of his right to be heard by allowing the appeal to be withdrawn after the time within which he may himself appeal has elapsed. P. 80.

256 Fed. Rep. 224, reversed.

THE case is stated in the opinion.

Mr. William J. Conlen for petitioner.

No brief filed for respondents.

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

Consequent on the allowance of a writ of certiorari, the case is here to review the action of the court below in granting, in an admiralty case there pending, a motion for leave to withdraw an appeal made by the respondents, who were there appellants. 256 Fed. Rep. 224. The situation thus arose: The schooner "John Twohy" was chartered to carry a cargo of bones from Buenos Aires to Philadelphia. The voyage was made and, following the discharge of the cargo, the charterers, who are the petitioners,

libeled the vessel, asserting claims (1) for failure to deliver part of the cargo which, as evidenced by the in-take weights recited in the bill of lading, had been loaded on the vessel at Buenos Aires, and (2) for damage by sea water to part of the delivered cargo in consequence of leakage alleged to be due to the unseaworthiness of the vessel.

Holding that the recital in the bill of lading of the in-take weights was but *prima facie* evidence and that the proof showed the delivery of all cargo received on board, the court dismissed the libel as to the first claim. As to the second, however, it found that the damage from leakage had resulted from unseaworthiness, and sustained that claim.

The claimants alone appealed, and, after having twice obtained a continuance, moved for leave to withdraw the appeal. Opposing this motion, the libellants asserted that, under the practice in admiralty in that circuit, an appeal opened up the whole case for reconsideration in the appellate court; that relying upon that practice they had refrained from themselves taking an appeal from the ruling of the trial court denying their claim for non-delivery of cargo; that, owing to the continuances allowed the appellants, the time within which the libellants might have taken an appeal had expired, and if the appellants prevailed in their motion the libellants would be without means of obtaining a review of the adverse action of the trial court.

Coming to consider these contentions, the court held them to be without merit, first, because the libellants, by themselves taking an appeal, could have required the appellate court to proceed and decide the same; second, because, having failed to adopt that course, they could not complain if the court, in the exercise of its discretion, declined to grant them as a legal right that which they might have made such had they availed themselves of

the appropriate procedure; and third, because the court conceived that the allowance of the withdrawal of the appeal would be in furtherance of the due administration of the admiralty in that it would tend to put an end to litigation, would afford appellants time within which to exercise a cooler judgment, would forewarn all persons to themselves appeal if they desired to insure a review of unfavorable decisions, and would prevent the hardship which would result from a contrary ruling, as many would be deterred from appealing from unjust decisions if, having once embarked on that course, they were powerless to withdraw. Upon compliance with certain conditions prescribed by the court, appellants' motion was therefore granted.

We are unable to give our approval to this result or the reasons by which it was sustained. As recognized by the court, the case of *The Canadia*, 241 Fed. Rep. 233, had settled in that circuit that in admiralty an appeal by either party operated to remove the case to the appellate court for a trial *de novo*. The decision was based solely upon the previous rulings of this court in *Irvine* v. *The Hesper*, 122 U. S. 256, and *Reid* v. *American Express Co.*, 241 U. S. 544. In *Irvine* v. *The Hesper*, Mr. Justice Blatchford, speaking for the court, said:

"It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton* v. *United States*, 5 Cranch, 281; *Anonymous*, 1 Gallison, 22; *The Roarer*, 1 Blatchford, 1; *The Saratoga* v. *438 Bales of Cotton*, 1 Woods, 75; *The Lucille*, 19 Wall. 72; *The Charles Morgan*, 115 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole

case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

And in the *Reid Case* this court, although pressed to repudiate the practice as opposed to the weight of adjudged cases, declined to do so and reaffirmed the ruling made in *Irvine* v. *The Hesper*.

In view, therefore, of the settled law as to the effect of appeals in admiralty, we are of opinion that the libellants were justified in regarding the appeal taken by the claimants as securing to libellants the right to be heard in the appellate court without the necessity of perfecting a cross-appeal in order to preserve that right. To hold, then, that the appellate court could nevertheless, without affording the libellants an opportunity to be heard, enter a decree the plain effect of which was to deny one of the two claims for which the libel was brought and which, in view of the settled effect of the appeal, the libellants could not be presumed to have abandoned, would be to subject them to a wrong without a remedy, even if it did not amount to a denial of due process of law.

And this renders it unnecessary to consider the supposed advantages which would arise from the adopting of a new rule, since, if the wisdom of so doing be *arguendo* conceded, that concession would not justify the misapplication of the existing rule and the destruction of rights vested in reliance, not only upon its existence, but upon the discharge of the duty to enforce and apply it.

It follows that the decree of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* L. COHEN GROCERY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 324. Argued October 18, 19, 1920.—Decided February 28, 1921.

1. Section 4 of the Food Control Act of August 10, 1917, as amended October 22, 1919, in denouncing and attaching a penalty of fine or imprisonment to the making by any person of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," must be construed as forbidding and penalizing the exaction of an excessive price upon the sale of a commodity. P. 88.
2. To that extent the section, since it sets up no ascertainable standard of guilt, is repugnant to the Fifth and Sixth Amendments to the Constitution, which require due process of law and that persons accused of crime shall be adequately informed of the nature and cause of the accusation. P. 89.
3. The mere existence of a state of war did not suspend these guarantees of the Amendments or relieve Congress from their limitations. P. 88.

264 Fed. Rep. 218, affirmed.

THIS is one of several cases (see *post*, 98, 100, 102, 104, 106, 108, 109) involving the constitutionality, in part, of § 4 of the Act of August 10, 1917, c. 53, 40 Stat. 276, known as the Food Control or Lever Act, as amended by § 2 of the Act of October 22, 1919, c. 80, 41 Stat. 297, which is set out below.[1]

[1] "That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in

An indictment charged, in the first count, that the Cohen Company, a dealer in sugar and other necessaries, wilfully and feloniously made an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar, in that it wilfully and feloniously demanded of a person named, who made the purchase, a stated sum for a stated amount of sugar, which, as the company knew, was an unjust and unreasonable rate. The second count described a similar transaction.

The defendant successfully demurred and the case was brought here by the Government under the Criminal Appeals Act.

The Solicitor General for the United States:

The first contention made against the statute is that the offense charged was not a crime under the laws of the United States until the passage of the Act of 1919, and that, at that time, Congress was without power to enact

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handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any coöperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

such legislation because actual hostilities in our war with Germany had ceased. The District Judge correctly held that this contention was not tenable. *Stewart* v. *Kahn*, 11 Wall. 493, 506; *Ruppert* v. *Caffey*, 251 U. S. 264; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

The war conditions were such indeed as to make it imperative that Congress exert whatever power it had to encourage the production of necessaries and to regulate their prices.

The regulation of the prices of the necessaries of life is a proper governmental function which, when deemed necessary for the prosecution of a war, Congress may exercise. *Munn* v. *Illinois*, 94 U. S. 113, 124; Tucker's Blackstone, vol. 4, pp. 159, 160; Russell on Crimes, 7th ed., vol. 2, p. 1919; *King* v. *Waddington*, 1 East, 143, 163; Statute of Laborers, *anno* 1349, 2 Stat. of England, c. vi, pp. 26, 28; Statute of Herrings, anno 1357, id., p. 117. See also: 2 *id.*, p. 162, anno 1363; 2 *id.*, c. viii, pp. 313, 314, anno 1389; 3 *id.*, c. xii, p. 196, anno 1433; 4 *id.*, cc. viii, ix, p. 41, anno 1487; 4 *id.*, c. v, p. 220, anno 1531; 4 *id.*, c. ii, pp. 263, 264, anno 1533; 4 *id.*, c. xiv, p. 439, anno 1536; 5 *id.*, c. xxi, p. 347, anno 1549; 12 *id.*, c. xviii, p. 77, anno 1709; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 410.

It was impracticable to lay down any fixed and unvarying schedule of profits that would be reasonable. No rule that would fix a certain percentage of cost price as a legitimate profit could, with justice, be uniformly applied. The rate of profit that may be legitimately charged varies with the cost of handling different articles and in different lines of business.

The indictment is not open to the objection that it does not sufficiently give the defendant notice of the accusation, and is a good indictment unless it can be said that the act upon which it is based is unconstitutional.

The Act of 1919 is not subject to the objection that it is too vague and uncertain. The question is whether Congress may declare it to be a criminal offense to charge an unreasonable price for necessaries, leaving it to a jury to determine, from all the facts and circumstances, whether a particular charge is reasonable or unreasonable; or whether it is necessary for the act itself to provide a more definite standard by which the jury must be governed.

If the reasonableness of a rate or charge can be said to be a fact, then undoubtedly it may be left to the determination of the jury under the circumstances disclosed by the evidence.

Undoubtedly a statute creating an offense must use language which will convey to the average mind information as to the act or fact which it is intended to make criminal. *United States* v. *Brewer*, 139 U. S. 278, 288. But statutes describing crimes must necessarily be more or less general in their terms. It is impossible to fix rules of conduct to cover every circumstance or condition that may arise. It is perhaps equally impossible to frame a statute so that all men will agree as to just what circumstances will or will not constitute the crime denounced. There are certain standards both of law and of fact which may be assumed in enacting legislation. When these standards are invoked, a question of fact is presented for the jury to determine under the particular facts of each case, and it is no objection to the statute that it is necessary to invoke these external standards. *Miller* v. *Strahl*, 239 U. S. 426, 434.

To determine from the evidence in a given case what is reasonable or unreasonable is to perform exactly the same function which a jury performs when the question of negligence is submitted to it.

That the language used in this statute is not so general and uncertain as to be subject to constitutional objections would seem now to be definitely settled by recent rulings

of this court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Nash* v. *United States*, 229 U. S. 373.

If it can constitutionally be left to the jury to determine, from the facts and circumstances of a particular case, whether a given contract or combination unduly restricts competition or restrains trade, it is difficult to see any principle upon which it can be denied that the same jury may be left to determine, from a given state of facts and circumstances, whether a particular price demanded for necessaries is reasonable or unreasonable. Later cases have emphasized the rule laid down in the *Nash Case*. *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Arizona Employers' Liability Cases*, 250 U. S. 400, 432. Distinguishing: *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. *United States* v. *Rosenblum*, 264 Fed. Rep. 578, 582; *United States* v. *Oglesby Grocery Co.*, 264 Fed. Rep. 691, 695.

This principle, as applied to this case, is not a new departure, but has consistently been applied to numerous criminal laws. See *United States* v. *Oglesby Grocery Co.*, *supra*.

Mr. Louis B. Sher and *Mr. Chester H. Krum* for defendant in error.

Mr. William D. Guthrie, *Mr. Benjamin F. Spellman* and *Mr. Bernard Hershkopf*, by leave of court, filed a brief as *amici curiæ*.

Mr. John A. Marshall, *Mr. D. N. Straup*, *Mr. Joel F. Nibley* and *Mr. Thomas Marioneaux*, by leave of court, filed a brief as *amici curiæ*.

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

Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt

§ 4 of the Lever Act as reënacted in 1919, we reproduce the section so far as relevant (Act of October 22, 1919, c. 80, § 2, 41 Stat. 297):

"That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person . . . (e) to exact excessive prices for any necessaries . . . Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: . . ."

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the reënacted section with the original text (Act of August 10, 1917, c. 53, § 4, 40 Stat. 276), it will be seen that the only changes made by the reënactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessaries in the City of St. Louis, was charged with violating this section by wilfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, the specification in the first count being a sale for $10.07 of about 50 lbs. of sugar, and that in the second, of a 100-pound bag of sugar for $19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and

therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer, the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations, which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments which it had under consideration, that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

"Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country. . . .

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against it,

I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed.

In cases submitted at about the same time with the one before us, and involving identical questions with those here in issue, it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since if well founded the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as reënacted, are broad enough to embrace the price for which a commodity is sold, and second, because, as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its reënactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121–127; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571; *McCray* v. *United States*, 195 U. S. 27, 61;

United States v. *Cress*, 243 U. S. 316, 326; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly

portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject.[1] And again, this condition would be additionally

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[1] In *United States* v. *Leonard*, District Judge Howe of the Northern District of New York, held that in determining whether or not a price was unreasonable, the jury should take into consideration "*what prices the defendants paid for the goods in the market*—whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, *but not how much the market price had advanced from the time the goods were purchased to the time they were sold.*"

In *United States* v. *Oglesby Grocery Co.*, District Judge Sibley, of the Northern District of Georgia, said [264 Fed. Rep. 691, 695]:

"The words used by Congress in reference to a well-established course of business *fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some inflexibility in view of changing conditions.* The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer."

Judge McCall, of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 per pair "and then he sells both lots of those shoes at eighteen dollars, he is profiteering clearly upon the first lot of [shoes] that only cost him $8. Now he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes."

In *United States* v. *Myatt*, District Judge Connor, of the Eastern District of North Carolina, said [264 Fed. Rep. 442, 450]:

"It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant. He may, within the language of the statute, make an unreasonable and therefore unlawful 'rate or charge' without making

obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. *United States* v. *Reese*, 92 U. S. 214, 219–220; *United States* v. *Brewer*, 139 U. S. 278, 288; *Todd* v. *United States*, 158 U. S. 278,

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any profit, or the rate or charge made may involve a loss to him upon the purchasing price."

District Judge Hand, of the Northern District of New York, in his charge to the grand jury, said:

"Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skillful merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed. But if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss."

In *United States* v. *Goldberg*, District Judge Bledsoe, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into consideration, among other circumstances, the following:

"That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be made upon sugar sold either by manufacturers or jobbers and retailers."

In *United States* v. *Culbertson, etc., Co.*, District Judge Rudkin, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law, defendant was entitled to sell its goods on the basis of the actual *market value* at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

282; and see *United States* v. *Sharp*, 27 Fed. Cas. 1041, 1043; *Chicago & Northwestern Ry. Co.* v. *Dey*, 35 Fed. Rep. 866, 876; *Tozer* v. *United States*, 52 Fed. Rep. 917, 919–920; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237–238.

But decided cases are referred to which it is insisted sustain the contrary view. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Nash* v. *United States*, 229 U. S. 373; *Fox* v. *Washington*, 236 U. S. 273; *Miller* v. *Strahl*, 239 U. S. 426; *Omaechevarria* v. *Idaho*, 246 U. S. 343. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 637; *American Seeding Machine Co.* v. *Kentucky*, 236 U. S. 660, 662; and see *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237–238.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute

if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

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

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concurred in the result, the former delivering the following opinion in which the latter concurred:

I concur in the judgment of the court, but not in the reasoning upon which it is rested.

Defendant was indicted upon two counts, alike in form, charging in each case that it "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar," in that it demanded, exacted and collected excessive prices for specified quantities of sugar purchased from it, in violation of the Lever Act (Act of October 22, 1919, c. 80, § 2, 41 Stat. 297, 298, amending § 4 of Act of August 10, 1917, c. 53, 40 Stat. 276, 277). I am convinced that the exacting of excessive prices upon the sale of merchandise is not within the meaning of that provision of the act which is cited as denouncing it; that the act does not make it a criminal offense; that for this reason the demurrer to the indictment was properly sustained; and that whether the provision is in conflict with the Fifth or Sixth Amendment is a question not necessarily raised, and which ought not to be passed upon.

In order to appreciate the point it is necessary to quote entire so much of the section as defines the crimes thereby denounced. It reads as follows:

"That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided*, . . . " etc.

For a definition of "hoarding," the section refers to § 6 of the original act (40 Stat. 278), which declares that necessaries shall be deemed to be hoarded, within the meaning of the act, when (*inter alia*) "withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price."

The court holds that the words "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" are broad enough to embrace the exaction of an excessive price upon a sale of such

merchandise. Why Congress should employ so unskillful and ambiguous a phrase for the purpose when it would have been easy to express the supposed purpose in briefer and more lucid words, it is difficult to understand. If the words were to be taken alone, and without reference to the context, it might be possible to stretch their meaning so as to include the exaction of an excessive price. But to do this with a statute defining a criminal offense would, it seems to me, be inconsistent with established rules for construing penal statutes; not only so, but it would violate the rule that a statute is not to be so construed as to bring it into conflict with the Constitution, unless such construction is imperatively required by its plain words. The construction adopted by the court is not thus required. "To make a rate or charge in handling or dealing in or with" merchandise, imports the fixing of compensation for services, rather than the price at which goods are to be sold. It may refer to charges for buying, selling, hauling, handling, storage, or the like.

But the clause in question does not stand alone. It forms a part of a section in which the question of prices is dealt with four times: once in the initial prohibition against destroying any necessaries for the purpose of enhancing the price; a second time in the prohibition of hoarding, defined as including a withholding from market for the purpose of unreasonably increasing or diminishing the price; a third time in the prohibition of a conspiracy to limit the production of necessaries in order to enhance the price; and, finally, in the prohibition of a conspiracy "to exact excessive prices for any necessaries." It seems to me clear, upon the plainest principles of construction, that the change of phrase must be deemed to import a difference of purpose, and that "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" must be taken to mean something else than the exaction of an excessive price. It should be

observed how closely it is coupled with a cognate offense: "to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Evidently the words "in handling or dealing," etc., qualify "wasteful practice or device," as well as "unjust or unreasonable rate or charge."

That it is not altogether evident what was intended to be included within "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," may be conceded. So much the more reason for not extending the words by construction so as to make criminal that which is not clearly within their meaning; and for not giving to them a meaning which brings the act into conflict with the Constitution;—and for not expanding the unconstitutional reach of the act, supposing that even without the particular application now made of the quoted words it would be repugnant to the fundamental law.

It is to my mind plain that § 4 was not intended to control the individual dealer with respect to the prices that he might exact, beyond prohibiting him from destroying any necessaries for the purpose of enhancing the price, and from withholding them from the market for a like purpose. So long as he acts alone he is left uncontrolled except by the ordinary processes of competition, his own sense of fairness, and his own interest. A conspiracy with others to exact excessive prices is an entirely different matter, and *that* is clearly prohibited.

And this brings me to another point: Section 4 naturally divides itself into two parts; the first portion denounces a number of substantive offenses; the second portion denounces a conspiracy to commit any one of a number of offenses, but these do not in terms include any of the offenses specifically prohibited in the earlier

portion. This, as it seems to me, is significant. Section 37 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1096), makes it criminal for two or more persons to conspire to commit any offense against the United States, if one or more of them do any act to effect the object of the conspiracy. Hence it was not necessary for Congress to declare in the Lever Act that a conspiracy to commit any of the offenses defined in the first part of § 4 was punishable criminally. But it proceeded in the latter part to declare that a conspiracy to do any one of certain other acts, should be criminal. It seems to me too plain for argument that, under the circumstances, the inclusion in that part of the section of certain acts as forming the object of a criminal conspiracy amounts to a legislative declaration that, in the absence of conspiracy, those acts are not intended to be punished criminally. One of them is "to exact excessive prices for any necessaries."

Still further: Sections 14 and 25 of the original act (40 Stat. 281, 284) specifically deal with the question of official price-fixing of certain articles of prime necessity—wheat, coal, and coke—and furnish additional evidence that in the framing of this act, when Congress had price-fixing in mind and the regulation of "prices," it employed that simple term, and that it did not refer to prices in the provision of § 4 upon which the indictment in this case rests.

For these reasons, I regard it as unnecessary to pass upon the question whether that provision is in conflict with the Constitution of the United States.

TEDROW, AS UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT OF COLORADO, *v.* A. T. LEWIS & SON DRY GOODS COMPANY ET AL.

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

No. 357. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided on the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
Affirmed.

BILL to enjoin institution of criminal prosecutions against dealers in wearing apparel, under § 4 of the Food Control Act.

The Solicitor General, for appellant, in addition to the points made in the principal case, *ante*, 81, contended:

A controversy as to the proper construction of a criminal statute does not authorize an injunction against prosecutions under that statute.

The exclusion from the act of farm products in the hands of the producer is not an arbitrary and unconstitutional classification.

The penalties provided are not so unusual, excessive, cruel and drastic as to be unconstitutional.

Mr. Charles E. Hughes and *Mr. Clayton C. Dorsey*, with whom *Mr. Gerald Hughes* was on the brief, for appellees.

Mr. William D. Guthrie, *Mr. Benjamin F. Spellman* and *Mr. Bernard Hershkopf*, by leave of court, filed a brief as *amici curiæ*.

Mr. Wm. A. Glasgow, Jr., and *Mr. Louis O. Van Doren*, by leave of court, filed a brief as *amici curiæ*.

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

Various dealers in wearing apparel in the City of Denver filed their bill to enjoin the United States Attorney from instituting prosecutions against them under § 4 of the Lever Act on the ground that Congress had no power to adopt that section because a state of peace prevailed, or, if a state of war existed, the regulation of the price for which wearing apparel should be sold was beyond the authority of Congress, and for the further reason that the section in question was void for repugnancy to the Fifth and Sixth Amendments to the Constitution because of its vagueness, want of standard, and denial of the equal protection of the laws. The case was submitted on bill and answer and the statute was held void because of its uncertainty and want of standard, and its enforcement was enjoined.

That the court was right in this ruling, which is the subject now before us upon direct appeal brought by the Government, is not open in view of the decision this day in the *Cohen Grocery Co. Case*, *ante*, 81, and, for the reasons stated in that case, it is affirmed.

Decree affirmed.

Mr. Justice Pitney and Mr. Justice Brandeis concur in the result.

Mr. Justice Day took no part in the consideration or decision of this case.

KENNINGTON ET AL. *v.* PALMER ET AL.

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

No. 367. Argued October 19, 20, 1920.—Decided February 28, 1921.

1. Decided, as to the unconstitutionality of part of the Food Control Act, upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
2. Equity will enjoin criminal prosecutions threatened under a void statute, the legal remedy being inadequate.

Reversed.

BILL to enjoin criminal prosecutions against dealers in wearing apparel under § 4 of the Food Control Act.

Mr. Garner Wynn Green, with whom *Mr. Marcellus Green* and *Mr. Wm. H. Watkins* were on the briefs, for appellants.

The Solicitor General, for appellees, in addition to the points presented in the preceding cases, argued that the act does not take property without due process of law. There was no contention that a mere failure to conform to prices fixed by a fair-price committee can be made the basis of a criminal prosecution.

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

The appellants, dealers in wearing apparel in the city of Jackson, Mississippi, filed their bill in the court below against the Attorney General and subordinates charged by him with administrative duties under § 4 of the Lever

Act to enjoin the enforcement against them of provisions of that section. Their right to relief was based upon averments as to the unconstitutionality of the assailed provisions of the section, not only, in substance, upon the contentions which we have this day considered and disposed of in the *Cohen Grocery Co. Case, ante,* 81, but upon other grounds as well.

Without passing upon the question of constitutionality, the court dismissed the bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal.

As it is no longer open to deny that the averments of unconstitutionality which were relied upon, if well founded, justified equitable relief under the bill,[1] and because the opinion in the *Cohen Case* has conclusively settled that they were well founded, it follows that the court below was wrong and its decree must be and it is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

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

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[1] *Wilson v. New,* 243 U. S. 332; *Adams* v. *Tanner,* 244 U. S. 590; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ruppert* v. *Caffey,* 251 U. S. 264; *Ft. Smith & Western R. R. Co.* v. *Mills,* 253 U. S. 206.

KINNANE, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN, *v.* DETROIT CREAMERY COMPANY ET AL.

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

UNITED STATES *v.* SWARTZ.

UNITED STATES *v.* SMITH.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Nos. 376–378. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided on the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
264 Fed. Rep. 845, affirmed.

THESE were direct appeals from the District Court involving the validity of part of the Food Control Act. The first was from a decree enjoining the United States Attorney from prosecuting dealers in milk. The other two were from judgments quashing indictments based upon sales of potatoes.

The Solicitor General for appellant in No. 376 and for the United States in Nos. 377 and 378.

Mr. Charles E. Hughes, with whom *Mr. William L. Carpenter* was on the briefs, for appellees in No. 376 and defendants in error in Nos. 377 and 378.

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

In the first of the above cases the Creamery Company and others, appellees, filed their bill in the court below

against the United States Attorney and the members of the "Federal Fair Price Committee" for an injunction to restrain prosecutions against them for selling milk at alleged unjust and unreasonable rates or charges, in violation of the fourth section of the Lever Act, as re-enacted in 1919, on the ground, among others, that the section was repugnant to the Constitution because of its vagueness and because it failed to provide a standard of criminality.

The United States Attorney, after challenging in his answer the right to restrain the performance by him of his official duties, admitted that in its advisory capacity the said price committee had fixed what it had deemed to be a fair price for the sale of milk and that he intended, in the discharge of his official duty, to act upon such advice as the basis for prosecutions where such price was exceeded, and, asserting the constitutionality of the section and the want of merit in the grounds upon which it was assailed, prayed the dismissal of the bill.

A temporary injunction issued and, the case having been submitted on the pleadings without proof, the court, stating that the sole question involved was whether the provision in question of § 4 of the Lever Act was constitutional, decided that it was not, because of its vagueness and uncertainty and of the consequent absence from it of all standard of criminality. The enforcement of said provision was therefore permanently enjoined, and upon this appeal, the sole issue raised by the Government is whether the court erred in holding the provision of the statute in question to be void for repugnancy to the Constitution. That it did not so err, is fully established by the opinion this day announced in the *Cohen Grocery Co. Case*, No. 324, *ante*, 81, and therefore it is our duty to affirm.

The two other cases, Nos. 377 and 378, are likewise so controlled. Both were indictments for selling potatoes

at prices which were alleged to be unjust and unreasonable in violation of the reënacted fourth section of the Lever Act, and in both cases the indictments were quashed because of the unconstitutionality of the section, upon the grounds stated by the court in the *Creamery Case*, No. 376, and they are both here at the instance of the Government because of alleged reversible error committed in so doing. It follows, for the reasons just stated and those expounded in the *Cohen Grocery Co. Case*, that the action below in all three cases must be and the same is hereby

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE DAY took no part in the consideration or decision of these cases.

C. A. WEED & COMPANY *v.* LOCKWOOD, AS UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF NEW YORK.

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

No. 407. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
264 Fed. Rep. 453, reversed.

THIS was a suit by a dealer in wearing apparel to enjoin further prosecution under an indictment based on the

fourth section of the Food Control Act. The plaintiff appealed directly from a decree dismissing the bill.

Mr. Simon Fleischmann, with whom *Mr. Edward L. Jellinek*, *Mr. Martin Clark*, *Mr. James O. Moore* and *Mr. John W. Ryan* were on the brief, for appellant.

The Solicitor General for appellee.

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

An indictment having been returned against the appellant in the court below for violating the fourth section of the Lever Act by selling wearing apparel at an unjust or unreasonable rate or charge, it filed its bill in that court praying that the United States Attorney be enjoined from proceeding with the prosecution, assigning, as grounds for the injunction, that the section was void because a regulation of prices of wearing apparel was beyond the power of Congress in the existing state of peace, and because the statute was too vague and deficient in standard to justify a criminal prosecution under it.

The court, on demurrer, held that a status of war existed and that, although there were some authorities to the contrary, that condition, in its opinion, conferred upon Congress the authority to fix the price at which wearing apparel might be sold, as the business of selling such merchandise was a business in which the public had an interest and which, therefore, the Government could regulate. Pointing out, however, that the question as to the vagueness of the statute was more serious, the court nevertheless declared that it was of opinion that Congress had authority to provide against an unjust or unreasonable price, without fixing such price, by leaving it to be

adjusted by courts and juries, depending upon the general economic situation at the time an alleged violation of the prohibition came before them for consideration. The bill was accordingly dismissed, and the case is here on direct appeal.

It is evident, from the decision in the *Cohen Grocery Co. Case*, this day announced, *ante*, 81, that the decree below was wrong, and, for the reasons stated in the opinion in that case, it must be and is reversed.

Decree reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

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

G. S. WILLARD COMPANY ET AL. *v.* PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

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

No. 418. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
Reversed.

THIS was a suit by a corporation, a dealer in sugar, and officers and stockholders, to enjoin criminal proceedings under the Food Control Act. Plaintiffs appealed directly from a decree dismissing the bill.

Mr. William L. Day and *Mr. Joseph G. Fogg*, for appellants, submitted.

The Solicitor General for appellees.

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

In this case the complainants filed their bill to enjoin the Attorney General and the United States Attorney from taking steps to enforce against them provisions of the fourth section of the Lever Act, on the ground, among others, of their repugnancy to the Constitution of the United States because of their vagueness and want of constitutional standard. On motion, the court dismissed the bill for want of equity, and the case is here by direct appeal.

It presents the question under the Constitution which was this day decided in the *Cohen Grocery Co. Case, ante*, 81, that is, the repugnancy of the provisions relied upon to the Constitution, and therefore, as a result of the ruling in that case, the decree below must be reversed and the case remanded for further proceedings in conformity with this opinion and it is so ordered.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

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

OGLESBY GROCERY COMPANY *v.* UNITED STATES.

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

No. 457. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
264 Fed. Rep. 691, reversed.

WRIT of error to a conviction and sentence under § 4 of the Food Control Act, for selling sugar for excessive prices.

Mr. Edgar Watkins for plaintiff in error.

The Solicitor General for the United States.

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

The plaintiff in error is here to reverse a verdict and sentence against it on an indictment containing four counts charging it with four separate violations of the fourth section of the Lever Act. At the close of all the testimony it requested the court to charge the jury that the provisions of that section relied upon were repugnant to the Constitution of the United States, on the grounds, among others, which were held to be sound in the *Cohen Grocery Co. Case*, this day decided, *ante*, 81.

It is therefore unnecessary for us to do more than to apply to this case the rulings made in the *Cohen Case*, and, in consequence of doing so, to reverse the judgment

108. Counsel for Plaintiffs in Error.

with directions to set aside the sentence and quash the indictment, and it is so ordered.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

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

WEEDS, INC., ET AL. *v.* UNITED STATES.

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

No. 558. Argued October 19, 20, 1920.—Decided February 28, 1921.

Section 4 of the Food Control Act is unconstitutional, because of its uncertainty, not only in the clause penalizing sales of necessaries at "unjust or unreasonable rates or charges" (*United States* v. *Cohen Grocery Co.*, *ante*, 81), but also in the clause penalizing conspiracies to exact "excessive prices."

Reversed.

PLAINTIFFS in error were convicted, under § 4 of the Food Control Act, of conspiracy to exact excessive prices for wearing apparel, and, in furtherance of the conspiracy, of putting on sale in a store various articles of clothing at prices varying from 110 to 194 per cent. in advance of cost; and also of making sales of various suits of clothes at unreasonable prices.

Mr. Charles E. Hughes, with whom *Mr. Harvey D. Hinman*, *Mr. Thomas B. Kattell* and *Mr. Charles E. Hughes, Jr.*, were on the brief, for plaintiffs in error.

The Solicitor General for the United States.

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

The plaintiffs in error, having been convicted and sentenced under an indictment containing eight counts, one of which, the sixth, was eliminated at the trial, prosecute this direct writ of error. All the counts charged violations of the fourth section of the Lever Act, the first, a conspiracy under the section to exact and to aid and abet in exacting excessive prices for certain necessaries, that is, articles of wearing apparel; and each of the others a specific sale of such an article at an unjust and unreasonable rate or charge.

The indictment was demurred to because of its repugnancy to the Constitution upon these grounds: (1) Want of power in Congress because of a state of peace; (2) that the provisions in question were so vague and wanting in standard of criminality as to constitute a mere delegation by Congress of legislative power in violation of the Fifth and Sixth Amendments, and, furthermore, because, by virtue of the exemptions which they contained, they denied to defendants the equal protection of the laws. The demurrer was overruled and, at the trial which followed, the grounds of demurrer were again held to be without merit and the questions which it presented were saved and are pressed in the argument at bar as grounds for reversal.

As the only difference between the charges in the *Cohen Grocery Co. Case, ante,* 81, and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the *Cohen Case* is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard and to inform the

accused of the accusation against him, and thus make it not amenable to the ruling in the *Cohen Case*. But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally as wanting in standard and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the *Cohen Case*, it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded with directions to set aside the sentence and quash the indictment.

Reversed.

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

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concurred in the result, the former delivering the following opinion, in which the latter concurred.

In this case, as in No. 324, *United States* v. *Cohen Grocery Co.*, *ante*, 81, while concurring in the judgment of the court, I am unable to yield assent to the grounds upon which it is based.

Most of the counts in the indictment upon which plaintiffs in error were convicted allege specific violations of that provision of the Act of October 22, 1919 (c. 80, § 2, 41 Stat. 297, 298, amending § 4 of the Act of August 10, 1917, c. 53, 40 Stat. 276, 277), which declares it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"; the alleged offenses having consisted in the sale of specific articles of merchandise at excessive prices. Respecting these, my views are expressed in the concurring opinion in the *Cohen Grocery Co. Case*.

The remaining count alleges a conspiracy to exact, and to aid and abet in exacting, excessive prices for certain specified necessaries. I see no unconstitutional lack of definiteness in the prohibition of a conspiracy to exact excessive prices for necessaries. In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value: the price prevailing under current conditions of supply and demand, uninfluenced by manipulation. So construed, I regard this provision as clearly constitutional, and need only refer to *Nash* v. *United States*, 229 U. S. 373, 377. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221–223, is distinguishable. In that case it was conceded, *arguendo*, that a standard fixed by market value under fair competition and normal market conditions was admissible; and the statute was denounced only because in truth it did not apply this standard, but called for an estimate of what prices would have been under non-existent and imaginary conditions. To the same effect, *Collins* v. *Kentucky*, 234 U. S. 634, 638.

I assume (as the court has this day held) that the provision declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is unconstitutional for want of a definite standard; but this does not carry with it the provision now in question, since by § 22 of the Act of August 10, 1917, 40 Stat. 283, it is declared that if any clause, sentence, paragraph, or part of the act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved—a conclusive declaration

by Congress that the various provisions of this complicated statute shall be regarded as separable.

The record shows, however, that the trial court repeatedly rejected testimony offered by defendants for the purpose of showing the market value of the goods in question at times material to the controversy, and that exceptions were duly allowed. The effect of the rulings was to deprive defendants of the benefit of this standard, by which the jury might have determined whether the prices defendants agreed to exact for the merchandise were excessive; and for this reason only I concur in the reversal of the judgment of conviction as to this count. As to the other counts, I concur in the reversal upon the ground that the statute, in declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," does not include the exaction of an excessive price for merchandise sold.

VANDALIA RAILROAD COMPANY *v.* SCHNULL ET AL., COMPOSING THE FIRM OF SCHNULL & COMPANY, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 125. Argued December 16, 17, 1920.—Decided February 28, 1921.

1. A railroad rate fixed by state authority violates the Fourteenth Amendment if it does not yield the carrier a reasonable return upon the class of traffic to which it applies. P. 119.
2. A rate which, so tested, is deficient, is not saved by the fact that the intrastate business as a whole is remunerative. *Id. Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605.

3. An answer should be construed with recognition of its implications and with regard to the issue to which it is addressed. P. 121.
4. In reviewing the decision of a state court upholding a state railroad rate against a charge of confiscation, this court will follow that court in assuming that the issue was sufficiently raised by the pleadings and defined by the evidence. P. 122.
5. In a suit by shippers to enforce obedience by a railroad company to an order of a state commission fixing rates, *held* that a contention, made by the plaintiffs for the first time in this court, to the effect that the company's remedy was by direct review of the order under the state law, could not be entertained where the state court, without referring to such remedy, had considered the company's defense of confiscation upon the merits and decided against it. *Id.*
6. A bill brought by a railroad company against a state commission to enjoin enforcement of an order fixing rates assailed as confiscatory, was dismissed without prejudice, because inadequacy of the rates was not proven by the evidence. *Held*, not *res judicata* in a subsequent suit by shippers against the company to compel it to observe the order *in futuro*. P. 123.

188 Indiana, 87, reversed.

THE case is stated in the opinion.

Mr. D. P. Williams, with whom *Mr. Samuel O. Pickens*, *Mr. Frederic D. McKenney*, *Mr. Charles W. Moores*, *Mr. R. F. Davidson* and *Mr. Owen Pickens* were on the briefs, for plaintiff in error.

Mr. Karl Knox Gartner, with whom *Mr. Gibbs L. Baker*, *Mr. Charles W. Smith*, *Mr. Henry H. Hornbrook*, *Mr. Charles Remster*, *Mr. Albert P. Smith* and *Mr. Paul Y. Davis* were on the briefs, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Defendants in error, alleging themselves to be engaged either as wholesale or as retail grocers in Indianapolis, Indiana, brought this suit against plaintiff in error, herein

called the Railroad Company, to restrain it from charging or receiving any other compensation than that mentioned and described in an order entered by the Railroad Commission of the State on December 14, 1906, and which, it is alleged, became effective February 1, 1907, and to require the Railroad Company to receive and transport freight at the rates prescribed in the order of the Commission.

The first pleading of the Railroad Company was a demurrer to the complaint. We omit it, as it was overruled and as the case depends upon the answer of the Railroad Company and a demurrer to it. It was in three paragraphs. In the first it denied "each and every material allegation" of the complaint. In the second it alleged that the order of the Commission would not yield "revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order, . . . and provide a fair return to defendant on the value of defendant's property used" in the service; and that, therefore, if the order of the Commission should be enforced, the Railroad Company would be deprived of its property without due process of law in violation of the Fourteenth Amendment. In the third paragraph it alleged that within 60 days after the act of the State took effect it filed with the Commission a schedule of its rates and charges between all of the points in the State, that it had kept on file a like schedule in every station and depot and in its offices, that its charges had been in accordance with such schedules and were legal rates for the service, and that complainants (defendants in error) had not been and were not damaged thereby. Dismissal of the suit was prayed.

There was a demurrer to the second paragraph for insufficiency to constitute a defense, and, following the local practice, there was a memorandum specifying the grounds, as follows: (1) There was no statement that the

order of the Commission was unremunerative or confiscatory at the time it was made, or at the time suit was brought, but only at the time the answer was filed. Nor did it aver that at either of those times the rates would not pay the cost of the service to which they were applicable and leave the company a fair return upon the property used in the service. (2) Nor aver that, when taken in connection with the other rates lawfully prescribed by the Commission and its successor, the Public Service Commission, the rates did not afford an adequate and remunerative compensation for the handling and transportation of all classes of freight or passengers covered by such orders. (3) The averment that the rates were not compensatory "states no issue of fact, but the mere conclusion of the pleader as to a material fact." (4) The answer did not profess to set out the schedules of rates filed with the Commission or posted in the offices of the Railroad Company. And further, that, if the schedules of rates varied from those of the Commission, they were thus far unlawful and invalid under the laws of the State and constituted no defense to the action; "the mere continuance in such wrongful conduct" did "not constitute a defense." And further, if the rates charged were the same as those prescribed by the Commission, the fact could be proved under the general denial.

The demurrer was sustained by the court and the Railroad Company ruled to answer by September 5, 1916. The company elected to stand by its answer and declined to plead further. The case, therefore, rested on the complaint and the denial of its allegations by the Railroad Company, and upon the issue thus made there was a trial upon which there were admitted in evidence over the objection of the Railroad Company, a transcript of the record of the suit brought by the Railroad Company against Union B. Hunt, et al., constituting the Railroad Commission of the State, in the District Court of the

United States for the District of Indiana, and a transcript of the record in the same case in this court, entitled *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1, and, over objection, the proceedings before the Railroad Commission under which the order was made, establishing the rates that are the subject of controversy.

The court enjoined the Railroad Company from charging, collecting or receiving from plaintiffs and others in like situation other rates than those mentioned in the order of the Commission, and enjoined the rates in excess thereof. The decree specifically mentioned the rates to be charged. It was affirmed by the Supreme Court of the State.

It will be observed, therefore, that one of the grounds of the demurrer to the second paragraph of the answer of the Railroad Company was, not that the rates were not non-compensatory, but that they were not alleged to be so at the time of the order of the Commission or at the commencement of the suit, but were only alleged to be so at the time of filing the answer. The Supreme Court seems to intimate concurrence in this view of the answer, but said, whether its ruling were based on that construction of the answer "or upon the evidence heard," it was satisfied that the railroad had "not tendered or made a defense, and that the decision" of the trial court was correct.

The court put in contrast the contentions of the parties as follows: "Appellees [plaintiffs] assert that, for all that thus appears, appellant may receive sufficient net income on all its other business on this division, and on all of its business, including the specified classes, on other divisions, to furnish it a fair return on all its investments and operations, including the transportation of these classes, and therefore appellant will receive all to which it is entitled, though this order be enforced." "Appellant [Railroad Company] asserts that the State has no power

to thus segregate a certain class of traffic and require the railroad company to carry that traffic at unremunerative rates."

The cases that were adduced to sustain the respective contentions the court enumerated, but considered that there was "little or no conflict" in them and that any confusion in them "almost altogether disappears" when they "are read in view of the fundamental principles involved." The court's conclusion from the cases was, that "a carrier is entitled to fair remuneration on all its investments and property. It is entitled to no more. For this it undertakes to reasonably serve in the capacity chosen by it. It undertakes to serve for no less. If the carrier receives, in the aggregate, such fair remuneration, notwithstanding the rates on a part of its business are not remunerative, the carrier has no basis for complaint." And further, "When a rate on a part of the business is too low, some other part of the carrier's business may be paying too much, thus preventing a deficiency of income which would otherwise result from the nonremunerative rates. In such cases the shippers affected by the higher rates may have a basis for complaint. *Smyth* v. *Ames*, 169 U. S. 466, op. 540, *et seq.*" The court considered that the principle of the proposition announced was in its opinion "strongly upheld" in *Wood* v. *Vandalia R. R. Co.*, which the court regarded "to say the least" as holding that the hearing upon the character of rates "is not properly confined to the particular rates and the 'actual cost and outlay' in carrying the classes specified on a specified division in ascertaining whether a fair return is provided."

The court, therefore, makes clear the federal question, and its decision makes the question precise by a contrast of the contentions of the parties. Let us repeat them: that of the Railroad Company is that the revenue from traffic to which the rates apply is the test of their legality

and any deficiency in them cannot be made up by rates on some other traffic; that of the defendants in error is that the revenue from all of the intrastate business of the Railroad Company is to be taken into account, and, if it be sufficient to remunerate the Railroad Company, the particular rates, though unremunerative, are nevertheless legal.

The question presented by the contentions is not easy of off-hand solution, though its elements are easy of declaration. A railroad is private property, and as such a rate may be fixed for its use; but it is private property devoted to the public service, and as such it is subject to the power of the State to see and require that the rate fixed be just and reasonable, one that, while it will yield a revenue to the railroad, will be proportioned to that which should be charged to the public. And this relation of right and power is illustrated in many cases. It is declared in *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, and a test of it given, that is, when the right must yield to the power and when the power is limited by the right. And there was a consideration and review of all of the elements involved. It was declared that the legislature "has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. . . . It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic." And this court will not sit in judgment upon such action and substitute its judgment for that of the legislature when reviewing "a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved." "But" the court said, "a different question arises when the State has segregated

a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted." And further, "it has repeatedly been assumed in the decisions of this court, that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward." It was, hence, concluded that where there is such segregation and a rate imposed which would compel the carrier to transport a commodity "for less than the proper cost of transportation, or virtually at cost" the carrier would be "denied a reasonable reward for its service," and "the State has exceeded its authority."

The case and its principle were followed and illustrated in *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, and the principle applied to a passenger rate. It was there said, explaining the "range of permissible action" by a State, that the State "has no arbitrary power over rates; . . . and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal." See also *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396.

These cases leave nothing to be said, nor need we review the prior cases from which they are deductions. The concession of counsel is "that it may be admitted that the *North Dakota* and *West Viginia Cases* have greatly discredited the previous theory and practice under which a rate which returned any revenue over and above 'out of pocket' costs was considered to be constitutionally remunerative. . . ." Counsel are mis-

taken in their judgment of those cases. They did not discredit what had been announced of either theory or practice, they only removed them from misunderstanding and controversy and declared a principle that assigned to the State a useful power of regulation while it accorded to railroads a reasonable return upon the capital invested and a reward for enterprise; a principle, therefore, which keeps power and right, in proper relation, if we may repeat ourselves, power not exercised in excess, right not used in abuse.

It is, however, contended by the defendants in error that the averments of the answer (second paragraph) are not sufficient to present the issue of law based upon it because it does not allege that the rates are not compensatory of the cost of the service "between the stations to which the rate applies" and that, therefore, it may well be that they are remunerative of that service, and "only be non-remunerative when applied to some other carriage." And it is further urged that the answer fails to specify upon what part of the carrier's property the rates will not yield a fair return, and that it is consistent with the answer that there may be a fair return on the value of the property "used in carriage between the stations named in the order, although not sufficient to 'provide a fair return on the value of . . . property used and employed in handling and carrying the classes of property in said order specified' over some other part of its line."

The distinctions are artificial and strained. They are an attempt to make the necessary implications of the answer no part of it. The averment of a pleading need not be so certain that an affirmative allegation of the existence of a fact or condition must be accompanied by the negation of that which is contradictory to it or inconsistent with it. The answer besides is addressed to the complaint and to the rates and order of the Commis-

sion that constitute the bases of the complaint and puts them and the effect of them in issue. In other words, the complaint deals with the rates and service between designated stations, and the answer deals with those rates and that service. And the Supreme Court so regarded it and explicitly said that the evidence made the issue. Counsel attack the conclusion as unsupported but we must accept it as it is the judgment of the court we are reviewing and it is to be estimated by the reasons given for it.

We, therefore, repeat, we regard the answer as a reply to the complaint and as alleging the invalidity of the order of the Commission because it required a service that the rates did not compensate, and necessarily this involves a consideration of all of the elements which are involved in that service and determine its effect. It is to be remembered that we are dealing with a pleading. What the evidence may show we can neither know nor anticipate.

Another contention of defendants in error is that the law of the State prescribes the remedy to be pursued against an order of the Commission to be to procure from the secretary of the Commission a transcript of the proceedings before the Commission and file such transcript with a statement of the causes of complaint against the action of the Commission in the office of the clerk of the Appellate Court of the State within a designated time, and give notice to the Commission. And it is said, the Appellate Court is given power to affirm the action of the Commission or to change, modify, or set it aside as justice may require, and that its judgment is made final. This procedure was not followed, it is said, and that hence the answer (paragraph 2) of the Railroad Company "was not a compliance with this requirement of the substantive law of Indiana," and "for this reason failed to state a defense."

The contention is made for the first time in this court.

Its lateness may not militate against it, but that it did not occur sooner to counsel and not at all to the Supreme Court, demonstrates its unsoundness. It is to be remembered that this is a suit, not by the Railroad Company but against the Company, and its purpose is to enforce rates established by the Railroad Commission, which the Railroad Company is resisting. The decision of the Supreme Court upon the grounds of suit and resistance is here for review, and we must assume that all that was pertinent to either the court considered, and regarded all else untenable, including the contention now urged by counsel. It must, therefore, be rejected.

The final contention of defendants in error is that *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1, is *res adjudicata* of the issues in this case. The suit was by the Railroad Company to restrain the order of the Commission involved in the present litigation, and the ground of attack was, as it is here, that the rates ordered were not compensatory of the service to which they applied. The averments of the bill we held unsustained by the proofs and nothing more was decided. The judgment was not that the order of the Commission was valid but that it was not shown by the bill to be invalid, and the bill was dismissed without prejudice. That is, without preclusion of the right to show it invalid when attempted to be enforced at a subsequent period. *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 539, 540. We cannot therefore yield to the contention.

It follows that the decree must be reversed and it is

So ordered and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE DAY, MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE, dissent.

POSTAL TELEGRAPH-CABLE COMPANY *v.* CITY OF FREMONT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 156. Submitted January 18, 1921.—Decided February 28, 1921.

A small license tax, imposed by a city on a telegraph company for the privilege of doing intrastate business, is not to be declared an unconstitutional burden on its interstate business merely because the local business is unprofitable, where the tax ordinance was in force when the company entered the place and the tax was paid without objection for a series of years,—the circumstances thus repelling any intent to invade interstate commerce in levying it,—and where the state law affords means to prevent the tax from burdening the interstate business through an application to increase intrastate rates, of which the company has not sought to avail itself. P. 127.

103 Nebraska, 476, affirmed.

THE case is stated in the opinion.

Mr. John N. Sebrell, Jr., for plaintiff in error.

Mr. Robert E. Evans for defendant in error. *Mr. Charles E. Abbott* and *Mr. John F. Rohn* were also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The City of Fremont is a city of Nebraska of the first class, having more than 5,000 and less than 25,000 inhabitants. By an ordinance duly enacted in 1903 and reënacted in 1907, there was levied a license tax upon businesses and occupations within the city including telegraph offices. Upon these offices it levied a tax of $60.00 per year on the business and occupation of sending

messages from the city to any place in the State, and receiving messages transmitted from any place in the State to the city, except messages received from or transmitted to any department, agency or agent of the United States, and except messages which were interstate commerce.

Plaintiff in error, herein called the Postal Company, is a corporation engaged in such business within the city, it having been in December, 1881, permitted by the constituted authorities of the city, in the manner provided by its ordinance, to occupy and use the streets of the city for that purpose, the ordinance providing that it was "subject to such regulations as have been or may be provided by ordinance," and that nothing in the article granting such consent to the use and occupation of the streets should "be construed to prevent said city from further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said city." The Postal Company in accordance with the ordinance paid a license tax of $60.00 a year for the years 1903 to 1914, each inclusive, but did not pay for the years 1915 and 1916, and this action was brought for the recovery of the same with interest at 7%.

The defenses of the Postal Company set up in its answer are that it is compelled by the charter of its organization to do intrastate as well as interstate telegraphing, that it paid the license tax for the years alleged inadvertently and without recognition of its legality; that it has accepted the terms of the Post Road Act of July 24, 1866, and is entitled to its benefits; that the tax is confiscatory and prohibitive and deprives the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In specification of this defense it is alleged that the receipts of the company for 1914 on its

intrastate business were only $108.28, and for the year 1915, $83.96, and that the expenses properly chargeable against these years respectively, exclusive of the tax, were $185.56 and $154.26, and that its loss on intrastate business would have to be made up from interstate business; that the city is under no expense by reason of the poles and wires of the company being in the city, and that $60.00 a year is in excess of a rental charge upon them and that the streets are post roads within the meaning of the Post Road Act of 1866. In further defense the answer alleges that the tax is one on interstate commerce; that it deprives the company of the equal protection of the laws and impairs the obligation of a contract, both in violation of the Constitution of the United States.

The case was tried to a jury, which, after evidence taken, was instructed by the court to return a verdict for the city in the sum of $135.00.

A motion for new trial was denied and judgment was rendered upon the verdict. It was affirmed by the Supreme Court of the State, the Supreme Court deciding: (1) the tax was "not a mere license or regulation measure, but one designed for revenue purposes," and that its extent was "a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory." Citing 2 Cooley on Taxation, 3rd ed., 1139, 1440. (2) The tax was not prohibitive; that proof of loss for two years without showing what volume of business was available in the municipality, or what portion was done by the company or what its facilities were for handling the business, was not sufficient to show that a tax of $60.00 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants was unreasonable. (3) In imposing an occupation tax for revenue purposes a municipality acts as the agent of the State, and where a tax is imposed upon a telegraph company doing an in-

trastate and an interstate business and the revenue derived from its intrastate business as a whole becomes insufficient and the tax may become a burden on its interstate business, "Section 7409, Rev. St. 1913, provides a remedy."

The only contention that the Postal Company makes here is that the tax "is in effect an imposition upon its interstate business." It has this effect, is the assertion, because the net receipts from its "intrastate business at Fremont are insufficient to pay the tax, which if compelled, must be paid from the company's interstate business," because it is required to do an intrastate business by § 7408 of the state statutes and its charges are prescribed by the section. For the contention and its supporting assertions the company relies on *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 U. S. 252.

We cannot assign to that case the determining force that counsel attribute to it. The case clearly declares that a license tax may be lawfully imposed on a telegraph company for the right to do business within the borders of the municipalities of a State. The power, of course, has its limitations and must be exercised with due relation to the company's interstate business. That relation is always to be considered but it is not disposed of by the simple assertion of a loss. The cause of it or the condition of it is to be considered. In this case the tax is $60.00 a year. It certainly cannot be said that it is repellent from its amount, and there is no pretense that its imposition "is a disguised attempt to tax interstate commerce." The Postal Company when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality or complain of its detrimental operation. Indeed, for the privilege of entering the city it subjected itself to further regulation, licensing and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the

tax "through the mistake and inadvertence of" its "clerical force" we are not disposed to accept, without more, as an explanation.

The Supreme Court expressed the view that mere proof of loss for two years, which may have been exceptional, determined nothing in the absence of a showing what business was available to the company or what facilities it had or used, and also held that the city being an agent of the State any deficit arising from the tax imposed on the intrastate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the State Railway Commission under the provisions of § 7409 for an increase of its intrastate rates. And the suggestion is pertinent. The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by § 7409 upon complaint of the Postal Company to raise the intrastate rate "fixed" in § 7408. No attempt to secure relief under § 7409 appears to have been made.

Judgment affirmed.

HARTFORD LIFE INSURANCE COMPANY *v.* BLINCOE, ADMINISTRATRIX OF BARBER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 161. Argued January 20, 1921.—Decided February 28, 1921.

1. In determining how far a decision of this court reversing a judgment of a state court binds that court on a second trial, the principle of *res judicata*, that all that might have been decided is presumed to have been decided, is inapplicable; and only those matters which were, not merely presented and argued here, but actually considered and decided by this court, are foreclosed. P. 136.
2. Upon examination of the former decision (245 U. S. 146), *held*, that, in determining the scope of the Connecticut judgment there given effect under the full faith and credit clause of the Constitution as upholding the assessment levied by the Insurance Company, this court did not decide that such judgment sanctioned including in the assessment the amount of a tax which the company thought was imposed by the law of Missouri. *Id.*
3. In a suit in a state court against a sister-state insurance company on a local contract of insurance, where an assessment on the insured was adjudged void because a few cents had been included in it for a supposed local tax, *held*, that whether such a tax was imposed by the local law and whether, it not being imposed, the assessment was void because of such slight excess, were questions of local law upon which the state court's decision was conclusive. P. 137.
4. A state statute allowing damages and attorney's fees against insurance companies for delay in paying claims, even where there is no proof of vexatious refusal to pay and even in a case where delay seems justified by a company's success in litigation, can not be said to violate the Fourteenth Amendment. *Id.*

279 Missouri, 316, affirmed.

THIS was an action to collect life insurance. The defense was that the policy had been forfeited by nonpayment of an assessment due and payable under its terms. The state court held the assessment void because there was included in it, without warrant, the amount of

15 cents to cover a tax of 2 per cent. to be paid to the State as a tax on the amount of the assessment collected. The decision of this court involves primarily the scope and effect of its former decision of the case, in 245 U. S. 146.

Mr. F. W. Lehmann, with whom *Mr. James C. Jones* and *Mr. Geo. F. Haid* were on the briefs, for plaintiff in error:

The decision under review is based wholly upon the ground that defendant included in the assessment the sum of 15 cents to cover a tax of 2 per cent, which the State of Missouri was demanding of it (under the provision of an act which was on the statute books of the State since 1889), and which defendant paid and had been paying for many years. The decision of the Supreme Court of Missouri, which held that the tax did not apply to assessments, was rendered more than six years after the assessment in question was levied, and that decision was by a divided court, four to two, so that the question of the application of the statute to assessments was not sufficiently free from doubt to call forth a unanimous decision from the Supreme Court of that State. *Bankers' Life Co.* v. *Chorn*, 186 S. W. Rep. 681.

The Supreme Court of the State in the case at bar based its decision upon what we believe to be a wholly untenable, non-federal question, which does not sustain the judgment in this case. *Ward* v. *Love County*, 253 U. S. 17.

No claim is made that the company was acting in bad faith in including the 15 cents in the assessment.

Defendant was justified in assuming that it was liable for the tax, even if assessments levied by companies licensed to do business in the State were not so liable. Rev. Stats. Mo., 1909, §§ 7099, 6954.

The effect of the inclusion of this tax in the assessment

was presented to this court by the defendant in error on the former writ of error, and it was then claimed and urged by the defendant in error that, irrespective of the other questions involved, the inclusion of the tax rendered the assessment void and necessitated an affirmance of the judgment then before the court. To support which contention defendant in error cited the authorities which will be found in the brief of defendant in error on the former hearing in this court.

The concrete question before this court on the former writ of error was whether or not the particular assessment which included the 15 cents tax, was authorized by the Connecticut decree in the *Dresser case.* Necessarily involved in that inquiry was the question whether or not the 15 cents included therein was payable. This court answered the inquiry in the affirmative. This court could not have held that this assessment was authorized by the Connecticut decree and at the same time hold that it was void because it included the 15 cents tax.

It is true that the opinion of this court on the former writ of error does not discuss the question of the inclusion of the tax, but the question was in the record, was necessarily involved, and was presented to this court. *Gould* v. *Evansville &c. R. R. Co.*, 91 U. S. 526, 532; *United States Trust Co.* v. *New Mexico*, 183 U. S. 535; *Chaffin* v. *Taylor*, 116 U. S. 567; *Tyler* v. *Magwire*, 17 Wall. 253, 283; *Pitkin* v. *Shacklett*, 117 Missouri, 548; *Hill* v. *Draper*, 37 S. W. Rep. 574; *Castleman* v. *Buckner*, 202 S. W. Rep. 681; *Illinois Life Insurance Co.* v. *Wortham*, 119 S. W. Rep. 802; *Clark* v. *Brown*, 119 Fed. Rep. 130. See also *Hastings* v. *Hennessey*, 70 Mo. App. 354; *Wellsville Oil Co.* v. *Miller*, 150 Pac. Rep. 186, 189; *s. c.* 243 U. S. 6; *In re Cook's Estate*, 143 Iowa, 733; *Perrault* v. *Emporium Department Store Co.*, 83 Washington, 578; *Nashville &c. Ry. Co.* v. *Banks*, 168 Kentucky, 579.

The judgment of the Supreme Court of Missouri is violative of the provisions of Art. IV, § 1, of the Constitution in that it fails to give full faith and credit to the decree of the Connecticut court in the *Dresser Case*, because: (1) An assessment levied as was call No. 126, was adjudged to be valid and lawful by the Connecticut court in the *Dresser Case;* (2) Under the Dresser decree it was adjudged that an excess in an assessment, if any, should not vitiate or invalidate the assessment, but should simply render the succeeding assessment subject to credit for such excess; and (3) It was held by the Connecticut court in the *Dresser Case* that the mortuary fund of the Safety Fund Division was only subject to and liable for the payment of certificates matured by the deaths of the holders thereof in the event that all assessments had been paid by the holders thereof during their lifetime, and the continuance of said certificates, whereas the trial court and the Supreme Court of Missouri held that the certificate in suit is payable out of the mortuary fund, notwithstanding the conceded and admitted fact that assessment or call No. 126 levied against the insured prior to his death was not paid.

The decision of the Supreme Court of Missouri in upholding the action of the trial court in permitting the recovery of penalty and attorneys' fees upon the facts in this case, deprives the defendant of its property without due process of law, in violation of § 1 of the Fourteenth Amendment. Rev. Stats. Mo., 1909, § 7068.

The only evidence on this issue offered on the trial was the fact that plaintiff in error had not paid the amount of the certificate, and the fact that its refusal to pay was based upon its interpretation of the contract that the failure of the insured to pay his assessment rendered his certificate unenforcible.

The company was a trustee of the fund, *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 671; and it owed a

duty to the beneficiaries (the members) to protect that fund against unjust demands. In the instant case the insured had failed to pay an assessment which under the terms of his certificate rendered the same void. *Bailey* v. *Alabama*, 219 U. S. 219, 234.

When the nature of the defense is the only evidence from which its character as being vexatious or not is to be inferred, then it is a question of law for the court. Here is no dispute as to the fact. Cf. *Stix* v. *Travelers Insurance Co.*, 175 Mo. App. 180; *Non-Royalty Shoe Co.* v. *Phœnix Assurance Co.*, 277 Missouri, 399.

Mr. Charles E. Morrow, with whom *Mr. Robert Kelley* was on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

This is the second writ of error in this case. The opinion upon the first writ is reported in 245 U. S. 146. The suit here is, as it was there, upon a certificate of qualified life insurance, issued to Frank Barber and payable at his death to his wife, the plaintiff, who has since died and her administratrix has been substituted as defendant in error.

The defense here is, as it was there, that Barber failed to pay the mortuary assessment levied January 29, 1910, known as quarterly call No. 126 and that the failure voided the policy by its terms.

In that case Mrs. Barber recovered judgment, which we reversed on the ground that in rendering it the state court disregarded a judgment of a Connecticut court which had jurisdiction of the subject-matter and the parties, including Barber.

Upon the return of the case to the state court a new

trial was had that resulted again in a verdict and judgment for Mrs. Barber. They were affirmed by the Supreme Court of the State. 279 Missouri, 316.

To that affirmance this writ of error is directed, and the question presented is, Did the Supreme Court proceed in consonance with our decision? The extent of our decision is, therefore, necessary to consider and what it directed. The determination is in the issue that was presented and passed upon.

By reference to the report of the case (245 U. S. 146) it will be seen that the Supreme Court rested the judgment reviewed on the invalidity of the assessment and that the non-payment of the latter did not, upon two grounds, work a forfeiture of the insurance: (1) Under the condition of the funds of the company the assessment was for a larger amount than was necessary to pay death losses; (2) The charter of the company required all its affairs to be managed and controlled by a board of not less than seven directors, and that the assessment was not levied by the board. These rulings we held to be "in the teeth of the Connecticut adjudication which held that it was proper and reasonable for the company to hold a fund collected in advance in order to enable it to pay losses promptly." It was hence decided that the trial court in rendering judgment against the Hartford Company, and the Supreme Court in affirming the judgment, did not give "full faith and credit to the Connecticut record." The reasons for the conclusion we need not repeat.

With this ruling the Supreme Court was confronted upon its reconsideration of the case with the freedom of decision that remained to it, and resolved that we had left untouched any consideration of the elements constituting the assessment; and that it was at liberty to decide, and decided, that a tax, asserted by the company to have been imposed by the laws of Missouri, had been

unlawfully included in the assessment and that, therefore, the assessment was void and its non-payment did not work a forfeiture of Barber's insurance. To the contention of the company that such holding was precluded by our opinion, it was replied that the matter presented purely a question arising under the laws of the State and that this court "did not intend by its judgment to adjudicate to the contrary."

The decision of the court that the Hartford Company was not subject to the tax that it had included in its assessment was not new. It was a repetition of the ruling made in *Northwestern Masonic Aid Association* v. *Waddill*, 138 Missouri, 628, in 1897, and should have been known to the Hartford Life Insurance Company at the time it made the assessment and mortuary call. The ruling has been again repeated in *Young* v. *Hartford Life Insurance Co.*, 277 Missouri, 694, and upon the authority of those cases the court decided that the tax was not applicable to companies doing business on the assessment plan and that on that plan the Hartford Company was doing business.

The Hartford Company contests the latter ruling and, as dependent upon it, the other ruling, that is, that the company was not subject to the tax, and asserts besides that the effect of the inclusion of the tax in the assessment was presented to this court on the former writ of error, and whether it was authorized by the Connecticut decree, and that the answers were in the affirmative,—in other words, passed upon the power to make and the elements that made the assessment. Counsel say "this court could not have held that this assessment was authorized by the Connecticut decree and at the same time hold that it was void because it included the fifteen cents tax." To sustain this view of the case the opinion is quoted as follows: "It is obvious on the evidence that this assessment was levied in the usual way adopted by

the company and tacitly sanctioned by the Connecticut judgment."

Counsel, however, admit that the question of the inclusion of the tax was not discussed, but insist that "the question was in the record, was necessarily involved, and was presented," and invoke the presumption that whatever was within the issue was decided. In other words, that the case was conclusive not only of all that was decided, but of all that might have been decided.

From our statement of the issues it is manifest that the quotation from the opinion has other explanation than counsel's, and we need not dwell upon the presumption invoked or the extent of its application in a proper case. The question of the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, or its effect upon a particular issue or question in some other case, is not here involved. The most that can be said of any question that was decided is, that it became the law of the case and as such binding on the Supreme Court of the State, and to what extent binding is explained in *Messenger* v. *Anderson*, 225 U. S. 436. Certainly, omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. The element of taxes in the assessment was not considered by the Supreme Court, and in this court the Connecticut judgment and its effect were the prominent and determining factors. The question of the inclusion of the tax was not discussed or even referred to. The only question considered was the powers given to the directors of the company by the Connecticut charter and the effect that was to be assigned to the Connecticut judgment as that of a court having jurisdiction to decide what powers the charter conferred or required. It is hardly necessary to say that the tax law of Missouri was no part of the

charter. It was a condition the company encountered and became subject to in Missouri.

It was urged, it is true, in the brief of counsel that the assessment "was void because it included money for taxes erroneously claimed to be exacted under the laws of Missouri." No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. If it made any impression at all it was obviously as a state question dependent upon the state statutes upon which we would naturally not anticipate the state courts, the case necessarily going back to them.

Nor may we judge of the action of the Supreme Court of the State upon the tax because of its size, nor yield to the contention of the company that it had not accepted the assessment plan of insurance but was doing business on the premium plan, and, therefore, subject to the tax which it had included in the assessment. These are state questions and are not within our power to review.

It is further contended by the Hartford Company that the Supreme Court permitted the recovery of damages and attorney's fees under the provisions of a statute of the State, although there was no evidence in support thereof except the delay in payment of the claim for insurance, notwithstanding, it is further said, the company "had prevailed on every issue that had theretofore been presented," and that by this action the company was deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

In support of its contention the Company cites § 7068 of the Revised Statutes of Missouri which, it is said, authorizes such recovery only "if it appear from the evidence that such company [insurance company] has vexatiously refused to pay" loss under a policy, and no evidence was offered on either trial to show the existence of the condition prescribed by the statute. The immediate

answer to the contention is that what the statute prescribed was for the courts of the State to determine and their construction is not open to our review though we might consider its application to the circumstances of of the case to be rather hard. And it would, we think, be extreme to hold that the statute or its construction is a violation of the Fourteenth Amendment.

Judgment affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS, dissent.

UNITED STATES *v.* RUSSELL.

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

No. 143. Argued January 17, 1921.—Decided February 28, 1921.

1. An experimental approach through a third person to the corruption of a juror is enough to constitute an "endeavor" within Crim. Code, § 135. P. 143.
2. The term "endeavor" in this section is not subject to the technical limitations of "attempt," but embraces any effort or essay to accomplish the evil purpose that the section was enacted to prevent. *Id.*
3. The section applies where the juror has been summoned to attend the session at which the trial in view is to be held but has not been selected or sworn. *Id.*

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Stewart, with whom *Mr. Oliver E. Pagan,* Special Assistant to the Attorney

General, and *Mr. W. C. Herron* were on the brief, for the United States.

The following authorities were cited for the Government: *Commonwealth* v. *Kennedy*, 170 Massachusetts, 18; Bishop, New Criminal Law, vol. i, §§ 435, 436; *People* v. *Murray*, 14 California, 159, 160; *United States* v. *Stephens*, 12 Fed. Rep. 52, 54; *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267; *Commonwealth* v. *Hill*, 11 Massachusetts, 135, 136; *United States* v. *Quincy*, 6 Pet. 443, 464; *United States* v. *Bittinger*, Fed. Cas. No. 14,598; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Rex* v. *Vaughan*, 4 Burr. 2494; *Rex* v. *Isherwood*, 2 Lord Kenyon, 202; *Rex* v. *Plympton*, 2 Lord Raymond, 1377; *Rex* v. *Gurney*, 10 Cox C. C. 550; *State* v. *Ellis*, 33 N. J. L. 102; *United States* v. *Worrall*, 2 Dall. 384; Wharton's State Trials, 139; *State* v. *Carpenter*, 20 Vermont, 9, 12; *Walsh* v. *People*, 65 Illinois, 58, 60; *Commonwealth* v. *Murray*, 135 Massachusetts, 530, 532; *Light's Case*, [1915] 11 Crim. App. Cas. 111, 113; Stephen, Digest of Criminal Law, c. v, art. 49; *Laitwood's Case* [1910], 4 Crim. App. Cas. 248; *White's Case* [1910], 4 Crim. App. Cas. 257, 271; *Robinson's Case* [1915], 11 Crim. App. Cas. 124; *State* v. *Hurley*, 79 Vermont, 28; *Rex* v. *Taylor*, 1 F. & F. 511; *People* v. *Sullivan*, 173 N. Y. 122, 133–136; *People* v. *Youngs*, 122 Michigan, 292, 295 (dissenting opinion); Beale, Criminal Attempts, 16 Harv. Law Rev. 491.

Mr. Otto Christensen for defendant in error.

The following authorities were cited for the defendant in error: Bouvier (1897), vol. i, p. 190 (attempt); *People* v. *Murray*, 14 California, 159; *United States* v. *Stephens*, 12 Fed. Rep. 52, 54; *Hicks* v. *Commonwealth*, 86 Virginia, 223; *Groves* v. *State*, 116 Georgia, 516; *People* v. *Youngs*, 122 Michigan, 292; *State* v. *Hurley*, 79 Vermont, 28, 33; *Patrick* v. *People*, 132 Illinois, 529.

To constitute an "attempt" or "endeavor" to in-

fluence a juror, it is necessary to show, not only that that was the defendant's purpose, but that he performed some acts beyond mere preparation which would "amount to the commencement of the consummation." We have only an unaccepted solicitation of a third person to ascertain a juror's attitude towards men held for trial; if we are to assume that the defendant here had in mind, upon receiving information that the juror was not hostile to the men about to be placed on trial, to "corruptly endeavor to influence" such juror, his conduct amounted to nothing but preparation for the "endeavor." Between the two—preparation for the endeavor and the endeavor itself to influence a juror—there is a wide difference.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Review of an indictment in two counts for violation of § 135 of the Criminal Code of the United States, which provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or threatening communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The Government does not press the case on count two. It is only necessary, therefore, to consider count one. It charges defendant with unlawfully and corruptly endeavoring to influence one William D. Russell, who, he well knew, was a petit juror in the court in the discharge of his, the juror's, duty, and who he knew had been summoned as a petit juror on April 3, 1918, at which time the trial of William D. Haywood and others was to begin. The manner of the execution of the violation of the section, the indictment details as follows: "Endeavoring to ascertain in advance of the examination of said William D. Russell in said court as to his qualifications to sit as a petit juror at said trial whether said William D. Russell was favorably inclined towards said William D. Haywood and his codefendants, and corruptly to induce said William D. Russell to favor the acquittal of said William D. Haywood and his codefendants in case he should be selected as a petit juror at said trial, said L. C. Russell, on said April 1, 1918, called at the home of said William D. Russell at No. 604 West Thirty-first Street, in said city of Chicago, and engaged Lucy Russell, wife of said William D. Russell, in a conversation, in the course of which said L. C. Russell told said Lucy Russell that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; by means of which request and statement said L. C. Russell conveyed to Lucy Russell, and endeavored to convey to said Wil-

liam D. Russell, an offer to pay money to said William D. Russell in return for his favoring such acquittal; . . . ."

Defendant demurred to the indictment on the ground that it did not appear therefrom by any sufficient averment or recital of "jurisdictional facts that any cause involving any issue of fact triable by a jury was, at the time in said indictment mentioned, pending in the District Court of the United States, or any other court, whereby the above named United States District Court does or could acquire jurisdiction in the premises."

The enumeration of the deficiencies of the indictment may be summarized as follows: It did not appear that William D. Russell possessed the qualifications to act as a juror; or had been duly and regularly drawn and summoned; or had been examined and accepted as a juror at the array; it cannot be ascertained at what time and place the alleged conversation was had; or at what time Lucy Russell received the impression of the meaning of the conversation; or that she had access to her husband or had opportunity, or could have communicated the conversation to him; or that defendant knew she had such opportunity; or that William D. Russell was a juror in any particular case.

The demurrer was sustained and the indictment dismissed. This writ of error was then allowed.

Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to "find out what his [L. C. Russell's] attitude was towards the defendants" to be tried. And that this (we are stating the effect of counsel's contention) was only in preparation of a sinister purpose, that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did

not "want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal." And this, counsel says, "only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation," and "could be interpreted only . . . to be *preparation* [italics counsel's] for an 'endeavor' or 'attempt' to influence the juror, but falls far short of an actual endeavor to do so."

Counsel enters into quite a discussion, with citation of cases, of the distinction between preparation for an attempt and the attempt itself, and charges that there is a wide difference between them.

We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the "endeavor" to do so. Experimental approaches to the corruption of a juror are the "endeavor" of the section. Guilt is incurred by the trial—success may aggravate, it is not a condition of it.

The indictment charges that defendant knew that William D. Russell was a petit juror in the discharge of his duty as such juror and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn. *State* v. *Woodson*, 43

La. Ann. 905. The court, hence, erred in sustaining the demurrer and dismissing the indictment.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

LOWER VEIN COAL COMPANY *v.* INDUSTRIAL BOARD OF INDIANA ET AL.

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

No. 186. Argued January 27, 1921.—Decided February 28, 1921.

1. There is a sufficient distinction between coal mining and other hazardous employments to justify a state legislature in applying its Workmen's Compensation system to the one compulsorily, while leaving it permissive or not applying it at all as to the others. Pp. 146, 149.
2. Neither in this respect nor in applying to all employees of coal mine operators, whether engaged in hazardous work or not, does the Indiana law invade the rights of a coal company under the Fourteenth Amendment. *Id.*
3. Nor does such law offend §§ 21 and 23 of the Indiana Bill of Rights, in failing to distinguish between those employees of coal operators who are and those who are not in the hazardous part of the business. P. 149.
4. The policy of workmen's compensation acts, unlike that of employers' liability acts, goes beyond the mere element of hazard, and admits of a broader range of reasonable classification in the public interest. P. 150.

Affirmed.

THE case is stated in the opinion.

Mr. William H. Thompson and *Mr. Henry W. Moore*, with whom *Mr. Samuel D. Miller* and *Mr. Frank C. Dailey* were on the brief, for appellant.

Mr. E. M. White and *Mr. John A. Riddle*, with whom *Mr. Ele Stansbury*, Attorney General of the State of Indiana, *Mr. U. S. Lesh*, Assistant Attorney General of the State of Indiana, and *Mr. Harold A. Henderson* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellant, the Lower Vein Coal Company, is a corporation of the State of Indiana. The Industrial Board of Indiana is a board created by an Act of the General Assembly of Indiana, approved March 8, 1915, known as "The Indiana Workmen's Compensation Act." The personal appellees are members of the board.

This suit was brought by the Coal Company to enjoin the Industrial Board, the Governor and Attorney General of the State, from enforcing in any manner § 18 of the Workmen's Compensation Act of the State, as amended by the General Assembly in 1919, from asserting that plaintiff is compelled to operate under the Compensation Act, from hearing any claim for compensation asserted by any employee of the plaintiff so long as plaintiff elects not to come within the provisions of the act, from making any award to any injured employee, or his or her dependents, during such time, and from doing any other act or thing prejudicial to the rights of the plaintiff, so long as it elects not to be bound by the act.

The grounds for this relief were set forth in a complaint of considerable length to which the defendants separately and severally answered. After trial of the issues thus presented, the District Court entered its decree dismissing the bill for want of equity. This appeal was then prosecuted.

The Compensation Act is very long and declares its purposes to be to promote the prevention of industrial

accidents; to cause provision to be made for adequate medical and surgical care for injured employees in the course of their employment; to provide methods of insuring the payment of such compensation; to create an Industrial Board for the administration of the act and to prescribe the powers and duties of such board; to abolish the State Bureau of Inspection, and provide for the transfer to the Industrial Board of certain rights, powers and duties of the Bureau of Inspection.

The original act passed in 1915 was elective and left employer and employee the option of rejecting its terms with certain exceptions. It was amended in 1917, and railroad employees engaged in train service were exempted from its provisions.

The amendment of 1919 made the act mandatory as to all coal mining companies of the State and its political divisions and as to municipal corporations. To all other employers the act remains permissive. They may elect to operate under its provisions. Railroad employees engaged in train service are not within them.

The sole question presented is the validity of § 18 as amended, that is, the compulsion of coal companies to the operation of the act, while to other employers it is permissive, or does not apply at all. The grounds of attack upon it are that it violates the due process clause and the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States and §§ 21 and 23 of the Indiana Bill of Rights. Specifically, the question is, as the Coal Company expresses it, "whether the Indiana General Assembly may pass a general compensation law, applicable to all employers within the State, and make it compulsory as to one hazardous employment, and elective as to all others (many equally as hazardous) except railroad employees in train service to which it does not apply at all." And the insistence is "that such a classification rests upon no

sound or just basis," and hence is inimical to the Constitution of the United States and that of Indiana.

The principle of law involved and the power of a State to distinguish and classify objects in its legislation have been too often declared, too abundantly and variously illustrated, to need repetition and we pass immediately to the contention of counsel. It is that the act is addressed to hazardous employments, and where in employments that character exists, sameness exists, and a law which ignores such sameness discriminates in its operation and offends the Constitution of the United States. It may be that the Coal Company does not contend for so broad a principle but may assert protection by a comparison of its business with other businesses equally hazardous, or even more hazardous than coal mining, and that necessarily the exemption from the law of the businesses so compared taints it with illegal discrimination. To support and justify the comparison, statistics of accidents are given in the complaint, and in the number of accidental injuries coal mines are made to run fifth. Notwithstanding those other companies may go in or out of the law—coal mining companies must stay.

The answer replies with counter assertions and statistics and a detail of the methods of coal mining and what those methods cause of accidents to the miners, and to these are added, it is said, the risks that come from the generation of noxious and explosive gases. And there is evidence in the case addressed to the conflicting statistics and the conclusions to be deduced from them which occupies about ninety-three pages of the record. In this evidence, occupations and businesses are compared with estimates of accidents in each, and their character, severity and consequences, fatal and otherwise. There is also testimony of the wages that mine workers get and of their prosperity, and that they have a legal department and paid attorneys. And there is averment and testimony

of two organizations of mine owners who retain officers and attorneys to defend suits and secure releases from personal injury claims.

The length and character of the reports and tables of statistics preclude summary. It may be conceded that different deductions may be made from them, but they and the controversies over them and what they justified or demanded of remedy were matters for the legislative judgment, and that judgment is not open to judicial review. Indeed, there may be a comprehension of effects and practical influences that can not be presented to a court and measured by it, and which it may be the duty of government to promote or resist, or deemed advisable to do so. Degrees of policies, if they have bases, are not for our consideration, and the bases cannot be judged of by abstract speculations or the controversies of opinion. Legislation is impelled and addressed to concrete conditions deemed or demonstrated to be obstacles to something better, and the better, it may be, having attainment or prospect in different occupations (we say occupations as this case is concerned with them) dependent in the legislative consideration upon their distinctions in some instances, upon their identities in others, and, as the case may be, associated or separated in regulation. And this is the rationale of the principle of classification and of the cases which are at once the results and illustrations of it.

There are facts of especial pertinence that make the principle apply in the present case and justify the legislation of the State. That coal mining has peculiar conditions has been quite universally recognized and declared. It has been recognized and declared by this court and is manifested in the laws of the States where coal mining obtains. There is something in this universal sense and its impulse to special legislation—enough certainly to remove such legislation from the charge of being an unreasonable or arbitrary exercise of power.

The action of the Coal Company indicates that it considered the coal business distinctive. Other businesses, though according to the Coal Company's assertion as hazardous as coal mining, accepted the law; the Coal Company and other coal companies rejected it. To this, of course, the coal companies were induced by comparison of advantages, but the inducements to reject the legislation might well have been the inducement to make it compulsory. At any rate, there is, taking that and all other matters into consideration, ground for the legislative judgment expressed in the amendment of 1919 under consideration, that is, § 18 as amended. And the fact is to be borne in mind that there are 30,000 employees in the State engaged in coal mining.

The Coal Company further contends that the law includes within its terms all the Company's employees whether engaged in the hazardous part of its business or not so engaged. In other words, it asserts that the conditions of those who work undergound may justify the law but do not justify its application to those who work above ground. The contention has a certain speciousness but cannot be entertained. It commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts; and this against the same Company. The contention is answered in effect by *Booth* v. *Indiana*, 237 U. S. 391.

Appellant invokes against the law §§ 21 and 23 of the Indiana Bill of Rights which respectively provide that no man's property or particular services shall be taken without just compensation, nor, except in the case of the State, without compensation being first assessed and tendered, nor shall there be a grant of privileges or immunities to any citizen or class of citizens that shall not equally belong to all citizens.

Appellant, however, while admitting, indeed citing

cases to show, that the classification of objects of legislation under the Bill of Rights of the State has the same bases of power and purpose as the classification of objects under the Fourteenth Amendment of the Constitution of the United States, yet contends that the Supreme Court of the State has strictly construed the Bill of Rights of the State, and has observed a precision in classification not required or practiced in the application of the Fourteenth Amendment. Citing for this *Indianapolis Traction Co.* v. *Kinney*, 171 Indiana, 612, 617; *Cleveland, etc., Ry. Co.* v. *Foland*, 174 Indiana, 411; *Richey* v. *Cleveland, etc., Ry. Co.*, 176 Indiana, 542, at p. 558.

These cases were constructions of the Employers' Liability Act of the State. It was held in *Indianapolis Traction Co.* v. *Kinney*, *supra*, that that act was constitutional as to railroads because it related "to the peculiar hazards inherent in the use and operation of" them, and only applied to employees operating trains. It is the contention of the Coal Company that it is a deduction from that decision and the others cited, which may be said to be of the same effect, that there must be a difference observed between employees of coal mining companies as they are or are not engaged in the hazardous part of the business, and as that distinction is not observed in the Compensation Act, it infringes the Bill of Rights of the State, because it is made compulsory "upon coal mining companies with respect to their employees not engaged in the hazardous part of the business, and as to all other private business enterprises within the State, except railroad employees in train service, which are excluded, it is purely optional."

The argument in support of the contention is that the act requires all employees in the coal mining business to be paid compensation under the act whether employed above ground or under ground, that is, whether hazardously employed or otherwise, whereas, in the cited cases,

it is insisted, the court considered such employment as a material distinction and that legislation which disregarded it would have unconstitutional discrimination.

The contention only has strength by regarding employers' liability acts and workmen's compensation acts as practically identical in the public policy respectively involved in them and in effect upon employer and employee. This we think is without foundation. They both provide for reparation of injuries to employees but differ in manner and effect, and there is something more in a compensation law than the element of hazard, something that gives room for the power of classification which a legislature may exercise in its judgment of what is necessary for the public welfare, to which we have adverted, and which cannot be pronounced arbitrary because it may be disputed and "opposed by argument and opinion of serious strength." *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *International Harvester Co.* v. *Missouri*, 234 U. S. 199.

Decree affirmed.

SILVER KING COALITION MINES COMPANY *v.* CONKLING MINING COMPANY.

CERTIORARI TO AND APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 158, 187. Argued January 19, 1921.—Decided February 28, 1921.

1. Monuments prevail over courses and distances. P. 162.
2. A patent which describes a lode mining claim by courses and distances, but which also calls for monuments at the first two corners, and refers to the other two turning-points as "corner No. 3" and "corner No. 4," is subject to interpretation as calling for monuments at all four corners, and opens the door to field notes showing such

monuments and to parol evidence of their actual location on the ground. Pp. 159, 162.

3. And such interpretation is greatly strengthened when the patent by its language assumes identity of the claim as therein described and patented with the lot as surveyed, platted and designated by the surveyor general, in view of his duty to see that such lots are identified by monuments on the ground. P. 161.
4. Under the mining law, an application to patent a lode claim is for a claim marked by monuments; the posted and published notice of application refers to a claim so marked; and such notice, as a jurisdictional basis, will not sustain a patent for land outside the monuments, as against a senior location. P. 161.
5. The rights of the respondent under its patent were fixed by the register's final certificate. P. 162.
6. The Act of April 28, 1904, amending Rev. Stats., § 2327, and declaring that monuments shall prevail over inconsistent descriptions in mining patents, merely made more explicit the previous policy of the law. *Id.*

230 Fed. Rep. 553, reversed.

REVIEW of a decree of the Circuit Court of Appeals, which reversed a decree of the District Court dismissing a bill to establish title to a body of ore as within the plaintiff's patented mining claim and to obtain an account for ore extracted. The case is stated in the opinion, p. 159.

Mr. Thomas Marioneaux, with whom *Mr. W. H. Dickson*, *Mr. A. C. Ellis, Jr.*, and *Mr. R. G. Lucas* were on the briefs, for petitioner and appellant, presented, among other points, the following:

The Court of Appeals was in error in holding that the language of the Conkling patent is such that the calls for 1500 feet forbid the reception of any evidence, even of the Conkling field notes, to show the actual positions of posts Nos. 3 and 4, as erected upon the ground at the time of the patent survey.

The finding of the trial judge that the original position of the west end line of the Conkling claim as marked by posts 3 and 4 thereof was 1364.5 feet distant from the

easterly end line, was not only well warranted but imperatively demanded by the evidence.

The Land Office is without jurisdiction to issue a patent which, by its terms, embraces a greater area than is actually marked out upon the ground by the surveyor making the patent survey at the instance of the applicant for patent.

The language of the Conkling patent must be so interpreted, if possible, as to confine the ground within the boundaries erected at the time of the patent survey to mark the corners of the claim.

Considered in the light of the law requiring monuments to be erected to mark the corners of mining claims when surveyed for patent, the calls in the Conkling patent, "thence second course south 60 deg. 45 min. west 1500 feet to corner No. 3; thence third course south 21 deg. 9 min. east 600 feet to corner No. 4;" are in fact calls for monuments.

Mr. Edward B. Critchlow and *Mr. Wm. W. Ray*, with whom *Mr. Wm. D. McHugh* and *Mr. Wm. H. King* were on the briefs, for respondent and appellee:

The patent of the United States is the deed of the owner (*United States* v. *Stone*, 2 Wall. 525), and in the absence of statute is to be construed in accordance with the rules of the common law.

As to the corners Nos. 3 and 4, no monuments were called for in the patent. The corners were merely abrupt changes in direction. The point of beginning and corner No. 2 of the survey were fixed and in no wise in dispute. It was, therefore, not permissible to consider parol evidence or field notes of survey of the various claims. *Pollard* v. *Shively*, 5 Colorado, 315–317; 3 Washburn, Real Property, 5th ed., p. 428; *Drew* v. *Swift*, 46 N. Y. 204; *Negbaur* v. *Smith*, 44 N. J. L. 672; *Chinoweth* v. *Haskell*, 3 Pet. 92; *Boardman* v. *Reed*, 6 Pet. 328; *Bruck-*

ner v. *Lawrence*, 1 Douglas, 19; *Wells* v. *Jackson Iron Manufacturing Co.*, 47 N. H. 235.

As to agricultural land, from the beginning, it has been expressly provided by statute that the lines as actually run upon the ground by the surveyor control the courses and distances of the government patent. Rev. Stats., § 2396.

No such statute was ever passed by Congress with respect to mineral lands until the year 1904. Rev. Stats., § 2327, which governed as to the descriptions or boundaries of claims conveyed by lode claim patents, expressly directed that the surveyor general should treat as the boundaries of such claims the lines described and platted.

It was the evident purpose of this statute that these claims should be so measured and platted that the descriptions placed in the patents and the plats in the surveyor general's office according therewith should constitute the final record upon which reliance should be placed, and such was the construction placed upon it, prior to the amendment of 1904, by the Land Department. *Mono Fraction Lode Mining Claim*, 31 L. D. 121.

The original survey and plat and all the evidence of acts done prior to the issuance of the patent were submitted to the Land Department; from these the Department determined what land the claimant was entitled to receive; and the patent was the adjudication, by competent authority, that the precise land described in the patent should be and was conveyed to the patentee. This adjudication was final and conclusive, and not subject to any collateral attack. *Uinta Tunnel Mining Co.* v. *Creede & Cripple Creek Mining Co.*, 119 Fed. Rep. 164, 166; *King* v. *McAndrews*, 111 Fed. Rep. 860, 863, 866; *Doe* v. *Waterloo Mining Co.*, 54 Fed. Rep. 935, 940, 56 Fed. Rep. 685, 687; *Carson City Mining Co.* v. *North Star Mining Co.*, 73 Fed. Rep. 597, 600; *Golden Reward Mining*

Co. v. *Buxton Mining Co.*, 79 Fed. Rep. 868, 874; *St. Louis Mining Co.* v. *Montana Mining Co.*, 113 Fed. Rep. 900.

Cases where, in an effort to change the description of a patent, proof of the field notes and the location of the monuments was made without objection, throw no light upon the discussion. *Resurrection Mining Co.* v. *Fortune Mining Co.*, 129 Fed. Rep. 668; *cf.* Lindley on Mines, §§ 777, 778; *Miller* v. *Grunsky*, 141 California, 441.

Where there is any surface conflict whatever and there is a failure to adverse, the issuance of the patent operates as a conclusive determination of priority in favor of the patentee as to the conflict area. 3 Lindley on Mines, § 742.

The Act of 1904 was not intended to have any retroactive effect. If it were, it would be void under the Fifth Amendment as applied to this case.

Inasmuch as the lot number was given to this claim before any official survey was made, there is no foundation for the theory that, because the number is incorporated in the patent, therefore the plain and unambiguous description of the patent may be attacked by evidence of the survey.

All the preliminary proceedings were for the purpose of enabling the Land Department to decide what land the claimant was entitled to receive; the patent was the final determination.

By mentioning in connection with certain corners monuments which mark the same, the patent shows that it did not treat the word "corner" as including a reference to a monument. *Resurrection Mining Co.* v. *Fortune Mining Co.*, 129 Fed. Rep. 668, 672.

Only one of the two claims in conflict with the Conkling claim was of prior location; but the date of location is immaterial. Both were junior in time of patent, and in their patent the conflict area was expressly excluded in

favor of the Conkling. Under these circumstances, the superiority of the Conkling is conclusively established, since their owners failed to adverse the Conkling application. 3 Lindley on Mines, § 742; *Gwillim* v. *Donnellan*, 115 U. S. 45.

Petitioner's main argument amounts to the assertion that in all cases the jurisdiction of the Land Department over mineral lands is a jurisdiction *in rem* analogous to the jurisdiction of the courts in proceedings of that character, and that its jurisdiction in all such cases is dependent upon the presence of certain essential elements of jurisdiction; namely, an application, seizure and due notice. In short, it is contended that any error or defect in the seizure, or in other words, the survey and the posting of notice, is jurisdictional and fatal. 3 Lindley on Mines, § 713; *El Paso Brick Co.* v. *McKnight*, 233 U. S. 250. The two authorities cited by no means sustain the contention.

If the jurisdiction of the Department were thus limited, every patent ever issued is subject to impeachment at any time upon a showing, either that the officer who made the survey made a false or an erroneous return in that the boundaries were not actually marked, or that such markings as were made were insufficient to distinctly mark its limits, or that the required notice was never posted upon the claim, or that its posting was defective.

An analysis of petitioner's argument on this question shows that it necessarily presupposes a lack of authority on the part of the Department to adjudicate or determine the boundaries of any claim. If petitioner's contentions are correct the most that the Department could ever do upon an application for patent would be to determine that the applicant was entitled to a conveyance from the Government covering a parcel of land of uncertain location, and, in so far as the Department was concerned,

of undeterminable boundaries, but which would be found staked off upon the ground in a certain general locality. Such a determination would and could not even be conclusive of the fact that there was a tract so staked, and, should the question ever arise as to whether, or where, the stakes had been set, it would have to be determined anew upon whatever evidence was then obtainable.

We assert the law to be that, not only was it within the power, but it was the duty, of the Department to determine and forever settle the boundaries of lands conveyed by patent, with certainty, and this not only in the interest of the Government but in the interest of patentees as well. *Beard* v. *Federy*, 3 Wall. 478; *Cragin* v. *Powell*, 128 U. S. 691; *Maxwell Land-Grant Case*, 121 U. S. 325; *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Knight* v. *United States Land Association*, 142 U. S. 161.

The rules of the Department antedating 1904 (see those of April 28, 1891) indicate a policy to avoid the doubts and uncertainties which would be occasioned by treating all of the unstable survey stakes as monuments, and an intention that the description written in the patent, the final record, should be in and of itself sufficient without a reference to the plat. *Sulphur Springs Quick Silver Mine*, 22 L. D. 715. This was consistent with Rev. Stats., § 2325. The monuments, which are to mark distinctly the boundaries of the claim at the time of the survey, are expressly distinguished in that section from the natural objects and permanent monuments with reference to which the claim is to be identified in the patent description.

It is submitted that the judgment of the Land Department is as conclusive of the fact that the survey monuments were set and that, as set, they distinctly marked the boundaries of the area ultimately patented, as it is conclusive that the original location was properly marked upon the ground, or that any other antecedent step in the patent proceeding was regularly taken.

These survey stakes or monuments are in no sense permanent (*Byrne* v. *Slauson*, 20 L. D. 43) nor are they of such a character as to be properly classified with natural objects as stable witnesses, a reference to which would at all times serve to identify the claim. In the judgment of the Land Department the public survey corners and mineral monuments were more certain and reliable guides.

In the wording of the grant, the fact that the field notes, together with other evidence, had been deposited in the Land Office, was mentioned by way of inducement merely, and, were they by this reference made admissible, it would follow that all of the proceedings in the Department are subject to inspection and review. The lot number is merely a convenient official name, given before the survey to the area applied for and ultimately patented. Whatever significance may be attached to it, it refers only to the lot as platted. And the petitioner did not see fit to put the plat in evidence, but sought rather to go back of both patent and plat to the field notes, in order to raise a latent ambiguity and then, by extrinsic evidence, to control them both. *Beaty* v. *Robertson*, 130 Indiana, 589; *Cornett* v. *Dixon* (Ky.), 11 S. W. 660; *Jones* v. *Johnston*, 18 How. 150; *Haley* v. *Martin*, 85 Mississippi, 698.

The Department had not, prior to the passage of the amendment, construed the law as authorizing the identification of patented areas by means of parol evidence of the positions of the survey stakes without regard to the calls in the patent. *Mono Fraction Lode Mining Claim*, 31 L. D. 121; *United States* v. *Rumsey*, 22 L. D. 101; *St. Lawrence Co.* v. *Albion Co.*, 4 L. D. 117; *Sinnot* v. *Jewett*, 33 L. D. 91.

Conceding the admissibility of the evidence, it is entirely insufficient to establish that the original survey posts were set 135.5 feet short of their reported positions.

The Solicitor General, Mr. Assistant Attorney General Nebeker, and *Mr. H. L. Underwood,* Special Assistant to the Attorney General, by leave of court, filed certain suggestions on behalf of the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the respondent, the Conkling Mining Company, in order to establish its right to a large body of ore found under the southwesterly 135.5 feet of its patent as laid out by courses and distances, and to obtain an account from the petitioner, which has mined the ore, making a claim of right on its side. The District Court dismissed the bill. The decree was reversed by the Circuit Court of Appeals. 230 Fed. Rep. 553. Thereupon a writ of certiorari was granted by this Court. 250 U. S. 655. A short statement will be enough to present the single issue that it is necessary to pass upon here. The only ground upon which the Conkling Mining Company stands is that the ore is within the lines of its patent extended vertically downward. If the patent properly construed does not cover the land in question the case is at an end.

The patent under which the Conkling Mining Company gets its title was granted to the Boss Mining Company and so far as material is as follows: It recites that in pursuance of the Revised Statutes, &c., there have been deposited in the General Land Office of the United States the plat and field notes of survey and the Certificate No. 1697 of the Register of the local land office with other evidence whereby it appears that the grantee duly entered and paid for that certain mining claim known as the Conkling lode mining claim, designated by the Surveyor General as Lot No. 689, "bounded, described, and platted as follows . . . Beginning at corner No. 1 a pine post four inches square marked U. S. 689 P. 1. Thence"

by courses and distances northwesterly "to corner No. 2, a pine post four inches square marked U. S. 689 P. 2," these two corners being undisputed. "Thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3. Thence third course, south twenty-one degrees and nine minutes east six hundred feet to corner No. 4." It then grants "the said mining premises hereinbefore described" and all that portion of veins, lodes or ledges, "the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 689" &c., with a proviso confining "the right of possession to such outside parts of said veins," etc., "to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 689," &c.

If "corner No. 3" and "corner No. 4" are determined by courses and distances alone the Conkling Mining Company is entitled to prevail upon the question that we are discussing. The Circuit Court of Appeals was of opinion that the patent represented an adjudication by the Land Department that the lot was 1500 feet long and 600 feet wide without regard to the location of the other posts which the field notes showed to exist but the patent did not mention. The District Court on the other hand held that evidence was admissible to show that there were monuments at corners No. 3 and No. 4, held that the monuments so established prevailed, and therefore decided that the title of the Conkling Mining Company failed.

The decree of the District Court appears to us to be supported by the face of the patent and by consideration of the circumstances. If a draughtsman were determining his description by courses and distances only it seems unlikely that he would insert "corner No. 3" and "corner No. 4" where the direction changed, as it would add nothing to the change of direction in the boundary line. The

words by themselves suggest a reference to an external object, an interpretation greatly strengthened by the fact that the same phrase in the first two instances of its use referred to one in terms; and coupled with evidence that such an external object was found, the words at least tend to prove that a monument was meant. Of course evidence is admissible, if needed, to show that language is to receive the interpretation that taken by itself it invites. Furthermore the grant is of "the said mining premises hereinbefore described," assumed in the same sentence to be the lot designated by the Surveyor General as Lot No. 689; and, when it is observed that it is the duty of the Surveyor General to see that the lot is identified by monuments on the ground, the presumption becomes almost irresistible that "corner No. 3" and "corner No. 4" mean corners determined as they are required to be determined by the law.

One statutory foundation of a mining claim is that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. Stats., § 2324. To obtain a patent the claimant must file in the proper land office along with his application "a plat and field-notes of the claim . . . made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim . . . which shall be distinctly marked by monuments on the ground." (*Waskey* v. *Hammer*, 223 U. S. 85, 92.) He also must file a certificate of the Surveyor General "that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent." Rev. Stats., § 2325. It is the reference to natural objects or monuments that is to be incorporated. Before the application is filed notice of it must be posted on the ground. The register subsequently advertises the application in a newspaper,

&c., and if no adverse claim is made and the other conditions are complied with the patent is granted. The notice is jurisdictional. *El Paso Brick Co.* v. *McKnight*, 233 U. S. 250, 259. Obviously therefore a patent car convey only the claim as to which notice has been given. A notice of an application for a patent of land determined by monuments cannot give priority to a junior location, such as was that of the Conkling Mining Company, in respect of land outside the monuments, to which adjoining claimants had no notice that the patent would purport to extend.

The final receipt from the local land officer fixed the claimant's rights. *El Paso Brick Co.* v. *McKnight*, 233 U. S. 250, 257. The failure of the subsequent patent to the Boss Mining Company, issued February 23, 1892, to describe the monuments at corners Nos. 3 and 4 was not an adjudication in favor of an inconsistent description but simply the following of a practice of abbreviating by omission that had been adopted by the land office in 1891, and which a few years later it was directed to discard. The Act of April 28, 1904, c. 1796, 33 Stat. 545, amending Rev. Stats., § 2327, making the monuments the highest authority to which inconsistent descriptions must give way, simply made more explicit or at most carried a little farther the previous policy of the law. We are satisfied that evidence that the field notes, as the regulations of the department required, showed marked posts at the third and fourth corners was admissible, and that witnesses properly were allowed to testify that they found posts upon the ground. The District Judge who saw and heard the witnesses was satisfied that they told the truth and thereupon rightly determined that the monuments so fixed controlled the courses and distances in the instrument evidencing the grant. See *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 Fed. Rep. 668; *Grand Central Mining Co.* v. *Mammoth*

Mining Co., 36 Utah, 364, 378, 379; *Foss* v. *Johnstone*, 158 California, 119, 128; *McIver* v. *Walker*, 4 Wheat. 444, 447, 448; *Heath* v. *Wallace*, 138 U. S. 573. We see no sufficient reason for disturbing the finding of the trial court upon the facts.

It may be that our decision will end this litigation. If not, our decree is made without prejudice to such further questions as may arise. We confine ourselves to the one here determined.

The petitioner besides applying for the writ of certiorari took an appeal, for greater caution. It is immaterial to the petitioner in which way the relief to which it is entitled is obtained. The appeal will be dismissed.

Decree reversed.
Appeal dismissed.

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

UNITED STATES *v.* ROGERS ET AL.

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

No. 147. Argued January 17, 18, 1921.—Decided February 28, 1921.

1. In a proceeding to condemn land, the owner is entitled, as part of his just compensation, to interest on the confirmed award from the time when the Government took actual possession. P. 169.
2. Assuming that the local state rate of interest is not binding, there was no objection to adopting it (6 per cent.) in this case. *Id.*

257 Fed. Rep. 397, affirmed.

THE case is stated in the opinion. The judgment below affirmed a judgment of the District Court.

Mr. Assistant Attorney General Garnett, with whom *Mr. Assistant Attorney General Nebeker* and *Mr. Charles S. Lawrence* were on the brief, for the United States:

The United States is not contractually bound for interest except by express agreement. The implied promise is to pay the value of the property as of date of the taking, without interest. An obligation to pay interest is not implied. *United States* v. *North American Transportation Co.*, 253 U. S. 330.

While obligation to pay interest may be imposed by statute, there is no federal legislation justifying addition of interest as such to this award.

No authoritative case has been found holding that the United States has adopted the local code in respect of matters of substantive law. The quantum of compensation due for expropriation of land is a matter of substance. It is essentially a federal question, to be determined upon construction of the Constitution and the statutes of the United States and by independent application of general principles of jurisprudence thereto. *Carlisle* v. *Cooper*, 64 Fed. Rep. 472; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320; *Nahant* v. *United States*, 136 Fed. Rep. 273; *United States* v. *O'Neill*, 198 Fed. Rep. 677, 680, 682; *Latinette* v. *St. Louis*, 201 Fed. Rep. 676, 678; *Kanakanui* v. *United States*, 244 Fed. Rep. 923; *United States* v. *Forbes*, 259 Fed. Rep. 585, 594. *Cf.* also: *Kohl* v. *United States*, 91 U. S. 367; *Chappell* v. *United States*, 160 U. S. 499, 509, 512–514; *In re Secretary of the Treasury*, 45 Fed. Rep. 396; *United States* v. *Certain Land in New Castle*, 165 Fed. Rep. 783, 786–7; dissenting opinion *United States* v. *Sargent*, 162 Fed. Rep. 85. *Contra: United States* v. *Engeman*, 46 Fed. Rep. 898; *Hingham* v. *United States*, 161 Fed. Rep. 295, 300; *United States* v. *Sargent*, 162 Fed. Rep. 81.

The language of § 2 of the Act of August 1, 1888, is modal and directory and but carries over into condem-

nation proceedings the similar provision found in § 914, Rev. Stats. It was designed to bring about conformity to state practice, and has no reference to substantive rights or obligations.

Section 721, Rev. Stats., adopting state laws as rules of decision in the federal courts in cases where they apply, does not oblige the United States to pay interest made legal by New Mexico, because her laws do not (even if they purport to do so) confer on the United States power to expropriate land within her borders. *Nahant* v. *United States*, 136 Fed. Rep. 273, 276. Substantive rights and obligations springing from federal laws even when, as suitor, the Government asserts them in its courts, are not subject, because of § 721, to either express or implied limitation or definition by state authority. *Carlisle* v. *Cooper*, 64 Fed. Rep. 472, 474; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237, 240; *United States* v. *Herron*, 20 Wall. 251, 255, 260; *United States* v. *Thompson*, 98 U. S. 486. *Cf. Billings* v. *United States*, 232 U. S. 261, 284.

It is not only well recognized that the United States is not obliged to pay interest except under express contract or statute (*United States* v. *North Carolina*, 136 U. S. 211), but, furthermore, no sovereign State is bound to pay interest because payment of its obligations has been delayed. Interest as damages for detention of money (though sometimes recoverable from individuals) cannot be added to obligations of the United States. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Verdier*, 164 U. S. 213, 218, 219.

In the absence of proof that a sum equal to six per cent. on the award was the equivalent of actual damage sustained by occupation prior to the award, the court erred when, of its own motion and without submitting the matter to the commission, it entered the order of October 1, 1917, directing deposit of interest.

It is also clear that if the matter had been submitted to the commissioners it would have been error to instruct them that, as matter of law and without further proof, they might add interest at the fixed rate of six per cent. as the equivalent of or in lieu of damages actually due the landowner for loss of possession.

When interest at a fixed rate is added to the award as a legal right, it is in substance and effect precisely the same thing as allowance of interest as damages for delay in paying for the land. Since it is evident the statutory rate of interest on loaned money is not always or often the standard by which rental value—the actual loss—can be justly estimated, plainly the consideration which induced its application in this case was that it was thought right to add interest for the detention of the price of the land. But this, however just in the abstract, cannot be done in respect of a payment delayed by the Government.

Assuming that it would be just to allow it, it does not appear from the record that any effort was made before the commission or elsewhere to prove rental value or other actual loss suffered. The burden of proving his losses is on the landowner. 2 Lewis Em. Dom., 3rd ed., § 645, pp. 1112–1115; 2 Nichols Em. Dom., 2nd ed., § 432, pp. 1138–1140.

It should be noted that at any time after April 19, 1912, the landowner might have sued the United States under § 145 or § 24 (par. 20), Jud. Code, treating, as he might, the flooding as an expropriation vesting title to the land in the Government and vesting in him, *eo instanti*, a right of action on implied contract. *United States* v. *North American Transportation Co., supra.*

Mr. George S. Downer, for defendants in error, submitted. *Mr. W. C. Reid* and *Mr. J. M. Hervey* were also on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

The United States brought an action January 18, 1915, in the District Court of the United States for New Mexico, to condemn lands of the defendants in error for reclamation purposes. 32 Stat. 388. Condemnation proceedings to acquire real estate for Government uses and public purposes under judicial process are regulated by the Act of August 1, 1888, c. 728, 25 Stat. 357.

Section 2 of the act provides that the practice, pleadings, forms and modes of proceedings in causes arising under the provisions of the act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held.

The petition averred the necessity of appropriating the lands in question; that the Secretary of the Interior had determined to acquire the defendants' real estate; that at the date of the completion of the work lands of the defendants were flooded, and thereby appropriated by the United States under the authority of the acts of Congress; that the owners received no compensation; that necessary funds were available to pay any damages which might be awarded defendants. The petition prayed that the court appoint commissioners to assess the damage which the owners had sustained in consequence of the taking and appropriation of their lands, and that upon payment of the amount assessed the lands be decreed to be the property of the United States from the date of the appropriation thereof.

The award of the commissioners was filed February 3, 1917, and an order was entered July 27, 1917, directing that the sums awarded be deposited, and distributed for the benefit of the owners. Subsequently the owners made a motion for a supplemental order requiring the

United States to deposit sums equal to 6 per cent. interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding the same. The court made an order requiring the deposit of the additional sum, to which order the United States excepted, and prosecuted a writ of error from the Circuit Court of Appeals of the Eighth Circuit, where the judgment of the District Court was affirmed. 257 Fed. Rep. 397.

It appears that the allowance of interest was from the time of the actual taking of the land to the time deposit was made in payment for the same.

The questions upon which the case was taken to the Circuit Court of Appeals appear from the assignments of error, and are: (1) That the District Court erred in awarding interest against the United States from April 12, 1912, to date of deposit of the awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of final judgment; (2) that the District Court erred in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of the order of the court placing the United States in possession of the lands condemned; (3) that the District Court erred in awarding interest at the rate of 6 per cent. per annum against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that there is no authority of law for allowing interest at said rate on judgments against the United States.

As we are reviewing the judgment of the Circuit Court of Appeals, the assignments of error in that court are the ones open here, and it is evident from what we have said that the question in substance comes to this: Was there error in awarding the owners interest on the value

of their lands appropriated from the time of actual taking of the same until compensation was made?

It is unquestionably true that the United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. The Government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341.

In fixing the compensation, the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the Circuit Court of Appeals applying the statutes of Minnesota to lands appropriated in that State. *United States* v. *Sargent*, 162 Fed. Rep. 81.

The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The

fact that the rule is in harmony with the policy of the State where the lands are situated does not militate against but makes for the justice and propriety of its adoption. *United States* v. *Sargent, supra.*

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

UNITED STATES *v.* HIGHSMITH.

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

No. 148. Argued January 17, 18, 1921.—Decided February 28, 1921.

Decided on the authority of *United States* v. *Rogers, ante,* 163. 257 Fed. Rep. 401, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Garnett, with whom *Mr. Assistant Attorney General Nebeker* and *Mr. Charles S. Lawrence* were on the brief, for the United States.

Mr. George S. Downer, for defendant in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This case is like No. 147, just decided, *ante,* 163, and was argued and submitted at the same time.

In this instance the Government and the landowner appealed from the award of the commissioners, and the case was tried to a jury. Jurors were instructed that the allowance of interest was a matter of law, and in a form

of verdict given to them, interest at 6 per cent. was to be added from April 19, 1912, the date of appropriation.

It appears that by agreement a separate order requiring the deposit of interest was entered in order to allow a writ of error upon that point, and in connection with the above form of verdict the jurors were instructed to assess compensation as of the value of the land on April 19, 1912, and not to add interest from that time to the date of the verdict. Afterwards a final judgment was entered in the District Court requiring a deposit of the amount of the verdict, and a separate order was made directing payment of interest from April 19, 1912. A writ of error was prosecuted from the Circuit Court of Appeals where the judgment of the District Court was affirmed. 257 Fed. Rep. 401.

The Circuit Court of Appeals recited the facts of the case, and held that it was ruled by *United States* v. *Rogers*, No. 147, just decided. We agree with this conclusion, and the judgment of the Circuit Court of Appeals is

Affirmed.

DETROIT UNITED RAILWAY *v.* CITY OF DETROIT ET AL.

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

No. 492. Argued January 5, 6, 1921.—Decided February 28, 1921.

1. Action of a city requiring a street railway company, upon reasonable notice, to remove its tracks and other property from the streets, does not invade the company's contractual and property rights in violation of the Constitution, if its franchise to use the streets was granted by the city for a definite period which has expired. P. 174. *Detroit United Railway* v. *Detroit*, 229 U. S. 39.

2. Certain permits, an ordinance and a former decision considered and *held*, not to have created any right in the plaintiff street railway, as against the City of Detroit, to continue operating in streets where its franchises had expired. P. 174.
3. A street car company, after expiration of its franchise, cannot acquire new franchise rights by estoppel against the city and its people, through the expenditure with their knowledge of large sums on its railway, where the state constitution forbids the city to grant franchises not revocable at its will unless authorized by a popular vote. P. 175. *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, and *Detroit United Railway* v. *Detroit*, 248 U. S. 429, explained.
4. The City of Detroit, in pursuance of its charter, passed an ordinance for the acquisition, ownership, maintenance and operation by the city of a street railway system, embracing, among others, certain streets occupied by plaintiff street railway company on which, however, its franchises had expired, and the proposition was duly submitted to the electors and adopted by the requisite majority. *Held:* (a) That a purpose therein to force the plaintiff to sell its tracks, etc., at less than their fair value, would not involve any violation of its constitutional rights, since the city was not bound to purchase, or the company to sell, and each might make its own bargain. P. 176. (b) Furthermore, under the charter, any contract to purchase such property must be approved at another popular election before it could be effective. P. 177. (c) Motives of city officials and of electors in acting on the proposal were not proper subjects for judicial inquiry. P. 178. (d) That misinformation alleged to have been publicly given the voters, improperly and fraudulently, by the common council, and to have misled them as to the purpose and effect of the election, but which was not complained of before the election, could not vitiate it. P. 179.

Affirmed.

THIS was a direct appeal from a decree of the District Court, sustaining a motion to dismiss the bill, and dismissing it, for want of equity. The case is stated in the opinion.

Mr. Charles E. Hughes, with whom *Mr. Elliott G. Stevenson, Mr. John C. Donnelly, Mr. William L. Carpenter, Mr. P. J. M. Hally* and *Mr. Hinton E. Spalding* were on the brief, for appellant.

Mr. Clarence E. Wilcox and *Mr. Alfred Lucking* for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

The appellant, plaintiff below, sets forth in its bill that it is the owner of a system of street railways in the city of Detroit, and suburban lines running from said city. The suit was brought in the District Court, to enjoin the city of Detroit and the other defendants, municipal officials, from acquiring or constructing a system of street railways, which had been provided for by an ordinance of the city, with an issue of $15,000,000 of its bonds for that purpose and approved by the requisite majority at a municipal election.

The grounds of relief, briefly stated, are: That establishment of the system and the issue of the bonds should be enjoined at the instance of the plaintiff because the ordinance was not legally adopted by the voters of the city of Detroit and, if carried into effect, as proposed, and by the methods which brought about its adoption, a deprivation of plaintiff's property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States would result.

The District Court maintained the jurisdiction upon the federal ground alleged, and dismissed the bill upon motion in the nature of a demurrer. The case is brought to this court by direct appeal because of the constitutional question involved.

The bill is very voluminous and abounds in argumentative statements attacking the passage of the ordinance, and the good faith of the officials concerned in bringing about its enactment. Among the streets, proposed to be occupied by the city, are those upon which it is alleged the trackage and property rights of the complainants are

sought to be acquired, and upon which the franchise grants of the Street Railway Company have expired.

This court in *Detroit United Railway* v. *Detroit*, 229 U. S. 39, affirming the judgment of the Supreme Court of Michigan in the same case, 172 Michigan, 136, held that where a street railway company, operating in the streets of the city under a franchise granted for a definite period, has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the Federal Constitution or depriving the street railway company of its property without due process of law. We see no occasion to depart from the principles announced in that case. The decree is in the record and, so far as anything appears, is still in full force and effect. If the courts of Michigan shall see fit to carry it into execution we find nothing in the Federal Constitution which would make its enforcement a deprivation of due process of law.

The Railway Company claims to have acquired property rights in the streets of the city, upon which its franchises have expired, by reason of matters set out in the bill and supported in the argument submitted by the appellant. Reference is made to certain so-called day-to-day arrangements, by which continued operation was permitted notwithstanding the expiration of franchise rights. But an examination shows that construction and operation under such agreements gave the Railway Company no extended franchises in the streets, because it was expressly provided that the permits granted might be revoked, and that action under the day-to-day agreement should not waive the rights of either party.

Rights to remain in the streets are also claimed under the so-called Kronk Ordinance, which was before this court in *Detroit United Railway* v. *Detroit*, 248 U. S. 429,

in which this court, while reaffirming the principles laid down in *Detroit United Railway* v. *Detroit*, 229 U. S., *supra*, found that the city had not up to that time availed itself of the right to compel the removal of the tracks in streets where the company had no franchise, but had passed an ordinance looking to the continued operation by the company of the street railway system for a limited period; and, that while it acted under this ordinance there was the equivalent of a grant to operate during the life of the ordinance, entitling the company to a fair return; that the ordinance by its express terms provided for its amendment or repeal, and, that unless amended or repealed, it should remain in force for the period of one year. We do not perceive how that ordinance can now give rights to the company in the streets where the franchises have expired.

The chancery suit brought in the Wayne County Circuit Court in the name of the city of Detroit, in which a decree was granted, is also set up. An examination of that decree, which is attached to the bill, satisfies us that it was intended only to provide a temporary arrangement by which cars might be operated on the street railway system of the complainant. It is expressly stated in the decree that it shall not affect any fundamental rights of the parties in and to the streets of the city of Detroit as they at that time existed; the intention being to provide for the rate of fare at which cars should be operated; the decree being considered only a temporary solution of the problem before the court.

Allegations are made which are supposed to have the effect of estopping the city of Detroit from denying the franchise rights of the plaintiff in the streets of the city because of expenditures of large sums of money with the knowledge and acquiescence of the city authorities and the people of the city since the franchises have expired.

Under the constitution of Michigan, § 25, Art. VIII (as

revised 1908), it is provided that no city or village shall grant any public utility franchise, which is not subject to revocation at the will of the city or village, unless such proposition shall first have the affirmative vote of three-fifths of the electors. This phase of the case is covered in principle by our decision in *Denver* v. *New York Trust Co.*, 229 U. S. 123, 139, in which a similar provision of the Colorado constitution was under consideration, and wherein this court in speaking of the provision of the constitution of the State of Colorado, said:

"Besides, Article 20, § 4, of the state constitution then in force provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and Article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to make an election to purchase or to renew, the attempt would have gone for nothing."

The provision of the constitution of Michigan, in force when the ordinance here in controversy was passed, necessarily prevents acquiring rights by estoppel which might arise were the franchise within the power of the city to grant. In *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, the provision of the Colorado constitution was not considered. Nor in *Detroit United Railway* v. *Detroit*, 248 U. S. 429, was reference made to the like provision of the Michigan constitution now relied upon.

The charge is made at length in the bill that the city officials, by means of the proceedings complained of, are engaged in a scheme designed to compel the company to part with its property at a sum much less than its fair value, or to cease to operate in the streets and to remove its property therefrom. In this connection it is charged that the real purpose is to compel the sale of the property of the Street Railway Company at $40,000 per mile of track, which is far less than its actual value. The giving

effect to this scheme, it is averred, would work a deprivation of constitutional rights of the complainant in violation of the Fourteenth Amendment. But, if the city has the right to acquire the property on the best terms it can make with the company in view of the expiration of the franchises, an attempt to carry out such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. It was so ruled in *Denver* v. *New York Trust Co., supra.* In that case this court, in speaking of an alleged attempt of the city to acquire the company's plant after the expiration of its franchise for much less than its fair value, among other things, said:

"Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard of its own interests. That the city, mindful of its interests, offered $7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter."

Furthermore, it appears that under the charter of the city of Detroit, notwithstanding the alleged attempt to procure the property of the complainant at much less than its value, no such purpose could be effected by purchase without approval of the electors of the city. Section 8 of the charter provides:

"Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors

voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote."

No such contract has thus far been made, and there is nothing in the ordinance attacked which undertakes to acquire the property of the complainant without compliance with this charter provision.

The bill abounds in allegations that voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular, and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law. The principle has been declared by this court. *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1, 18; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710. This feature of the bill is an attempt to inquire in a collateral way into the validity of an election which was held without steps being taken to enjoin, and which was vigorously contested to a final result.

The charter of the city of Detroit gave ample power to the city to acquire, construct, own, maintain and operate a street railway system on the streets of the city within a distance of ten miles from any portion of its corporate limits that the public convenience may require. (§ 1, c. 13, Charter of Detroit, 1918.) Section 6 of the charter makes it the duty of the Board of Street Railway Commissioners to promptly proceed to purchase, acquire or construct, and to own and operate a system of street railways in and for the city, and as soon as practicable

to make the system exclusive. Section 7 gives the Board power to purchase or lease, or by appropriate proceedings to acquire, any part of the existing street railway property in the city, and to make the necessary purchases for that purpose. Section 9 gives authority to issue bonds of the city.

Under the authority of the charter the ordinance in question was passed. It directs the Board of Street Railway Commissioners to acquire, own, maintain and operate a street railway system. It requires that the proposition to acquire, own, maintain the system and to issue bonds shall be submitted to a vote at a special election. It is contended, however, that the proposal submitted did not conform to the requirements of the ordinance.

We agree with the District Court that the form of submission of the question was in substantial compliance with the law.

As to allegations of fraudulent and improper conduct of the Common Council in giving the electors information in advance of the election which misled them, the contention is that a sample ballot sent out to the electors did not definitely show the purpose to construct street railway lines where trackage already existed, and that the voters of the city were misled into believing that there was an intention not to construct the street railway lines where the same already existed, but to purchase at an estimated cost of $40,000 per mile. But we are of opinion that this so-called official information, no complaint being made of it before the election, cannot vitiate the election when the same was had upon a submission, within the authority of the city under its charter, and the ordinance passed in the form shown. Moreover, as we have already pointed out, this ordinance does not provide for acquisition at $40,000 per mile; nor can any purchase be made except by contract approved by the electors

as provided by § 8 of the charter. Other considerations are urged based upon lack of authority in the city which we have examined and deem it unnecessary to discuss.

We find nothing in the allegations of this bill establishing that the city of Detroit, in proceeding by its officials in the manner alleged, has done things which are subversive of the rights of the city to establish its own municipal system of street railways and to issue bonds for that purpose, or which would amount to deprivation of rights secured to the plaintiff by the Fourteenth Amendment to the Federal Constitution.

It follows that the decree of the District Court dismissing the bill must be

Affirmed.

SMITH *v.* KANSAS CITY TITLE & TRUST COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 199. Argued January 6, 7, 8, 1920; restored to docket for reargument April 26, 1920; reargued October 14, 15, 1920.—Decided February 28, 1921.

1. A bill by a shareholder of a trust company to enjoin the directors from investing its funds in bonds of Federal Land Banks and Joint Stock Land Banks, upon the ground that the act of Congress authorizing the creation of such banks and the issue of such bonds is unconstitutional, and that the bonds therefore are not legal securities in which the company's funds may be lawfully invested, states a cause of action arising under the laws of the United States. P. 199. Jud. Code, § 24.
2. The provisions of the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, amended January 18, 1918, c. 9, 40 Stat. 431, making the Federal Land Banks and Joint Stock Land Banks

established thereunder depositaries of public money, when designated by the Secretary of the Treasury, authorizing their employment as financial agents of the Government, requiring them to perform, as such depositaries and agents, such reasonable duties as may be laid upon them, and authorizing them to purchase government bonds,—justify their creation as an exercise of the constitutional power of Congress. P. 208.

3. The necessity for such federal agencies is for Congress to determine, and the motives actuating Congress in exercising its power to create them are not a subject for judicial scrutiny. Pp. 209, 210.
4. The extent to which these institutions have so far been employed as government depositaries or fiscal agencies is irrelevant to the power to create them. P. 210.
5. Nor does their legitimacy depend on their being, technically, banks; or on the extent of their banking powers. *Id.*
6. The fact that these banks were intended to facilitate the making of loans upon farm security at low rates of interest does not invalidate the enactment. P. 211.
7. These banks being federal agencies, Congress had power to exempt their bonds from state, as well as federal, taxation. P. 212.

Affirmed.

THIS was a direct appeal to review a decree of the District Court dismissing a bill brought by a shareholder to enjoin a trust company from investing its money in bonds of Federal and Joint Stock, Land Banks. The case is stated in the opinion, *infra*, p. 195.

Mr. William Marshall Bullitt for appellant:

The implied power of appropriation does not authorize the creation of Federal Land Banks to lend private capital on farm mortgages, nor the exemption of their obligations in private hands from state taxation.

The power to borrow money on the credit of the United States does not authorize the issuance and sale of Farm Loan Bonds to private investors, nor the exemption thereof from state taxation.

Congress could not acquire power by the mere expedient of calling such corporations "Banks" and endowing them

with the possibility of acting as depositaries of public money or financial agents.

It must be remembered that we are considering a question of constitutional power. If, as the Government now contends, Congress has the power to create a poss ble depositary and fiscal agent and can declare its private business, and all obligations executed to or issued by it, exempt from taxation, certainly the principle supporting such action also authorizes Congress to designate individuals, firms and corporations as depositaries and fiscal agents, and thereby exempt their private business from state taxation. There is no pretense that the private business of the Farm Loan Banks is (as in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *Bank*, 9 Wheat. 738), essential to the performance of governmental duties.

It must always be borne in mind that neither the Federal Land Banks nor the Joint Stock Banks can lend any assistance towards furnishing or regulating a sound currency; nor assist the Government in times of stress by furnishing liquid capital (from depositors' funds) to meet sudden governmental needs, nor indeed perform any of the functions which render the national banks so essential to governmental operations.

On the contrary, by the very nature of their long term loans, in times of financial stress or governmental need the Farm Loan Banks have to be helped by the Government. To-day, the Government has had to advance $175,000,000 to enable the Banks to operate; and at a time when the Government was having to pay 6 per cent. for its own borrowings!

Both the First and the Second Banks of the United States and the present national banks were created immediately after, or during, a great war, for the express purpose of affording the means for the execution of important express powers vested in Congress.

The First and Second Banks of the United States were

in fact the means actually used by the Government to carry on its fiscal operations; to obtain loans in anticipation of revenues; to facilitate the payment of federal taxes; to furnish a uniform and orderly currency on a sound specie basis; to collect, safeguard and transport money, and to transfer public funds from place to place (without cost to the Government or loss to it on account of the difference in exchange) as the exigencies of the Nation required. None of those functions can be performed by the Farm Loan Banks.

The Farm Loan Banks do not assist the Government to borrow money. To say they do, or can, is simply to ignore the plainest facts. Every dollar of their deposits (in the unlikely event of their stockholders making any deposits) must be invested in Farm Loan Bonds or farm mortgages. (§ 11.) They are not even permitted to invest their deposits in United States bonds.

Theoretically, the Farm Loan Banks have the power to invest the moneys received from the interest and amortization payments by the farmers, in United States bonds; but practically they would never do so, for such act would be at a loss and would operate to stop the system from functioning.

The basis of the *McCulloch* and *Osborn Cases* was not that the banks were mere passive depositaries or undefined financial agents, but was this: By virtue of engaging in general banking, they were enabled to perform a great many active and indispensable services essential to be performed in order to carry on government business.

In *McCulloch* v. *Maryland*, after holding that Congress could charter that particular bank because it was an appropriate means, plainly adapted to a legitimate end within the scope of the express powers granted by the Constitution, the Chief Justice emphasized the fact that in order to justify the incorporation of a bank it must be an appropriate measure to carry out express powers.

Again, in *Osborn* v. *Bank*, the great Chief Justice, while sustaining the validity of the bank's creation, notwithstanding the fact that it engaged in private business while carrying out its governmental functions, emphasized the fact that the bank was created primarily for national purposes and that it was necessary to allow it to do private business in order to effectively carry out the national purposes for which it was particularly created.

The Farm Loan Act expressly prohibits the Joint Stock Banks from receiving deposits or transacting any banking or other business except that of lending on farm mortgages; and prohibits the Federal Land Banks from receiving any deposits except from its stockholders who are also borrowers.

For what express national purposes were these Farm Loan Banks created? In what way is such national purpose dependent for its proper execution upon the lending of A's money to B at low rates, and exempting the transactions from state taxation? What fiscal operations of the Government are aided by the private business of farm mortgages? In what way is that branch of the business necessary to enable the Farm Loan Banks to perform any national purpose? In *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, it was held that, in order to enable the bank successfully to perform its functions as a machine for the fiscal operations of the Government, Congress could authorize it to conduct such private banking business as tended to make it a more effective Government agent.

Can it be successfully contended that because Congress uses national banks as a means for the execution of conceded constitutional powers and may confer upon them private powers deemed necessary for the successful performance of their public duties, it is also competent for Congress primarily to confer such private powers upon a corporation which performs no public functions?

The farm mortgages executed to the Federal Land Banks and to the Joint Stock Land Banks, and the Farm Loan Bonds issued by them respectively, and held by the general investing public, are subject to state taxation.

There is no implied, as there certainly is no express, power, in Congress to exempt property from state taxation. If exemption exists it is because it is essential to some federal instrumentality to which the property belongs. It exists then by force of the Constitution, and it is for the court to declare it in applying the Constitution. And Congress cannot, by any declaration, create an exemption which would not have existed independently. *McCulloch* v. *Maryland,* 4 Wheat. 316, 425; *Osborn* v. *Bank,* 9 Wheat. 777, 794, 795; *Collector* v. *Day,* 11 Wall. 113, 123; *United States* v. *Railroad Co.,* 17 Wall. 322, 327; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 30; *Dobbins* v. *Commissioners,* 16 Pet. 435, 447; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 157.

The authorities show that many instrumentalities of the Federal Government have been subjected to the power of state taxation, because, in the opinion of this court, such taxation did not interfere with their operations for the Government; that such exemption arises under the Constitution *ex proprio vigore*; that in the case of national banks Congress has expressly provided (Rev. Stats., § 5219) for the taxation of the shares of stock and the bank's real estate exactly as Marshall, J., held in *McCulloch* v. *Maryland* they could be taxed. A short review of the cases will show they are all consistent with these principles. It has repeatedly been held that the States may tax the property and operations of persons and corporations engaged in private business, although also employed by the Federal Government in the transaction of its business. *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310; *Thomson* v. *Pacific Railroad,* 9 Wall. 579;

Railroad Co. v. *Peniston*, 18 Wall. 5, 30–35; *Union Pacific R. R. Co.* v. *Lincoln County*, 1 Dill. 314; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382.

It is suggested (rather feebly it is true) that because the Farm Loan Banks were given the power to buy and sell United States bonds (a power that practically every individual and corporation, state or federal, possesses), they thereby became instrumentalities of the Federal Government and exempt from state taxation. If that argument were sound, every corporation and person who had the power to invest in or who invested in government securities, would be exempted with respect to the balance of his business from state taxation. *Monroe County Savings Bank* v. *City of Rochester*, 37 N. Y. 365, 370; *Plummer* v. *Coler*, 178 U. S. 115, 123.

Mr. Frank Hagerman for appellant:

There not having been expressly or by fair implication surrendered by the Constitution to Congress the power to create Land and Joint Stock Banks, such power must be deemed not to have been granted, but reserved to the States or to the people. Tenth Amendment; *United States* v. *Harris*, 106 U. S. 629, 630, 636; *Collector* v. *Day*, 11 Wall. 113, 124; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 410; *Osborn* v. *Bank*, 9 Wheat. 738; *Bank* v. *Dearing* 91 U. S. 29; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325; *Chisholm* v. *Georgia*, 2 Dall. 419, 435, 448; *Ableman* v. *Booth*, 21 How. 506, 516; *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435, 447; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178; *United States* v. *Cruikshank*, 92 U. S. 542, 549; *Claflin* v. *Houseman*, 93 U. S. 130, 136; *License Tax Cases*, 5 Wall. 462, 470; *Slaughter-House Cases*, 16 Wall. 36, 62; *Leisy* v. *Hardin*, 135 U. S. 100, 127; Cooley, Const. Lim., 7th ed., 831; *Hammer* v. *Dagenhart*, 247

U. S. 251, 255; *Kansas* v. *Colorado*, 206 U. S. 46, 87, 88.

Appellees radically differ in their contentions. The Joint Stock Banks seek to support the power upon the basis of a purpose to create agencies to perform governmental functions; the Land Banks, upon the inherent right of the Government to appropriate its public money for any public purpose. The real and only purpose of the act was to enable owners of farm land, not necessarily farmers, to borrow, for any purpose, money on farm mortgages for very long terms at extremely low rates of interest. This is clearly shown by its language as well as by the congressional debates, and by the governmental literature and official announcements. As correctly declared by Senator Cummins in debate (53 Cong. Rec. 7246), "the chief purpose is to secure a lower rate of interest to those who borrow; that is its only object." That the scheme was, in fact, private in its nature and not governmental, is also apparent from every provision of the act.

In the case of the Joint Stock Banks, there is not even the flimsy pretense (which is claimed to exist in the case of the Land Banks) that the power of appropriation was exercised or that the money raised by the mortgages was to be used for agricultural development. There was for them no appropriation and there is no limit or restriction whatever as to the purposes for which the money loaned may be used, as those banks are expressly exempted from the limitations imposed upon Land Banks in that respect. Even the coöperative and collective plan of borrowing by the farmers, the joint and several liability of the banks, and the degree of federal supervision, which exist in the case of the Land Banks, and were the strongest arguments advanced in Congress in favor of the act,—were specifically dispensed with in the case of the Joint Stock Banks, because it was thought that some farmers might object to a coöperative undertaking with their neighbors, or to the publicity and scrutiny thereby entailed. Senate

Rep. 144, p. 11; House Rep. 630, p. 910; 1st Annual Rep. of Federal Farm Loan Board, p. 22.

These banks are expressly prohibited from receiving deposits or doing any banking or other business (§ 16).

But the functions of Land Banks are also purely private. The farm mortgages executed to both classes of banks and the bonds issued by them thereon, and held by private investors, are wholly instruments of private business. They, like the Joint Stock Banks (§ 16), can do no banking (§ 14), and do not possess any of the characteristics of those institutions which have ever been held to be instrumentalities of the Government. The bonds of both classes of banks are neither assets nor liabilities of the United States. It does not promise to pay or guarantee the payment of them. The money raised thereon does not go to it.

Not only were the agencies intended to be strictly private, but there was a distinct purpose not to appropriate public money or lend it on the credit of the Government.

The congressional debates and committee reports and the government official announcements all show that there was actually no real purpose to provide necessary and essential governmental agencies, nor to appropriate money nor lend any public credit. They do, however, affirmatively show, as Senator Cummins (53 Cong. Rec. 7246) stated, and the House Committee (64th Cong., 1st sess., Report No. 630) reported, that the sole and only object sought to be attained was to give the farmers long-time loans on farm mortgages at low interest rates.

It would therefore seem impossible to conceive that Congress, in fact, ever intended to exercise either of the two alleged powers about the existence of which counsel so radically differ.

The act cannot be sustained on the theory of the Joint Stock Banks, that it was an exercise of the power to establish agencies to perform necessary and essential governmental functions.

180. Argument of Mr. Hagerman for Appellant.

If the agencies established were not, in fact, general banks, or, regardless of what they were, if their main purpose was not to exercise necessary and essential governmental functions, to which private business was a mere incident, the premise on which the proposition rests wholly fails. *South Carolina* v. *United States*, 199 U. S. 437, and the national bank cases, when properly applied, are conclusive authorities in support of this view.

"A mere possibility" that either of the alleged banks might, under § 6, be unnecessarily used in the future for some minor governmental purpose does not make it "an agency of the United States." *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382; *Second Employers' Liability Cases*, 223 U. S. 1. The agency must be necessary and essential to aid the Government in performing governmental duties. *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Osborn* v. *Bank*, 9 Wheat. 738, 860, 861, 863; *Farmers' & Mechanics' Bank* v. *Dearing*, 91 U. S. 29, 33; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 425.

The reasons for the establishment of national banks to perform necessary and essential governmental functions clearly show that neither the Land nor the Joint Stock Banks were created as agencies for such purposes. Unless they were, there is not authority in Congress to establish them. *Osborn* v. *Bank*, 9 Wheat. 738, 860. The fact that unnecessarily they may possibly, if and when desired, be called upon to perform a minor governmental function is not sufficient. Banks are not unknown things. They are capable of being and have frequently been defined. The very definition, so far as concerns the exercise of a governmental function, is well understood. All the powers of a State or the United States are either governmental or else private and proprietary. These two classes of powers are well defined, quite distinct and fully recognized. *South Carolina* v. *United States*, 199 U. S. 437, 461, 462; *First National Bank* v.

Union Trust Co., 244 U. S. 416; *Illinois Trust & Savings Bank* v. *Arkansas City*, 76 Fed. Rep. 271, 282.

The money which the Government advanced to the Land Banks as a loan to make the initial stock payment, did not convert the scheme into one of a governmental nature. The fact that the agencies provided were actually named banks, or called instrumentalities of the Government, does not prevent an inquiry into the unquestionable fact that they were not in reality such.

The attempt by § 6 to provide for possible service to the Government was a subterfuge and merely a scheme to evade the Constitution. The section does not require but only permits the banks to be designated as depositaries of public money and their employment as financial agents of the Government. The law made no such designation nor any such requirement. Both agencies might forever exist without either of them ever being so designated or employed. All government funds, if deposited in any such depositary or financial agency, must be kept separate and apart from any other funds and cannot be invested in farm mortgages or bonds. It is wholly immaterial that some artful mind may have suggested, as indicated (53 Cong. Rec. 7246), the insertion of this section to give to the scheme a color that governmental functions were to be performed. It is sufficient to say they were not the main purpose of the scheme. If anything, they were possibilities, and if availed of, mere incidents, wholly non-essential and unnecessary to the main purpose.

This view accords with the practical working of the act.

The passage of the act cannot, as contended for by the Land Banks, be sustained as an exercise of the power to appropriate the public money for public purposes.

If, of course, the act is unconstitutional as to either class of banks, no tax exemption can, as to that bank, be upheld. *Norton* v. *Shelby County*, 118 U. S. 425.

While real governmental instrumentalities are exempt and should be exempted from state taxation (Willoughby on Constitution, § 45, *et seq.*), the exemption should never be lightly extended. *Thomson* v. *Pacific Railroad*, 9 Wall. 579.

There must, therefore, be an actual and essential governmental instrumentality before, without more, it is or can by Congress be made exempt from any state tax. Any restriction upon the State's power to tax arises from the operation of the Constitution itself. Congress cannot, by any declaration of exemption, create one that would not have equally existed without it. In other words, any attempt by Congress to exempt property from state taxation, if valid, is merely declaratory of what the exemption would have been anyway, without such declaration.

The principle underlying the cases is that neither the state nor Federal Government can tax the property or operations of any essential governmental instrumentality of the other. The reason why the States can tax the property and business of railroads, telegraph lines, etc., although they may have been chartered by Congress and used in part as governmental instrumentalities, and yet cannot similarly tax national banks, lies in this distinction between the two instrumentalities: The railroad and telegraph lines could, in fact, perform all the services for the Federal Government just as well without the addition of private business as they can with it (except as a money making proposition); and hence in accordance with the express language of *Osborn* v. *Bank*, 9 Wheat. 738, 861, the property and private operations of the companies are generally taxable by the State. The banks, as pointed out in that case and in *McCulloch* v. *Maryland*, 4 Wheat. 316, could only satisfactorily perform their essential governmental duties by being endowed with the right to transact private business; as private banking

business was the very thing which was needed to enable them to be an efficient machine for carrying out their fiscal operations.

A Joint Stock Bank, acting as a depositary, could, like the railroads, perform such a function just as satisfactorily to the Government without, as with, the addition of private business.

The mere possibility that at some future time the United States may elect to designate a Land or Joint Stock Bank as a depositary and thereafter may further elect actually to use it as such, while in the meantime the corporation is engaged solely in private business for private gain, certainly does not constitute the corporation such an essential instrumentality of the Federal Government as to exempt it from state taxation. *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382.

Mr. Charles E. Hughes for Federal Land Bank of Wichita, Kansas, appellee:

Congress had power to use the public money, and to provide for the borrowing of money to aid in agricultural development throughout the country in accordance with the systematic and general plan to promote the cultivation of the soil, involving the application of money through loans or otherwise.

Congress was not limited to the use of public moneys by outright appropriations, but, having that authority, could create a revolving fund to be used through loans. The purpose thus subserved through the provisions of the act was a public purpose.

The Farm Loan Act deals with pecuniary aid alone, that is, it is concerned only with the application of money.

The purposes in view are public, not private; national, not local.

Having this power, with respect to the use of money, Congress could exercise the power by the adoption of

appropriate means to that end and the creation of instrumentalities for that purpose.

Congress has the power to judge for itself what fiscal agencies the Government needs and its decision of that question is not open to judicial review. Congress may create in its discretion, as in this instance it has created, moneyed institutions to serve as fiscal agents of the Government and also to provide a market, as stated in the act, for United States bonds.

Congress may protect the securities created under its legislation, from impairment or destruction, by making them exempt from taxation.

Mr. W. W. Willoughby filed a separate brief on behalf of the Federal Land Bank of Wichita, Kansas, appellee.

Mr. George W. Wickersham, with whom *Mr. W. G. McAdoo* was on the briefs, for First Joint Stock Land Bank of Chicago, appellee:

There is no essential difference between the Federal Land Banks and the Joint Stock Land Banks so far as congressional authority for their creation is concerned.

The burden is upon appellant to establish the unconstitutionality of the Farm Loan Act beyond a reasonable doubt.

Appellant's attack on the constitutionality of the Farm Loan Act is based upon the erroneous hypothesis that the banks provided for in it are private institutions, established for a private purpose. This fallacy runs throughout his argument.

The Farm Loan Banks of both classes are banking instrumentalities lawfully created by Congress for a public purpose, namely, that of facilitating the fiscal operations of the Government. They are designed to relieve the national banks from the demands of long-time agricultural credits. The operations of the banks

have an influence upon public credit scarcely less important to the fiscal operations of the Government than that which led to the creation of the United States banks and the national banks.

The general purposes of the Farm Loan Act might have been attained by Congress through the direct exercise of the powers of taxation and borrowing.

Having the power to raise money for the purposes under consideration by taxation or borrowing, and to apply it directly, through the Treasury, or other department, Congress may accomplish the same ends through corporate instrumentalities adapted to or created for the purpose.

Since *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, the power of Congress to create corporations to execute its powers is unquestionable.

Private stockholding in Farm Loan Banks does not make the enterprise a private one.

Congress is sole judge of the powers it shall confer on a corporation lawfully created by it.

The banks of the Farm Loan System were created for public purposes.

Having created land banks for these lawful purposes, Congress also has power to adapt them to other legitimate federal purposes.

The provisions exempting from taxation, state or federal, the mortgages executed to secure loans made by Federal Land Banks or Joint Stock Land Banks, and Farm Loan Bonds issued by either class of banks, under the provisions of the Farm Loan Act, and the income derived therefrom, are within the powers of Congress to enact.

Congress might constitutionally have created both classes of banks to serve as depositaries of public moneys and financial agents of the Government. That it chose also to empower them to loan moneys on farm mort-

gages, even if that were not within its power to grant as a sole and distinct object, would not impair the legality of the incorporation, nor the power of Congress to protect them against national and state taxation.

The Farm Loan Act was passed after great consideration and discussion. Vast amounts have been invested in reliance upon it. Entire absence of constitutional power must be demonstrated beyond controversy before this court will declare worthless millions of securities issued on the faith of congressional authority.

Mr. Justin D. Bowersock filed a brief on behalf of Kansas City Title & Trust Company, appellee.

The Solicitor General, Mr. W. G. McAdoo, Special Assistant to the Attorney General, and *Mr. J. P. Cotton,* by leave of court, filed a brief on behalf of the United States as *amici curiæ.*[1]

Mr. Justice Day delivered the opinion of the court.

A bill was filed in the United States District Court for the Western Division of the Western District of Missouri by a shareholder in the Kansas City Title & Trust Company to enjoin the Company, its officers, agents and employees from investing the funds of the Company in farm loan bonds issued by Federal Land Banks or Joint Stock Land Banks under authority of the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, as amended January 18, 1918, c. 9, 40 Stat. 431.

The relief was sought on the ground that these acts were beyond the constitutional power of Congress. The bill avers that the Board of Directors of the Company are

[1] At the first hearing *Mr. Solicitor General King* and *Mr. W. G. McAdoo,* by leave of court, filed a brief on behalf of the United States as *amici curiæ.*

about to invest its funds in the bonds to the amount of $10,000 in each of the classes described, and will do so unless enjoined by the court in this action. The bill avers the formation of twelve Federal Land Banks, and twenty-one Joint Stock Land Banks under the provisions of the act.

As to the Federal Land Banks, it is averred that each of them has loaned upon farm lands large amounts secured by mortgage, and, after depositing the same with the Farm Loan Registrar, has executed and issued collateral trust obligations called Farm Loan Bonds, secured by the depositing of an equivalent amount of farm mortgages and notes; and that each of said Federal Land Banks has sold, and is continuing to offer for sale, large amounts of said Farm Loan Bonds. The bill also avers that various persons in different parts of the United States have organized twenty-one Joint Stock Land Banks, the capital stock of which is subscribed for and owned by private persons; that the Joint Stock Land Banks have deposited notes and mortgages with the Farm Loan Registrar, and issued an equivalent amount of collateral trust obligations called Farm Loan Bonds, which have been sold and will be continued to be offered for sale to investors in large amounts in the markets of the country. A statement is given of the amount of deposits by the Secretary of the Treasury with the Federal Land Banks, for which the banks have issued their certificates of indebtedness bearing interest at 2% per annum. It is averred that on September 30, 1919, Federal Land Banks owned United States bonds of the par value of $4,230,805; and the Joint Stock Land Banks owned like bonds of the par value of $3,287,503 on August 31, 1919; that pursuant to the provisions of the act the Secretary of the Treasury has invested $8,892,130 of the public funds in the capital stock of the Federal Land Banks, and that on July 1, 1919, the Secretary of the Treasury on behalf of the United States held $8,265,809 of the capital stock of the Federal Land Banks;

that pursuant to the provisions of § 32 of the act, as amended, the Secretary of the Treasury has purchased Farm Loan Bonds issued by the Federal Land Banks of the par value of $149,775,000; that up to September 30, 1919, bonds have been issued under the act by the Federal Land Banks to the amount of $285,600,000, of which about $135,000,000 are held in the Treasury of the United States, purchased under the authority of the amendment of January 18, 1918; that up to September 30, 1919, twenty-seven Joint Stock Land Banks have been incorporated under the act, having an aggregate capital of $8,000,000, all of which has been subscribed and $7,450,000 paid in; that bonds have been issued by Joint Stock Land Banks to the amount of $41,000,000, which are now in the hands of the public; that the Secretary of the Treasury up to the time of the filing of the bill has not designated any of the Federal Land Banks nor the Joint Stock Land Banks as depositaries of public money, nor, except as stated later in the bill, has he employed them or any of them as financial agents of the Government, nor have they or any of them performed any duties as depositaries of public money, nor have they or any of them accepted any deposits or engaged in any banking business. The bill avers that during the summer of 1918 the Federal Land Banks at Wichita, St. Paul and Spokane were designated as financial agents of the Government for making seed grain loans to farmers in drought-stricken sections, the President having at the request of the Secretary of Agriculture set aside $5,000,000 for that purpose out of the $100,000,000 war funds. The three banks mentioned made upwards of 15,000 loans of that character, aggregating a sum upwards of $4,500,000, and are now engaged in collecting these loans, all of which are secured by crop liens; that these banks act in that capacity without compensation, receiving only the actual expenses incurred.

Section 27 of the act provides that Farm Loan Bonds

issued under the provisions of the act by Federal Land Banks or Joint Stock Land Banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits. The bill avers that the defendant Trust Company is authorized to buy, invest in and sell government, state and municipal and other bonds, but it cannot buy, invest in or sell any such bonds, papers, stocks or securities which are not authorized to be issued by a valid law or which are not investment securities, but that nevertheless it is about to invest in Farm Loan Bonds; that the Trust Company has been induced to direct its officers to make the investment by reason of its reliance upon the provisions of the Farm Loan Acts, especially §§ 21, 26 and 27, by which the Farm Loan Bonds are declared to be instrumentalities of the Government of the United States, and as such with the income derived therefrom, are declared to be exempt from federal, state, municipal and local taxation, and are further declared to be lawful investments for all fiduciary and trust funds. The bill further avers that the acts by which it is attempted to authorize the bonds are wholly illegal, void and unconstitutional and of no effect because unauthorized by the Constitution of the United States.

The bill prays that the acts of Congress authorizing the creation of the banks, especially §§ 21, 26 and 27 thereof, shall be adjudged and decreed to be unconstitutional, void and of no effect, and that the issuance of the Farm Loan Bonds, and the taxation exemption feature thereof, shall be adjudged and decreed to be invalid.

The First Joint Stock Land Bank of Chicago and the Federal Land Bank of Wichita, Kansas, were allowed to intervene and became parties defendant to the suit. The Kansas City Title & Trust Company filed a motion to dismiss in the nature of a general demurrer, and upon hearing the District Court entered a decree dismissing the bill. From this decree appeal was taken to this court.

No objection is made to the federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The Company is authorized to invest its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress undertaking to organize the banks and authorize the issue of the bonds. No other reason is set forth in the bill as a ground of objection to the proposed investment by the Board of Directors acting in the Company's behalf. As diversity of citizenship is lacking, the jurisdiction of the District Court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States. Judicial Code, § 24.

The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

At an early date, considering the grant of constitutional power to confer jurisdiction upon the federal courts, Chief Justice Marshall said: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either," *Cohens* v. *Virginia*, 6 Wheat. 264, 379; and again, when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822. These definitions were quoted and approved in *Patton* v. *Brady*, 184 U. S. 608, 611, citing *Gold-Washing Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257; *White* v. *Greenhow*, 114 U. S. 307; *Railroad Company* v. *Mississippi*, 102 U. S. 135, 139.

This characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other federal courts. See *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501 506, 507; *Shulthis* v. *McDougal*, 225 U. S. 561, 569, paragraph 3. The principle was applied in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, in which a shareholder filed a bill to enjoin the defendant corporation from complying with the income tax provisions of the Tariff Act of October 3, 1913. In that case while there was diversity of citizenship, a direct appeal to this court was sustained because of the constitutional questions raised in the bill, which had been dismissed by the court below. The repugnancy of the statute to the Constitution of the United States, as well as grounds of equitable jurisdiction, were set forth in the bill, and the right to come here on direct appeal was sustained because of the averments based upon constitutional objections to the act. Reference was made to *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, where a similar shareholder's right to sue was maintained, and a direct appeal to this court from a decree of the Circuit Court was held to be authorized.

In the *Brushaber Case* the Chief Justice, speaking for the court, said:

"The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong and multiplicity of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these averments and

the ruling in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of § 3224, Rev. Stat., against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes referred to is without merit. . . .

"Aside from averments as to citizenship and residence, recitals as to the provisions of the statute and statements as to the business of the corporation contained in the first ten paragraphs of the bill advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that in a wide sense they all charge a repugnancy of the statute to the Sixteenth Amendment under the more immediate sanction of which the statute was adopted."

The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by mis-

application of the funds of the corporation, give jurisdiction under the principles settled in *Pollock* v. *Farmers' Loan & Trust Co.*, and *Brushaber* v. *Union Pacific R. R. Co.*, *supra*. We are, therefore, of the opinion that the District Court had jurisdiction under the averments of the bill, and that a direct appeal to this court upon constitutional grounds is authorized.

We come to examine the questions presented by the attack upon the constitutionality of the legislation in question. The Federal Farm Loan Act is too lengthy to set out in full. It is entitled: "An Act To provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes."

The administration of the act is placed under the direction and control of a Federal Farm Loan Bureau established at the seat of Government in the Treasury Department, under the general supervision of the Federal Farm Loan Board, consisting of the Secretary of the Treasury and four members appointed by the President by and with the advice and consent of the Senate. The United States is divided into twelve districts for the purpose of establishing Federal Land Banks. Each of the banks must have a subscribed capital of not less than $750,000, divided into shares of $5.00 each, which may be subscribed for by any individual, firm or corporation, or by the government of any State, or of the United States. No dividends shall be paid on the stock owned by the United States, but all other stock shall share in dividend distributions without preference. The Federal Farm Loan Board is to designate five directors who shall temporarily manage the affairs of each Federal Land Bank, and who shall prepare an organization certificate which, when approved by the Federal Farm Loan Board and filed with the Farm Loan Commissioner,

shall operate to create the bank a body corporate. The Federal Farm Loan Board is required to open books of subscription for the capital stock of each Federal Land Bank, and, if within thirty days thereafter any part of the minimum capitalization of $750,000 of any such bank shall remain unsubscribed, it is made the duty of the Secretary of the Treasury to subscribe the balance on behalf of the United States.

The amendment of January 18, 1918, authorizes the Secretary of the Treasury to purchase bonds issued by Federal Land Banks, and provides that the temporary organization of any such bank shall be continued so long as any Farm Loan Bonds shall be held by the Treasury, and until the subscription to stock in such bank by National Farm Loan Associations shall equal the amount of the stock held by the United States Government. When these conditions are complied with a permanent organization is to take over the management of the bank consisting of a Board of Directors composed of nine members, three of whom shall be known as district directors and shall be appointed by the Farm Loan Board, who shall represent the public interest, six of whom to be known as local directors, shall be chosen by, and be representative of National Farm Loan Associations.

Federal Land Banks are empowered to invest their funds in the purchase of qualified first mortgages on farm lands situated within the Federal Land Bank District within which they are organized or acting. Loans on farm mortgages are to be made to coöperative borrowers through the organization of corporations known as National Farm Loan Associations, by persons desiring to borrow money on farm mortgage security under the terms of the act. Ten or more natural persons who are the owners of or are about to become the owners of farm land qualified as security for mortgage loans, and who desire to borrow money on farm mortgage security, may unite to form a National Farm

Loan Association. The manner of forming these associations, and the qualifications for membership, are set out in the act.

A loan desired by each such person must be for not more than $10,000 nor less than $100, and the aggregate of the desired loans not less than $20,000. The application for loan must be accompanied by subscriptions to stock of a Federal Land Bank equal to 5% of the aggregate sum desired on the mortgage loan. Provision is made for appraisal of the land, and report to the Federal Farm Loan Board. No persons but borrowers on farm loan mortgages shall be members or shareholders of National Farm Loan Associations.

Shareholders in Farm Loan Associations are made individually responsible for the debts of the Association to the extent of the amount of the stock owned by them respectively, in addition to the amount paid in and represented by their shares.

When any National Farm Loan Association shall desire to secure for any member a loan on first mortgage from the Federal Land Bank in its district, it must subscribe to the capital stock of the Federal Land Bank to an amount of 5% of such loan, which capital stock shall be held by the Federal Land Bank as collateral security for the payment of the loan, the Association shall be paid any dividends accruing and payable on the capital stock while it is outstanding. Such stock may, in the discretion of the directors and with the approval of the Federal Farm Loan Board, be paid off at par and retired, and shall be so retired upon the full payment of the mortgage loan. In such event, the National Farm Loan Association must pay off at par and retire the corresponding shares of its stock which were issued when the Land Bank stock so retired was issued; but it is further provided that the capital stock of the Land Bank shall not be reduced to less than 5% of the principal of the outstanding Farm

Loan Bonds issued by it. The shares in National Farm Loan Associations shall be of the par value of $5.00 each.

At least 25% of that part of the capital of any Federal Land Bank for which stock is outstanding in the name of National Farm Loan Associations must be held in quick assets. Not less than 5% of such capital must be invested in United States Government Bonds.

The loans which Federal Land Banks may make upon first mortgages on farm lands are provided for in § 12 of the act. By § 13 these banks are empowered, subject to the provisions of the act, to issue and sell Farm Loan Bonds of the kind described in the act, and to invest funds in their possession in qualified first mortgages on farm lands, to receive and to deposit in trust with the Farm Loan Registrar, to be held by him as collateral security for Farm Loan Bonds, first mortgages upon farm lands, and, with the approval of the Farm Loan Board, to issue and to sell their bonds secured by the deposit of first mortgages on qualified farm lands as collateral, in conformity with the provisions of § 18 of the act. By the amendment of January 18, 1918, the Secretary of the Treasury was empowered during the years 1918 and 1919, to purchase Farm Loan Bonds issued by Federal Land Banks to an amount not exceeding $100,000,000 each year, and any Federal Land Bank was authorized at any time to repurchase at par and accrued interest, for the purpose of redemption or resale, any of the bonds so purchased from it and held in the United States Treasury.

It is also provided that the bonds of any Federal Land Bank so purchased and held in the Treasury one year after the termination of the pending war shall, upon thirty days' notice from the Secretary of the Treasury, be redeemed and repurchased by such bank at par and accrued interest. By § 15 it is provided that whenever, after the act shall have been in effect for one year, it shall appear to the Federal Farm Loan Board that National Farm Loan

Associations have not been formed and are not likely to be formed, in any locality, because of peculiar local conditions, the Board may in its discretion authorize Federal Land Banks to make loans on farm lands through agents approved by the Board, on the terms and conditions and subject to the restrictions prescribed in that section.

The act also authorizes the incorporation of Joint Stock Land Banks, with capital provided by private subscription. They are organized by not less than ten natural persons, and are subject to the requirements of the provisions of § 4 of the act so far as applicable. The board of directors shall consist of not less than five members. Each shareholder shall have the same voting privileges as the holders of shares in National Banking Associations, and shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. The Joint Stock Land Bank is authorized to do business when capital stock to the amount of $250,000 has been subscribed, and one-half paid in cash, the balance remaining subject to call by the board of directors, the charter to be issued by the Federal Farm Loan Board. No bonds shall be issued until the capital stock is entirely paid up. Except as otherwise provided, Joint Stock Land Banks shall have the powers of and be subject to all the restrictions and conditions imposed on Federal Land Banks by the act, so far as such conditions or restrictions are applicable.

Federal Land Banks may issue Farm Loan Bonds up to twenty times their capital and surplus. Joint Stock Land Banks are limited to the issue of Farm Loan Bonds not in excess of fifteen times the amount of their capital and surplus. Joint Stock Land Banks can only loan on first mortgages upon land in the State where located, or in a State

contiguous thereto. No loan on mortgage may be made by any bank at a rate exceeding 6% per annum exclusive of amortization payments. Joint Stock Land Banks shall in no case charge a rate of interest on farm loans which shall exceed by more than 1% the rate established by the last series of Farm Loan Bonds issued by them, which rate shall not exceed 5% per annum.

Provisions for the issue of Farm Loan Bonds secured by first mortgages on farm lands or United States bonds, as collateral, are made for Federal Land Banks and Joint Stock Land Banks; in each case the issue is made subject to the approval of the Federal Farm Loan Board. The farm loan mortgages, or United States bonds, which constitute the collateral security for the bonds, must be deposited with the Farm Loan Registrar.

Section 26 of the act provides as follows: "That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

"Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two

hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

"Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Since the decision of the great cases of *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *Bank*, 9 Wheat. 738, it is no longer an open question that Congress may establish banks for national purposes, only a small part of the capital of which is held by the Government, and a majority of the ownership in which is represented by shares of capital stock privately owned and held; the principal business of such banks being private banking conducted with the usual methods of such business. While the express power to create a bank or incorporate one is not found in the Constitution, the court, speaking by Chief Justice Marshall, in *McCulloch* v. *Maryland*, found authority so to do in the broad general powers conferred by the Constitution upon the Congress to levy and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and conduct war, to raise and support armies, and to provide and maintain a navy, etc. Congress it was held had authority to use such means as were deemed appropriate to exercise the great powers of the Government by virtue of Article I, § 8, cl. 18, of the Constitution granting to Congress the right to make all laws necessary and proper to make the grant effectual. In *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 419, the Chief Justice, speaking for the court, after reviewing *McCulloch* v. *Maryland*, and *Osborn* v. *Bank*, and considering the power given to Congress to pass laws to make the specific powers granted effectual, said:

"In terms it was pointed out that this broad authority

was not stereotyped as of any particular time but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for."

That the formation of the bank was required in the judgment of the Congress for the fiscal operations of the Government, was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose being an appropriate measure in the judgment of the Congress, it was held not to be within the authority of the court to question the conclusion reached by the legislative branch of the Government.

Upon the authority of *McCulloch* v. *Maryland*, and *Osborn* v. *Bank*, the national banking system was established, and upon them this court has rested the constitutionality of the legislation establishing such banks. *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 33, 34.

Congress has seen fit in § 6 of the act to make both classes of banks, when designated for that purpose by the Secretary of the Treasury, depositaries of public money, except receipts from customs, under regulations to be prescribed by the Secretary of the Treasury, and has authorized their employment as financial agents of the Government, and the banks are required to perform such reasonable duties, as depositaries of public moneys and financial agents as may be required of them. The Secretary of the Treasury shall require of the Federal Land Banks and the Joint Stock Land Banks, thus designated, satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and

for the faithful performance of their duties as the financial agents of the Government.

Section 6 also provides that no government funds deposited under the provisions of the section shall be invested in mortgage loans or Farm Loan Bonds.

It is said that the power to designate these banks as such depositaries has not been exercised by the Government, and that the Federal Land Banks have acted as federal agents only in the case of loans of money for seed purposes made in the summer of 1918, to which we have already referred. But the existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it. Congress declared it necessary to create these fiscal agencies, and to make them authorized depositaries of public money. Its power to do so is no longer open to question.

But, it is urged, the attempt to create these federal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.

That Congress has seen fit, in making these banks fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in nowise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so. A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending and caring for money. But whether

technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. Furthermore, these institutions are organized to serve as a market for United States bonds. Not less than 5% of the capital of the Federal Land Banks, for which stock is outstanding to Farm Loan Associations, is required to be invested in United States bonds. Both kinds of banks are empowered to buy and sell United States bonds.

In *First National Bank* v. *Union Trust Co., supra,* this court sustained the power of Congress to enable a national bank to transact business, which, by itself considered, might be beyond the power of Congress to authorize. In that case it was held to be within the authority of Congress to permit national banks to exercise, by permission of the Federal Reserve Board, when not in contravention of local law, the office of trustee, executor, administrator or registrar of stocks or bonds.

We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions.

In the brief filed upon reargument counsel for the appellant seem to admit the power of Congress to appropriate money for the direct purposes named, and in that brief they say: "Tax exemption is the real issue sought to be settled here." Deciding, as we do, that these institu-

tions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows. This principle was settled in *McCulloch* v. *Maryland,* and *Osborn* v. *Bank, supra.*

That the Federal Government can, if it sees fit to do so, exempt such securities from taxation, seems obvious upon the clearest principles. But, it is said to be an invasion of state authority to extend the tax exemption so as to restrain the power of the State. Of a similar contention made in *McCulloch* v. *Maryland,* Chief Justice Marshall uttered his often quoted statement: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." 4 Wheat. 431.

The same principle has been recognized in the National Bank Cases declaring the power of the States to tax the property and franchises of national banks only to the extent authorized by the laws of Congress. *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, involved the validity of a franchise tax in Kentucky on national banks. In that case this court declared (pp. 668, 669) that the States were wholly without power to levy any tax directly or indirectly upon national banks, their property, assets or franchises, except so far as the permissive legislation of Congress allowed such taxation; and the court declared that the right granted to tax the real estate of such banks, and the shares in the names of the shareholders, constituted the extent of the permission given by Congress, and any tax beyond these was declared to be void.

In *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, this court held that a State may not tax bonds issued by the municipality of a territory; that to tax such bonds as property in the hands of the holder is, in the last analysis, an imposition upon the right of a municipality to issue them.

The exercise of such taxing power by the States might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the States can tax these bonds they may destroy the means provided for obtaining the necessary funds for the future operation of the banks. With the wisdom and policy of this legislation we have nothing to do. Ours is only the function of ascertaining whether Congress in the creation of the banks, and in exempting these securities from taxation, federal and state, has acted within the limits of its constitutional authority. For the reasons stated, we think the contention of the Government, and of the appellees, that these banks are constitutionally organized and the securities here involved legally exempted from taxation, must be sustained.

It follows that the decree of the District Court is

Affirmed.

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

MR. JUSTICE HOLMES, dissenting.

No doubt it is desirable that the question raised in this case should be set at rest, but that can be done by the Courts of the United States only within the limits of the jurisdiction conferred upon them by the Constitution and the laws of the United States. As this suit was brought by a citizen of Missouri against a Missouri corporation the

single ground upon which the jurisdiction of the District Court can be maintained is that the suit "arises under the Constitution or laws of the United States" within the meaning of § 24 of the Judicial Code. I am of opinion that this case does not arise in that way and therefore that the bill should have been dismissed.

It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.

But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819–823, which perhaps is all that is meant by the less guarded expressions in *Cohens* v. *Virginia*, 6 Wheat. 264, 379. I am content to assume this to be so, although the *Osborn Case*

has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this Court again and again. *Miller* v. *Swann*, 150 U. S. 132, 136, 137; *Louisville & Nashville R. R. Co* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303. See also *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 508, 509.

I find nothing contrary to my views in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 10. It seems to me plain that the objection that I am considering was not before the mind of the Court or the subject of any of its observations, if open. I am confirmed in my view of that case by the fact that in the next volume of reports is a decision, reached not without discussion and with but a single dissent, that "a suit arises under the law that creates the cause of action." That was the *ratio decidendi* of *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260. I know of no decisions to the contrary and see no reason for overruling it now.

MR. JUSTICE MCREYNOLDS concurs in this dissent. In view of our opinion that this Court has no jurisdiction we express no judgment on the merits.

THE PESARO.[1]

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

No. 317. Argued January 26, 27, 1921.—Decided February 28, 1921.

1. A decree in admiralty releasing a vessel finally from arrest, in a suit *in rem*, upon the ground of her immunity to the process of the court, but not in terms dismissing the libel, is final. P. 217.
2. Whether from the jurisdiction over "all civil cases of admiralty and maritime jurisdiction," Jud. Code, § 24, cl. 3, there is an implied exception of trading vessels owned and possessed by foreign powers, is a jurisdictional question, in the sense of Jud. Code, § 238, governing appeals to this court from the District Courts. P. 218.
3. A suggestion that a vessel, arrested in admiralty, is owned and possessed by a foreign country and is, therefore, beyond the jurisdiction of the District Court, cannot be entertained if made by the ambassador of that country directly and not through the official channels of our government. *Id. Ex parte Muir*, 254 U. S. 522.

Reversed.

THIS was a direct appeal to review a decree of the District Court dismissing a libel *in rem* for want of jurisdiction over the ship. The case is stated in the opinion.

Mr. Oscar R. Houston and *Mr. Harold V. Amberg*, with whom *Mr. D. Roger Englar* was on the brief, for appellants.

Mr. John M. Woolsey for appellee.

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

The *Pesaro* an Italian steamship which carried a shipment of olive oil from Genoa to New York, was sued *in rem*

[1] The docket title of this case is: *Luzzato et al., copartners trading under the firm name of Giovanni Luzzato & Son*, v. *The Steamship "Pesaro," etc.*

in admiralty in the District Court to enforce a claim for damage to that part of her cargo, the libel alleging that she was a "general ship engaged in the common carriage of merchandise by water, for hire." The usual process issued and the ship was arrested. Afterwards, upon a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession, and therefore was not subject to the court's process, the court vacated the arrest. The libelants objected that a direct suggestion by the Ambassador was not admissible and that, to be entertained, the suggestion should come through official channels of the United States; but the objection was overruled. The libelants then requested permission to traverse the suggestion and to make a showing in opposition; but the request was denied, the court holding that to controvert or question the suggestion was not allowable. The libelants appealed directly to this court and in that connection the District Court certified the ground of its decisions as follows:

"I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a Court of Admiralty, has no jurisdiction to subject to its process a steamship, which is by the suggestion of the said Italian Ambassador filed in this Court represented to be the public property and in the possession of the Kingdom of Italy."

Our authority to entertain the appeal is challenged upon two grounds. One is that the decree is not final, because it does not dismiss the libel. That it does not formally do so is true, but this is not decisive. The suit is *in rem*—is against the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as if it formally dismissed the libel.

Obviously, therefore, it is final. That it was intended to be so is shown by the court's certificate.

The other ground is that the question raised and decided was not a jurisdictional one in the sense of the statute, Jud. Code, § 238, providing for an appeal or writ of error from a District Court directly to this court "in any case in which the jurisdiction of the court is in issue." But we think it was such a question, because it directly concerned the power of the District Court, as defined by the laws of the United States, to entertain and determine the suit. *The Steamship Jefferson*, 215 U. S. 130, 137–138; *The Ira M. Hedges*, 218 U. S. 264, 270; *United States* v. *Congress Construction Co.*, 222 U. S. 199. By the Judicial Code, § 24, cl. 3, the District Courts are invested with original jurisdiction of "all civil causes of admiralty and maritime jurisdiction"; and this is a suit of that character. Whether Congress intended this statute should include suits against ships such as the *Pesaro* is represented to be in the Ambassador's suggestion, when they are within the waters of the United States, is as yet an open question. The statute contains no express exception of them; but it may be that they are impliedly excepted. *The Exchange*, 7 Cranch, 116, 136, 146. If so, the implication is a part of the statute. *United States* v. *Babbit*, 1 Black, 55, 61; *South Carolina* v. *United States*, 199 U. S. 437, 451. Thus, the answer to the question propounded to the District Court involved a construction of the statute defining its jurisdiction in admiralty.

We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the

Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a "suggestion" and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *Ex parte Muir*, 254 U. S. 522. And see *United States* v. *Lee*, 106 U. S. 196, 209. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must.

Decree reversed.

THE CARLO POMA.[1]

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

No. 167. Argued January 26, 27, 1921.—Decided February 28, 1921.

An appeal does not lie to the Circuit Court of Appeals from a final decree of the District Court releasing a vessel upon the ground that its ownership and possession by a foreign power place it beyond the

[1] The docket title of this case is: *Cavallaro* v. *Steamship "Carlo Poma," Her Engines, etc.; Kingdom of Italy, Claimant.*

jurisdiction in admiralty. Jud. Code, §§ 128, 238. *The Pesaro*, *ante*, 216.

259 Fed. Rep. 369; decree vacated with direction to dismiss appeal from District Court.

THIS was certiorari to review a decree of the Circuit Court of Appeals affirming a decree of the District Court, in admiralty, which dismissed a libel *in rem*. The case is stated in the opinion.

Mr. Oscar R. Houston and *Mr. Harold V. Amberg*, with whom *Mr. D. Roger Englar* was on the brief, for petitioner.

Mr. Van Vechten Veeder for respondent.

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

This case is much like that of *The Pesaro*, *ante*, 216. The only difference requiring notice is that the appeal in that case was to this court while in this it was to the Circuit Court of Appeals, which rendered a decree of affirmance. 259 Fed. Rep. 369. A writ of certiorari brings that decree here for review. 250 U. S. 656.

The question raised and decided in the District Court was whether, sitting as a court of admiralty, it could entertain a suit *in rem* against a ship such as the *Carlo Poma* was represented to be in the suggestion of the Italian Ambassador. That was a jurisdictional question in the sense of § 238 of the Judicial Code. *The Pesaro*, *supra*. The court resolved it in the negative and accordingly released the ship from arrest, thereby disposing of the suit adversely to the libelant.

From that decree an appeal did not lie to the Circuit Court of Appeals, but only to this court. Such is the effect of the statute, Jud. Code, §§ 128, 238, defining and regulating the appellate jurisdiction of this court and of the Circuit Court of Appeals, as is pointed out in *United*

States v. *Jahn,* 155 U. S. 109, 114. In that case, after an extended review of the statute, it was said: "If the jurisdiction of the Circuit Court [now District Court] is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court."

As therefore the decree in the District Court was not open to review by the Circuit Court of Appeals, we must vacate the latter's decision and remand the case to it with a direction to dismiss the appeal. See *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73–74; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318.

Decree of Circuit Court of Appeals vacated with direction to dismiss appeal from District Court.

BODKIN *v.* EDWARDS.

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

No. 495. Motion to dismiss or affirm submitted December 6, 1920.—Decided February 28, 1921.

1. The court accepts the concurrent findings of the District Court and Circuit Court of Appeals upon the facts in an equity case, unless clear error is shown. P. 223.
2. Where the facts determine the decision, and where the record exhibits no clear error in the concurrent findings and the appellant has not brought up all the evidence, a decree may be affirmed on motion to avoid the harmful and useless delay of retaining the case for oral argument. *Id.*

265 Fed. Rep. 621, affirmed.

APPEAL from a decree of the Circuit Court of Appeals

which affirmed a decree of the District Court holding Bodkin trustee for Edwards as to certain patented land. The case is stated in the opinion.

Mr. Samuel Herrick, for appellee, in support of the motion. *Mr. Henry M. Willis* was also on the brief.

No brief filed for appellant.

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

This is a suit by Edwards to have Bodkin declared a trustee for him of the title to a quarter section of land in California. While the land was public and subject to entry under the homestead law, Edwards, a qualified applicant, made a homestead entry of it and afterwards submitted final proofs in due course. Bodkin instituted a contest against the entry and obtained its cancellation by the land department. The land officers then permitted Bodkin to make a homestead entry of the tract, afterwards allowed him to relinquish that entry and make others of the same tract under soldiers' additional rights of which he was the assignee, and finally patented the tract to him. During all these proceedings Edwards actively asserted the validity of his claim and sought to interpose it as an obstacle to passing the title to Bodkin. This suit was brought shortly after the patents issued. Apparently Edwards himself drafted the bill. The District Court dismissed it without leave to amend and he appealed. The Circuit Court of Appeals, while recognizing that the bill was somewhat inartificial, held that it contained allegations which, if true, disclosed a right to the relief sought. The decree of dismissal was accordingly reversed. 249 Fed. Rep. 562. When the case got back to the District Court the form of the bill was helped by amendments, but the substance remained substantially

as before. Bodkin answered and the issues were tried. The court found that the material allegations of the bill were true; that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards. A decree for the latter followed and Bodkin appealed. The Circuit Court of Appeals affirmed this decree, and in the course of its opinion said: "A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated." 265 Fed. Rep. 621. Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under § 128 of the Judicial Code.

The appellee, Edwards, now moves that the appeal be dismissed, or in the alternative that the decree be affirmed, under Rule 6, 222 U. S., Appendix, p. 10. The appellant, Bodkin, although served with the motion and supporting brief, has not presented any brief in opposition.

The motion to dismiss must be denied and the one to affirm sustained. The case as presented here turns essentially on questions of fact. Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. *Page* v. *Rogers*, 211 U. S. 575, 577; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 402; *National Bank of Athens* v. *Shackelford*, 239 U. S. 81. No such error is shown by the record before us. Besides, it does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose.

Decree affirmed.

BAENDER *v.* BARNETT, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA.

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

No. 614. Argued January 11, 1921.—Decided February 28, 1921.

1. Criminal Code, § 169, declaring that whoever, without lawful authority, shall have in possession any die in the likeness or similitude of a die designated for making genuine coin of the United States shall be punished, is not intended to make criminal a possession which is not conscious and willing. P. 225.
2. A statute defining a crime in general terms should be so construed as to avoid manifest injustice and possible unconstitutionality. *Id.*
3. In appropriate, if not necessary, support of the power to coin and regulate the value of money (Const. Art. I, § 8, cl. 5), Congress has power to penalize the conscious and willing possession of dies, as in Crim. Code, § 169. P. 226.
4. The clause relating to the punishment of counterfeiting securities and coin (Const. Art. I, § 8, cl. 6), is not a limitation upon the power to protect the coinage. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Levi Cooke, with whom *Mr. Albert E. Carter* was on the briefs, for appellant.

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

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

This is an appeal from an order denying a petition for a writ of *habeas corpus*. The petitioner was indicted under

§ 169 of the Criminal Code, which declares that "whoever, without lawful authority, shall have in his possession" any die in the likeness or similitude of a die designated for making genuine coin of the United States shall be punished, etc. The indictment charged that he "wilfully, knowingly" and without lawful authority had in his possession certain dies of that description. He entered a plea of guilty and was sentenced to pay a fine and suffer a year's imprisonment. He made an explanatory statement to the effect that the dies were in some junk he had purchased and that he did not know at the time of their presence nor of their coming into his possession; but, so far as appears, the statement was made without his being under oath and with the purpose only of inviting a lenient sentence.

Originally the statute contained the qualifying words "with intent to fraudulently or unlawfully use the same," c. 127, § 1, 26 Stat. 742, but they were eliminated when it was incorporated into the Criminal Code, c. 321, § 169, 35 Stat. 1088, 1120.

The petitioner makes two contentions. One is that the statute is repugnant to the due process of law clause of the Fifth Amendment in that it makes criminal a having in possession which is neither willing nor conscious. The District Court in denying the petition held otherwise, saying that the statute rightly construed means "a willing and conscious possession;" and the court added: "Such is the possession intended by the indictment, and such is the possession, the petitioner having pleaded guilty to the indictment, that he must be held to have had. Otherwise he was not guilty. He might have pleaded not guilty, and upon trial shown that he did not know the dies were in his possession."

We think the court was right. The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general,

they are to be taken in a reasonable sense and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts. A citation of three will illustrate our view. In *Margate Pier Co.* v. *Hannam*, 3 B. & Ald. 266, 270, Abbott, C. J., quoting from Lord Coke, said: "Acts of parliament . . . are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged." In *United States* v. *Kirby*, 7 Wall. 482, 486, this court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'" And in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, we said: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The other contention is that the clause in the Constitution empowering Congress "to provide for the punishment of counterfeiting the securities and current coin of

the United States," Art. I, § 8, cl. 6, is a limitation as well as a grant of power, that the act which the statute denounces is not counterfeiting, and therefore that Congress cannot provide for its punishment. The contention must be rejected. It rests on a misconception not only of that clause but also of the clause investing Congress with power "to coin money" and "regulate the value thereof," Art. I, § 8, cl. 5. Both have been considered by this court, and the purport of the decisions is (1) that Congress not only may coin money in the literal sense, but also may adopt appropriate measures, including the imposition of criminal penalties, to maintain the coin in its purity and to safeguard the public against spurious, simulated and debased coin; and (2) that the power of Congress in that regard is in no wise limited by the clause relating to the punishment of counterfeiting. *United States* v. *Marigold*, 9 How. 560, 567–568; *Legal Tender Cases*, 12 Wall. 457, 535–536, 544–545. It hardly needs statement that in the exertion of this power the conscious and willing possession, without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States may be made a criminal offense. If this be not a necessary it is at least an appropriate step in effectively suppressing and preventing the making and use of illegitimate coin.

Final order affirmed.

PAYNE, SECRETARY OF THE INTERIOR, ET AL. *v.* CENTRAL PACIFIC RAILWAY COMPANY

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

No. 17. Argued October 6, 1920.—Decided February 28, 1921.

1. A selection duly made and perfected by the proper railroad company, under the California-Oregon Railroad Company land grant act (July 25, 1866, c. 242, 14 Stat. 239), of indemnity lands open at the time to such selection, and in lieu of place land actually lost, is not to be likened to the initial step toward acquiring title under a public land law by future compliance, but rather to the concluding step by which, after full compliance, the right to the title is earned. P. 234.
2. The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place; the only difference is in the mode of identification, lands in place being identified by filing the map of definite location, indemnity lands by selections made in lieu of losses in the place limits. P. 236.
3. In providing that such selections shall be made under the direction of the Secretary of the Interior, the act merely subjects them to the general rule that the administrative execution of all public land laws is to be under his supervision and direction, but clothes him with no discretion to enlarge or curtail the rights of the grantee or to substitute his judgment for the will of Congress manifested in the act. P. 236.
4. The Act of June 25, 1910, c. 421, 36 Stat. 847, applies to "public lands," and does not authorize the withdrawal as a power site of lands duly selected under the California-Oregon Grant, *supra*. P. 237.
5. A suit by a railroad company against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from canceling such an indemnity selection, *held* not a suit against the United States. P. 238.
6. The decree should require the defendants to dispose of the selection on its merits without reference to the power site withdrawal, rather than forbid cancelation of the selection. P. 238.

46 App. D. C. 374, affirmed, with a modification.

THE case is stated in the opinion.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for appellants:

Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list. *Sioux City & St. Paul R. R. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 117 U. S. 406, 408; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 511, 512, 513; *United States* v. *Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 374, 375; *New Orleans Pacific Ry. Co.* v. *Parker*, 143 U. S. 42, 57, 58; *Osborn* v. *Froyseth*, 216 U. S. 571, 577; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392; *Humbird* v. *Avery*, 195 U. S. 480, 507.

The word "selection" is commonly used to refer to an application to select, and from that arises a misapprehension as to what is meant in many of the adjudicated cases by the expression that title under such a filing vests upon selection. In such cases the word "selection" means approved selection. As was said in *Wisconsin Central R. R. Co.* v. *Price County*, *supra*, 514, "They [selections] are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

What is the effect then of the mere filing of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter, unless such latter filing is supported by a settlement or right initiated previously to the indemnity filing. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387, 388, 391, 392.

But it is important to note that this principle pertains to the relative rights of individuals seeking to acquire title from the Government but it can not be invoked against the Government itself. This distinction differen-

tiates the instant case from *Weyerhaeuser* v. *Hoyt, supra,* and what is said in the opinion in that case as to the doctrine of relation and the scope of the inquiry of the Secretary of the Interior in passing upon the selection must be taken in connection with the question there under consideration, namely, the relative rights of conflicting claimants. It is also important to note that in the *Weyerhaeuser Case* the selection had been approved and therefore the doctrine of relation was clearly applicable. In the case at bar there has been no approval of the selection and therefore there is nothing upon which to base an application of the doctrine of relation.

That the filing of an indemnity selection does not create rights as against the United States is also shown by what is said in *Stalker* v. *Oregon Short Line R. R. Co.,* 225 U. S. 142. See also *Minneapolis, St. Paul &c. Ry. Co.* v. *Doughty,* 208 U. S. 251.

The well-established rule that a claimant to public land, who has done all that is required to perfect his claim, acquires rights against the Government, can have no application to this case; for no legal or equitable title vested as to the lands sought under the indemnity selection, because the same was never approved. It was, therefore, incumbent on the Secretary to ascertain the status of the lands at the time when the indemnity filing was taken up by him for final action.

The withdrawal of the lands in controversy and their inclusion in a power-site reserve was authorized and valid and constituted a bar to the approval of the selection list. *United States* v. *Midwest Oil Co.,* 236 U. S. 459; Act of June 25, 1910, c. 421, 36 Stat. 847. Section 2 of this act particularly enumerates the kinds of claims or filings which are exempted from withdrawals.

Had Congress intended that other exceptions should be recognized, it would have so declared. See Administrative Ruling, 43 L. D. 293.

Furthermore, as only an inchoate right was initiated by the filing of the indemnity list, the withdrawal was superior to it and barred its consummation. Such a filing is not like homestead or other claims upon which final proofs have been submitted and the claimant has done all that is required of him under the law, thus vesting him with a title equivalent in equity to that obtained by patent. It bears a closer analogy to a claim based on the preëmption law. *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77; *Shepley* v. *Cowan*, 91 U. S. 330, 338; *Russo-American Packing Co.* v. *United States*, 199 U. S. 570; *Wagstaff* v. *Collins*, 97 Fed. Rep. 3, 8; *Campbell* v. *Wade*, 132 U. S. 34, 38. The doctrine of relation was sought to be invoked in *United States* v. *Morrison*, 240 U. S. 192.

The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands. The case falls within the rulings of this court in *Louisiana* v. *Garfield*, 211 U. S. 70, and *New Mexico* v. *Lane*, 243 U. S. 52.

Mr. A. A. Hoehling and *Mr. Frank Thunen*, with whom *Mr. C. F. R. Ogilby* was on the brief, for appellee.

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

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue. 46 App. D. C. 374. An appeal under § 250, par. 6, of the Judicial Code brings the case here.

The allegations of the bill were admitted by a motion to dismiss, upon which the defendants announced their purpose to stand; and the case as thus made is as follows:

By the Act of July 25, 1866, c. 242, 14 Stat. 239, a grant of public lands in California and Oregon was made "for the purpose of aiding in the construction" of a line of railroad from a point in Sacramento Valley to Portland "and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores" over such line. The part of the grant in California was made to the California and Oregon Railroad Company, its successors and assigns, and the part in Oregon to another company. The grant was in present terms—"there be, and hereby is, granted" —and was of "every alternate section of public land, not mineral, designated by odd numbers" within designated limits on each side of the line. With this was coupled a provision that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." The line of the road was to be definitely located by filing a map with the Secretary of the Interior; and the work of construction was to be completed in sections of twenty miles within a time named, which was extended to July 1, 1880, by an amendment of June 25, 1868, c. 80, 15 Stat. 80. The completion of each section was to be ascertained and reported by commissioners appointed by the President, whereupon patents for the lands coterminous therewith were to be issued. The railroad was to be and remain "a public highway for the use of the government of the United States, free of all toll or other charges" for the transportation of

its property or troops. An assent to the act on the part of each grantee was to be filed within one year after its passage.

The California and Oregon Railroad Company duly assented to the act, definitely located its part of the line by filing the required map, and constructed, completed and equipped that part of the railroad within the extended time. The completion was duly reported by the commissioners and was recognized by the President. In addition, that company and its successors have complied with the act in all other respects. The Central Pacific Railway Company, the plaintiff, became the legal successor of that company in 1899 and holds its rights, title and interest under the grant. The part of the road in Oregon also was completed, but that is not of present concern.

In the process of adjusting the grant it has developed that many of the designated sections in the place limits were lost to the grant by reason of other disposals, homestead settlements and preëmption claims antedating the definite location of the line of the road, thereby making it necessary to resort to the indemnity limits to satisfy the grant. The present ascertained losses amount to thousands of acres and it is certain that further substantial losses will develop as the adjustment proceeds. As yet it is impossible to determine even approximately the total losses, because a material part of the grant is still unsurveyed; and this makes it uncertain whether all can be made good from the lands available for indemnity.

The lands in question were selected by means of an indemnity list filed in the local land office February 24,1910, and the selection was in lieu of losses specified in the list which were actual and entitled the plaintiff to indemnity. The lands selected are in the indemnity limits and admittedly non-mineral, and at the time of selection were such as could be selected to supply the losses specified. The list was accompanied by the requisite sustaining proofs

and conformed in all respects to the regulations embodying the directions of the Secretary of the Interior upon the subject. The plaintiff paid the fees collectible thereon and the local land officers approved the list and promptly forwarded it and the accompanying proofs to the General Land Office with the usual certificates and endorsements. It remained pending in that office until January 16, 1915, when the Commissioner ordered its cancelation solely on the ground that in the meantime the selected lands had been included in a temporary executive withdrawal for a water-power site under the Act of June 25, 1910, c. 421, 36 Stat. 847. The plaintiff appealed to the Secretary of the Interior and he affirmed the Commissioner's action. A reconsideration was sought and denied, and the plaintiff then brought this suit.

It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the Commissioner and the Secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that so long as the selection was without the Secretary's actual approval it gave no right as against the Government and that the withdrawal made while it was as yet unapproved became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say: "What is the effect then of the mere filing of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter."

Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather

to the concluding step of one who by full compliance has earned the right to receive the title. Referring to a similar grant and the relative obligations of the Government and the grantee, it was said in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679–680: "The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described." And speaking specially of the right to indemnity lands under such a grant, it was said in *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, 570: "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of

a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 731–733; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 687. The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stats., §§ 441, 453, 2478, that the administrative execution of all public land laws is to be under his "supervision" and "direction." *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Williams* v. *United States*, 138 U. S. 514, 524; *Daniels* v. *Wagner*, 237 U. S. 547, 557–561; *Northern Pacific Ry. Co.* v. *McComas*,

250 U. S. 387, 392–393. The cases cited as making for a different conclusion respecting the Secretary's discretion were examined and that view of them rejected in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387–388, and *Daniels* v. *Wagner*, 237 U. S. 547, 557–561. In the *Weyerhaeuser Case* it was held that the authority conferred on the Secretary respecting the selection of indemnity lands "involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

As before shown, this indemnity selection was made in full compliance with the directions promulgated by the Secretary, was of lands subject to selection, and was based on actual losses in the place limits adequate to sustain it. The railroad then had been constructed and equipped as required by the granting act and nothing remained to be done by the grantee or its successor to fulfil the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that "a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof." *Wirth* v. *Branson*, 98 U. S. 118, 121; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432. This rule has been applied and enforced where the Secretary through an error of law declined to approve and give effect to lawful selections and certified the lands for the use of another claimant,—the court saying that the Secretary could not thus deprive the selecting company of "rights which became vested by its selection of those lands." *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720.

The act under which the subsequent power-site withdrawal was made is confined to "public lands," a term uniformly regarded as not including lands to which rights have attached and become vested through full compliance

with an applicable land law. *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391; *United States* v. *Hemmer*, 241 U. S. 379, 385–386. Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Lytle* v. *Arkansas*, 9 How. 314, 333, 335; *Sinking-Fund Cases*, 99 U. S. 700, 718–719; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 400.

We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger* v. *Frost*, 216 U. S. 240; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620; *Lane* v. *Watts*, 234 U. S. 525, 540.

Our conclusion is that in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellants departed from a plain official duty, and that to avoid the resulting injury to the plaintiff, for which no other remedy is available, an injunction should issue directing a disposal of the selection on its merits unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals. In other respects the decree of that court is

Affirmed.

STOEHR, SUING IN HIS OWN BEHALF AS A STOCKHOLDER IN STOEHR & SONS, INC., ETC. *v.* WALLACE ET AL.

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

No. 546. Argued January 4, 5, 1921.—Decided February 28, 1921.

1. The Trading With the Enemy Act, originally and as amended, is strictly a war measure, and finds its sanction in the provision empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Const. Art. I, § 8, cl. 11. P. 241.
2. Under § 7c of the act, as qualified by § 5, the power vested in the President to determine enemy ownership, precedent to a seizure of property, may be delegated by him to the Alien Property Custodian, whose determination then becomes in effect the act of the President. P. 244.
3. The provision made for *ex parte* executive seizure, without prior judicial determination of enemy ownership, does not violate the rights of the owner, if a citizen, under the due process clause of the Fifth Amendment, since ample provision is also made whereby any claimant who is neither an enemy nor an ally of an enemy may establish his right in a court of equity and compel a return of the property if wrongly sequestered. P. 245.
4. A transfer of shares upon the books of the corporation to the name of the Custodian is a proper incident to their effective seizure by him. P. 246.
5. A contract between a German corporation and a New York corporation, made in anticipation of this country's entry into the World War, whereby certain corporate shares in another domestic corporation, owned by the German corporation, were in purport sold to the New York corporation and were transferred to the latter on the books of the third company, not as a genuine business transaction but as a mere cover to avoid inconveniences of a state of war and with no intent to change the beneficial ownership, *held* not to have passed any interest entitling the New York corporation, or a stockholder asserting its rights, to demand release of such shares from seizure by the Alien Property Custodian. Pp. 246–251.

6. The provisions of the Treaty with Prussia of July 11, 1799, Arts. 23, 24, 8 Stat. 174, granting rights to the merchants of either country "residing in the other," when war arises, *held* inapplicable. P. 251.
7. Objection to a proposed sale by the Alien Property Custodian cannot be heard from one who has no interest in the property. *Id.*

269 Fed. Rep. 827, affirmed.

THE case is stated in the opinion.

Mr. Louis Marshall, with whom *Mr. Louis J. Vorhaus* was on the brief, for appellant.

The Solicitor General and *Mr. George L. Ingraham* for Francis P. Garvan, individually and as Alien Property Custodian, appellee.

Mr. John Quinn, with whom *Mr. Paul Kieffer* was on the brief, for Botany Worsted Mills and its directors, and Stoehr & Sons, Inc., and its directors, appellees.

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

This is a suit to establish a claim to and prevent a sale of 14,900 shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which were seized by the Alien Property Custodian under the Trading with the Enemy Act as the property of a German corporation called Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft. The plaintiff is a citizen of the United States, residing in New York, and sues in the right of Stoehr & Sons, Inc., a New York corporation, of which he is a stockholder, his asserted justification for so suing being that the directors of the corporation are agents of the Alien Property Custodian and so far under his control that it would be useless to request them to bring the suit.

The grounds for relief urged in the bill are that the shares, although seized and proposed to be sold as the

property of the German corporation, are in truth the property of the New York corporation; that, even if it does not own them, it has a substantial interest in them under a pre-war contract between it and the German corporation; that the shares cannot be taken from it consistently with due process of law as guaranteed by the Fifth Amendment, save through a judicial proceeding wherein it has a right and an opportunity to be heard; that the shares were seized and are about to be sold without any such proceeding or hearing, and in violation of subsisting treaty provisions; and that the seizure as made did not conform to designated provisions of the Trading with the Enemy Act, and the sale as proposed will not be in accord with other provisions of the act.

After a full hearing the District Court overruled the objections urged against the initial seizure; found from the proofs that the German corporation was the beneficial owner, that the New York corporation had no actual interest in the shares, and that the contract between those corporations, stressed by the plaintiff, "was not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose"; and as a result of the findings the court held that neither the plaintiff nor his corporation was entitled to any relief, and accordingly dismissed the bill. The plaintiff then asked and was allowed a direct appeal to this court. His assignments of error cover all the grounds on which the seizure and proposed sale were attacked in the bill.

We shall assume, as did the District Court, that a stockholder may bring a suit such as this in the right of his corporation, where there are circumstances justifying such representative action, and that the plaintiff has shown sufficient reason for suing in that capacity. See Eq. Rule 27, 226 U. S., Appendix, p. 8.

The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411,

or as since amended, March 28, 1918, c. 28, 40 Stat. 459, 460; November 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977, is strictly a war measure and finds its sanction in the constitutional provision, Art. I, § 8, cl. 11, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown* v. *United States*, 8 Cranch, 110, 126; *Miller* v. *United States*, 11 Wall. 268, 305.

It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody and disposal of enemy property. By § 5 he is in terms authorized to exercise "any" of these powers "through such officer or officers as he shall direct." By § 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. By § 7c, as amended November 4, 1918, direct provision for sequestering enemy property is made as follows:

"If the President shall so require any money or other property including . . . choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * * * *

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation,

association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

By § 9, as twice amended, any one, "not an enemy or ally of enemy," claiming any interest, right or title in any money or other property so sequestered and held may give notice of his claim and institute a suit in equity against the Custodian or the Treasurer, as the case may be, to establish and enforce his claim; and where suit is brought the money or property is to be retained by the Custodian or in the Treasury to abide the final decree. By § 12, as amended March 28, 1918, the Custodian is

clothed with "all of the powers of a common-law trustee" in respect of all enemy property coming into his hands and is given authority, subject to the President's supervision, to manage and dispose of the same, by sale or otherwise, as if he were the absolute owner, save as the power of disposal may be suspended by a suit under § 9. As respects the ultimate disposition of the property or its proceeds § 12 says: "After the end of the war any claim of an enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

The President, by orders of October 12, 1917, and February 26, 1918, committed to the Alien Property Custodian the executive administration of § 7c, including the power to determine after investigation whether property was enemy-owned, etc., and to require the surrender or seizure of such as he should determine was so owned. In exercising this power the Custodian after investigation determined, in substance, that the shares now in question, which then stood in the name of the New York corporation on the books of the Botany Worsted Mills, belonged to the German corporation, that it was an enemy not holding a Presidential license, and that the New York corporation held the shares for its benefit; and in further exercising this power the Custodian seized the shares and required the Botany Worsted Mills to transfer them to his name on its books in accordance with the provision in § 7c before quoted.

One objection urged by the plaintiff is that the seizure permitted by the act is confined to money or property "which the President after investigation shall determine" is enemy-owned, etc., and that here there was no such determination by the President, but only by the Custodian. Whether the objection would be good if it turned entirely on the words of § 7c, on which the plaintiff relies, we need

not consider; for they obviously are qualified and explained by § 5, which very plainly enables the President to exercise his power under § 7c "through such officer or officers as he shall direct." By the orders already noticed the President directed that this power be exercised through the Alien Property Custodian. It therefore is as if the words relied on had been "which the President, acting through the Alien Property Custodian, shall determine after investigation" is enemy-owned, etc. In short, a personal determination by the President is not required; he may act through the Custodian, and a determination by the latter is in effect the act of the President. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *The Confiscation Cases*, 20 Wall. 92, 109.

The plaintiff further objects that the shares, although claimed by and standing in the name of the New York corporation, which concededly was neither an enemy nor an ally of an enemy, were seized and transferred to the name of the Alien Property Custodian in virtue of a determination by an executive officer in an *ex parte* administrative proceeding that they belonged to an alien enemy, —the gist of the objection being that the shares could not be taken from the New York corporation consistently with due process of law without first according it a hearing on its claim in a court of justice. The objection rests on erroneous assumptions and is not tenable.

That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co.* v. *Garvan*, *supra*. There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom

he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious.

That the shares were transferred to the Custodian's name does not affect the question, for, considering the nature of the property, that was but an incident of an effective seizure and, if a return of the shares were ordered, a re-transfer would follow as of course.

Treating this as a suit under § 9,—the plaintiff having filed a notice of claim under that section,—the next question is, has the New York corporation such an interest in the shares as entitles it, or the plaintiff in its right, to demand that they be freed from the seizure. Whether it has any interest turns on the effect to be given to the contract between it and the German corporation, under which the plaintiff insists it became the owner or acquired a substantial interest. The District Court, as we have indicated, found that the contract was not intended to affect the ownership as between the two corporations, but to serve as a cover for something else, and that after the contract the German corporation remained, as it had been before, the sole beneficial owner. The facts bearing on the question are as follows:

At the beginning of the World War and during its early stages the Stoehr family, consisting of a father and three

sons, were engaged in business in New York as copartners under the name of Stoehr & Sons. The father and one son were German subjects residing in Germany; one son, Hans E. Stoehr, was a German subject residing in the United States, and the remaining son, Max W. Stoehr, was a naturalized citizen of the United States residing therein. All were shareholders in the German corporation and the father and son in Germany were among its chief officers. All were directors of the Botany Worsted Mills, and Hans E. Stoehr and Max W. Stoehr were directing and controlling its affairs, one being its treasurer and the other its secretary. It was a manufacturing concern with large holdings, had a well-established and extensive business, had been paying large dividends and gave promise of continuing to do so. The German corporation acquired the 14,900 shares in that company long prior to the war, and in 1915, after the war became flagrant in Europe, transferred them to Hans E. Stoehr and Max W. Stoehr to be held in trust for it as the beneficial owner. Stoehr & Sons, the copartnership, also had 5,690 shares in that company, and these with the 14,900 constituted a majority of its stock.

Diplomatic relations between the United States and Germany were severed February 3, 1917, and, as was commonly understood, war between them was then imminent. The Stoehrs took that view and began to adjust their affairs accordingly. They caused the New York corporation to be organized, and on February 19, 1917, transferred to it the entire assets and business of their copartnership, taking in exchange all of its capital stock and putting the same in a five-year voting trust as a means of protecting and preventing a severance of their interests. On the following day, February 20, 1917, the contract relating to the 14,900 shares in the Botany Worsted Mills was made and the shares were immediately transferred on its books to the name of the New York corporation.

In that transaction Hans E. Stoehr acted for the German corporation and the directors of the New York corporation for it,—the directors being Hans E. Stoehr, Max W. Stoehr, George G. Roehlig and Alfred de Liagre, the last two being relatives of the Stoehrs. The attorney who had advised and assisted them in transferring the copartnership assets and business also advised and assisted them in this. The shares were worth approximately $5,000,000; and yet the initial payment was only $5,000, and even that was paid by mere book entries. The full stipulated price was the book value of the shares, with good will and other intangible assets eliminated, and was payable in five future annual instalments. The stock certificates, transferred as just stated, were left in the custody of the German corporation as collateral security. If payment was not made when due, nor within sixty days after demand, the shares were to be re-transferred, the $5,000 was to be retained by the German corporation and neither corporation was to have "any further claim against the other" by reason of the contract. Possibly the stipulated price was less than the actual value; but, however this may have been, the assets and situation of the New York corporation were such that it reasonably could not have been expected to make the required payments.

After the contract the dividends accruing on the shares were not paid to the New York corporation, but were credited to it in a "special" account on the books of the Botany Worsted Mills, this being directed by Hans E. Stoehr, president of the former and treasurer of the latter.

War was declared by Congress April 6, 1917, 40 Stat. 1; and the Trading with the Enemy Act was passed October 6th following. Up to the latter date no preparation was made for making the first payment under the contract although it was to be about $1,000,000. Under the act it became the duty of every domestic corporation to report fully whether it owed any money to or held any property

for an enemy, and also whether any of its shares were owned by or held for an enemy. In the report of the New York corporation, signed by Max W. Stoehr, the 14,900 shares covered by the contract were not reported as held for the German corporation, nor was the stipulated price or any part thereof reported as owing to that corporation. But in the report of the Botany Worsted Mills, signed by Thomas Prehn, it was said that that company had "reason to believe" that the German corporation had an interest in the shares. This led to an insistent call for full information and resulted in some correspondence and several conferences at the Alien Property Custodian's office, in all of which Herbert Heyn represented the New York corporation and the Botany Worsted Mills,—he being the attorney who had advised and assisted the Stoehrs in adjusting their copartnership affairs and in making the contract. February 5, 1918, while Heyn was attending one of the conferences, Hans E. Stoehr, as president of the New York corporation and treasurer of the Botany Worsted Mills, sent to him, for use at the conference, a list of the latter company's stockholders, in which the German corporation was described as having 14,900 shares and the New York corporation as having only 5,685. In an accompanying letter he said, "the majority of the stock of the Botany Worsted Mills . . . is held by parties who are alien enemies,"—a statement which was true if the 14,900 shares belonged to the German corporation, and not true if they belonged to the New York corporation. Four days later Heyn, with the approval in writing of Hans E. Stoehr as such president and treasurer, wrote to the Alien Property Custodian, saying of the purpose with which the New York corporation was formed: "The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership [of Stoehr & Sons] would probably have to cease,

being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous"; and saying of the 14,900 shares: "Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons, Inc., from Stoehr & Co., of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. . . . While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests."

Max W. Stoehr, the plaintiff, was a director and the secretary of the New York corporation from the time it was organized until October 14, 1918. He participated in making the contract relating to the 14,900 shares and signed it as secretary. The shares were seized in April, 1918, and he knew of the seizure. The other directors at that time were new. He regularly attended their meetings, but did not suggest to them that the corporation had an interest in the shares. At a meeting in August, 1918, an attorney who had been looking into the contract made an oral report, in the course of which he called in question the purpose with which the contract was made and said it "would not hold water." Max W. Stoehr, although present, said nothing in support of the contract. Not until he

ceased to be an officer of the corporation did he manifest any opposition to the seizure. His only explanation of his silence while he remained a director is that he feared he would lose that position if he took any other course.

The District Court, after reviewing the proofs at length, concluded that the contract was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not to pass it to the New York corporation. We reach the same conclusion. On no other theory can the acts of those who were concerned be explained or their declarations reconciled. The mere recitation of the facts makes this so plain that we refrain from any special discussion of them.

The treaty provisions relied on (Articles 23 and 24, 8 Stat. 174) relate only to the rights of merchants of either country "residing in the other" when war arises, and therefore are without present application.

Of the objections specially directed against the proposed sale, it is enough to observe that as the New York corporation does not own or have any interest in the shares it is not in a position to criticize or attack the sale; and of course a stockholder suing in its right is in no better position.

Decree affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY ET AL. *v.* J. F. HASTY & SONS, ET AL.

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

No. 178. Submitted January 21, 1921.—Decided February 28, 1921.

1. Where a case in the District Court arising under the Constitution has been reviewed by this court under Jud. Code, § 238, this court retains jurisdiction to review a supplementary decree of the District Court not directly involving any constitutional question. P. 254. *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134.
2. A tariff giving special rates on rough wood material on shipment to mill, on condition that certain percentages of it by weight should be shipped over the same line after manufacture, and which specified as rough materials "Rough Lumber, Staves, Flitches, Bolts, and Logs," and among finished materials "Staves and Heading," *held* applicable to "bolts" out of which barrel headings were made, the term "bolts" in this connection having a loose generic meaning. *Id.*
3. Where the meaning of such a tariff was plain, *held* that an application for a construction by the state commission by which it was promulgated was not necessary for enforcement of a shipper's rights under it. P. 256.

Affirmed.

THE case is stated in the opinion.

Mr. George A. McConnell and *Mr. John M. Moore* for appellants.

Mr. W. E. Hemingway, Mr. George B. Rose, Mr. D. H. Cantrell and *Mr. J. F. Loughborough* for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is a sequel of *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, and *Arkadelphia Co.* v.

St. Louis Southwestern Ry. Co., 249 U. S. 134. See also *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, 244 U. S. 368. The Arkansas Railroad Commission having in June, 1908, adopted Standard Distance Tariff No. 3, establishing maximum intrastate freight rates, the present appellant railway company attacked its validity in a suit brought against the Commission in the United States Circuit Court for the Eastern District of Arkansas, contending that the rates were non-compensatory and therefore violative of the "due process of law" clause of the Fourteenth Amendment. A temporary injunction was issued and continued in force until May 11, 1911, when the Circuit Court entered a final decree making the injunction permanent, and discharging the surety from further liability on the injunction bond. On appeal to this court the decree was reversed June 16, 1913, with directions to dismiss the bill without prejudice, and for further proceedings in conformity with the opinion and decree of this court. 230 U. S. 553. Upon the going down of the mandate the United States District Court (successor of the Circuit Court) entered a decree in obedience thereto, at the same time making a reference to a special master for the purpose of ascertaining the claims of intervening shippers for refund of the difference paid by them in freight rates between those prescribed by the Commission and the higher ones maintained by the railway company during the pendency of the injunction. Under this reference the present appellees J. F. Hasty & Sons presented a claim based upon the difference between rates charged on rough material transported from forest to milling points and the rates provided in the commission tariff on such movements. That tariff contained maximum rates on such lumber applicable generally, and in addition provided for a "milling-in-transit privilege," by fixing certain "rough material rates" lower than the others, conditioned upon a specified percentage of the manufactured product

being shipped out on the same line that brought in the rough material. The railway company excepted to the claim on two grounds, (a) that the rough material rates were discriminatory, and (b) that they were not applicable to the shipments of Hasty & Sons because these constituted interstate commerce and hence were not subject to the Commission's rates. The District Court sustained both exceptions. The resulting decree so far as adverse to Hasty & Sons was reversed by this court (249 U. S. 134, 147–152), and the cause remanded for further proceedings in conformity with our opinion. Upon the going down of this mandate there were further hearings before the referee and the District Court upon the claim of Hasty & Sons and claims of the same type presented by three other intervening shippers; and from the resulting decree in their favor the present appeal is taken. Although the only question immediately involved is the proper construction of the Standard Distance Tariff, we have jurisdiction, as we had in the *Arkadelphia Case*, *supra*, because the decree is but supplementary to the main cause—bringing to effective conclusion, if not vitiated by error, the controversy that arose out of the railway company's attack upon the rates on constitutional grounds—and hence must be regarded as involving the construction and application of the Constitution of the United States, within the meaning of § 238, Judicial Code. See 249 U. S. 140–142.

The disputed claims are based in the main upon alleged overcharges on rough material shipped over appellant's road to the respective mills of appellees, and there manufactured into heading for barrels. The question is whether Item 79 of Distance Tariff No. 3 provided a rough-material rate for heading. It reads as follows:

"Item 79. Rough Material Rates.

"(a) Rough Material Rates applicable on Rough Lumber, Staves, Flitches, Bolts, and Logs, car loads,

between all points in Arkansas, minimum weight. . . .

[Here follows a table of rates graduated according to distance.]

"(b) The above named rates are conditional upon the manufactured product being reshipped over the same line bringing in the rough material, and may be only used subject to the following conditions: The proportion of the tonnage of outbound manufactured product to the tonnage of in-bound rough material shall not be less than the following: . . . .

[Here follows a table of percentages applicable to various products; among them:]

"Finished Staves, 40 per cent. of weight of rough staves.

. . .

"Staves and Heading, 30 per cent. of weight of bolts."

At the hearing before the master it was admitted that the claimants shipped out over the line of road that brought in the rough material the requisite percentages of manufactured product in the usual course of business; nevertheless, appellant objected to the allowance of the claims, on the ground that Item 79 provided no rate on in-bound rough heading but the same was covered by Item 41, and since the general rates provided therein were higher than those actually charged, there was no basis for a refund. The objection was renewed in an exception to the master's report and urged at the hearing before the court on the report and exceptions. The master found that rough heading was covered as rough material in Item 79, and the District Court sustained that conclusion.

Appellant's contention is based upon a literal reading of the opening sentence of Item 79: "Rough Material Rates applicable on Rough Lumber, Staves, Flitches, Bolts, and Logs," etc.; and since "rough heading " is not mentioned here, while the associated material "staves " is specified, it is contended that rough heading is not provided for.

From the testimony taken before the master it would appear that the raw material from which barrel heads are made is variously described as rough heading, sawed heading, split heading, and bolts or heading bolts; but it also appears that, whatever may be the distinctions, the terms are used loosely and indiscriminately in the trade and in billing shipments, material of either description being considered rough material, and all having been handled by the railway company under the rough-material rate on its own schedules, without regard to particular terms.

We regard appellant's reading of Item 79 as altogether too narrow. The scope and effect of the rough-material rates should be determined not by regarding the opening sentence alone, but by looking also to the list of finished products to be manufactured from the material, and considering the general purpose of Item 79. In the table of percentages, there are specified "Finished Staves, 40 per cent. of weight of rough staves," and "Staves and Heading, 30 per cent. of weight of bolts." The purpose is manifest to give the benefit of the milling-in-transit rate to rough material out of which heading is manufactured, and no reason appears for limiting it to material of a particular description. The word "bolts," used in connection with staves and heading, should be taken not as confining the privilege to rough material of a particular form, but in the generic sense in which it is employed in woodworking, as meaning: "A mass of wood from which anything may be cut or formed" (Century Dict.); "A block of wood from which something is to be made; as, a shingle-bolt; a stave-bolt" (Standard Dict.); "A block of timber to be sawed or cut into shingles, staves, etc." (Webster's Dict.)

The matter is so free from doubt that there is no occasion to apply to the Commission for a construction, as insisted by appellant under *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, 146.

Decree affirmed.

UNITED STATES *v.* FIELD, EXECUTOR OF FIELD.

APPEAL FROM THE COURT OF CLAIMS.

No. 442. Argued December 9, 1920.—Decided February 28, 1921.

1. The provisions of laws imposing taxes are not to be extended by implication. P. 262.
2. The Revenue Act of 1916, § 202, c. 463, 39 Stat. 777, did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment. *Id.*
3. To be taxable under clause (a) of § 202 of the act, the estate must be (1) an interest of the decedent at the time of his death, (2) which, after his death, is subject to the payment of the charges against his estate and the expenses of administration, and (3) is subject to distribution as part of his estate; and these conditions are expressed conjunctively and cannot be construed as disjunctive. *Id.*
4. A general power of appointment by will does not of itself vest any estate in the donee of the power. P. 263.
5. In equity, property passing under such a power may be treated as assets of the donee of the power, distributable to his creditors, but only when the power has been executed, and executed in favor of a volunteer, and then only to the extent to which the donee's own estate is insufficient to pay his debts; and his executor, if he take the appointed property at all, takes not as executor but as representative of the creditors. *Id.*
6. In any event, the property subject to such a power is not subject to distribution as part of the estate of the donee. P. 264.
7. Clause (b) of § 202 of the act, describing a transfer of an interest in the decedent's own property in his lifetime, intended to take effect at or after his death, does not cover a transfer by testamentary execution of a power of appointment over property not his own. *Id.*
8. The fact that in the later Act of February 24, 1919, property passing under a general power of appointment executed by the deceased was expressly included in the valuation of his estate for taxation, shows at least a legislative doubt whether the Act of 1916 included such property. P. 265.

55 Ct. Clms. 430, affirmed.

THE case is stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Davis*, with whom *Mr. T. K. Schmuck*, Special Assistant to the Attorney General, was on the brief, for the United States:

The common-law fiction regards the donor of a power as the source of title to an appointed estate, but the donee's execution of the power is a transfer of such estate when such execution is requisite to pass title to the appointees. *Chanler* v. *Kelsey*, 205 U. S. 466; *Luques Appellant*, 114 Maine, 235, 340; *Minot* v. *Treasurer*, 207 Massachusetts, 588; *McFall* v. *Kirkpatrick*, 236 Illinois, 281, 306.

It is a well-recognized rule of law that an estate passing under the execution of a general power of appointment is subject to the payment of debts of the donee of the power. 2 Sugden on Powers, c. 8, par. 7, p. 29; *Brandies* v. *Cochrane*, 112 U. S. 344, 352; *Knowles* v. *Dodge*, 1 Mack. (D. C.) 66; *Duncanson* v. *Manson*, 3 App. D. C. 260, 272; *Clapp* v. *Ingraham*, 126 Massachusetts, 200; *Johnson* v. *Cushing*, 15 N. H. 298; *Tallmadge* v. *Sill*, 21 Barb. 34; *Rogers* v. *Hinton*, 62 N. Car. 101; 4 Kent's Com., §§ 339, 340; 22 Am. & Eng. Encyc. of Law, 2nd ed., 1147.

The present case is not concerned with maintenance or disturbance of rules of property. The words of the act in question "distribution as part of his estate," § 202 (a), are words in common use and are therefore to be given their popular meaning. A popular interpretation would include in the estate of a deceased testatrix property over which she enjoyed substantially all the incidents of ownership and of which she disposed at her death. See House Doc. No. 1267, p. 101, 65th Cong., 2d sess.

The donee of the power enjoyed the estate during her life and had absolute power of disposal at her death. *Minot* v. *Treasurer*, *supra*. During her life the estate was perhaps subject to the lien of judgments against her.

Brandies v. *Cochrane, supra,* commenting on c. 77, §§ 1 and 3, Hurd's Illinois Revised Statutes, 1917. It was she whose act "turned the course of ownership," by whose act alone any future interest could be brought into existence. *McFall* v. *Kirkpatrick, supra.* On execution of her power the appointed estate became liable for her debts; and it has been suggested that such an estate is liable therefor though the donee do not execute the power. *Duncanson* v. *Manson, supra.* On the donee's death her executors were entitled to administer the appointed estate as part of her assets. *Olney* v. *Balch,* 154 Massachusetts, 318. She was to be regarded as the source of title within the purposes of registration acts and within the meaning of covenants for quiet enjoyment. *Chanler* v. *Kelsey, supra; Scrafton* v. *Quincy,* 2 Ves. Sr. 413; 2 Sugden on Powers, 3d ed., § 19. See *Attorney General* v. *Upton,* 1 L. R. Ex. [1865, 1866] 224, 229.

Mr. John P. Wilson, with whom *Mr. William B. Hale* and *Mr. Walter Bruce Howe* were on the brief, for appellee.

Mr. Justice Pitney delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims sustaining a claim for refund of an estate tax exacted under Title II of the Revenue Act of September 8, 1916, as amended by Act of March 3, 1917 (c. 463, 39 Stat. 756, 777; c. 159, 39 Stat. 1000, 1002). It presents the question whether the act taxed a certain interest that passed under testamentary execution of a general power of appointment created prior but executed subsequent to its passage.

The facts are as follows: Joseph N. Field, a citizen and resident of Illinois, died April 29, 1914, leaving a will which was duly admitted to probate in that State, and by which he gave the residue of his estate, after payment of certain

legacies, to trustees, with provision that one-third of it should be set apart and held as a separate trust fund for the benefit of his wife, Kate Field, the net income to be paid to her during life, and from and after her death the net income of one-half of said share of the trust estate to be paid to such persons and in such shares as she should appoint by last will and testament. The trust was to continue until the death of the last surviving grandchild of the testator who was living at the time of his death, and at its termination the undistributed estate was to be divided among named beneficiaries or their issue, *per stirpes*, in proportions specified. Kate Field died April 29, 1917, a resident of Illinois, leaving a will which was duly probated in that State, by which she executed the power of appointment, directing that the income to which the power related should be paid in equal shares to her children surviving at the date of the respective payments, the issue of any deceased child to stand in the place of such deceased child. The collector of internal revenue, assuming to act under the Revenue Act of 1916, as amended, and Regulations issued by the Commissioner of Internal Revenue, included as a part of the gross estate of Kate Field the appointed estate passing under her execution of the power; and proceeded to assess and collect an estate tax based upon the net value thereof, and amounting to $121,059.60. Her executor, having paid the tax under protest, and having made a claim for refund which was considered and rejected by the Commissioner of Internal Revenue, brought this suit and recovered judgment, from which the United States appeals.

The Revenue Act of 1916, in § 201 (39 Stat. 777), imposes a tax equal to specified percentages of the value of the net estate "upon the transfer of the net estate of every decedent dying after the passage of this Act." By § 203 (p. 778) the value of the net estate is to be determined by subtracting from the value of the gross estate certain

specified deductions. The gross estate is to be valued as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . ."

The amendment of March 3, 1917, (39 Stat. 1002), pertains merely to the rates, and need not be further considered.[1]

The provision quoted from § 202 was construed by the Treasury Department, in U. S. Internal Revenue Regulations No. 37, relating to Estate Taxes, revised May, 1917, Art. XI, as follows: "Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor."

No question being suggested as to the power of Congress

[1] The act was further amended October 3, 1917, c. 63, 40 Stat. 300, 324; superseded and repealed by Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1149.

to impose a tax upon the passing of property under testamentary execution of a power of appointment created before but executed after the passage of the taxing act (see *Chanler* v. *Kelsey*, 205 U. S. 466, 473, 478–479; *Knowlton* v. *Moore*, 178 U. S. 41, 56–61), the case involves merely a question of the construction of the act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (*Gould* v. *Gould*, 245 U. S. 151, 153), we are constrained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment.

The Government seeks to sustain the tax under both clauses above quoted from § 202.

The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

The chief reliance of the Government is upon the rule, well established in England and followed generally, but not universally, in this country, that where one has a general power of appointment either by deed or by will, and executes the power, equity will regard the property appointed as part of his assets for the payment of his creditors in preference to the claims of his voluntary appointees. See *Brandies* v. *Cochrane*, 112 U. S. 344, 352.

The English cases are fully reviewed by the House of Lords in *O'Grady* v. *Wilmot* [1916] 2 A. C. 231, 246, *et seq.* Illustrative cases in the American courts are *Johnson* v. *Cushing*, 15 N. H. 298, 307; *Rogers* v. *Hinton*, 62 N. Car. 101, 105; *Clapp* v. *Ingraham*, 126 Massachusetts, 200, 202; *Knowles* v. *Dodge*, 1 Mack. (D. C.) 66, 72; *Freeman* v. *Butters*, 94 Virginia, 406, 411; *Tallmadge* v. *Sill*, 21 Barb. 34, 51, *et seq.*; *contra*, *per* Gibson, C. J., in *Commonwealth* v. *Duffield*, 12 Pa. St. 277, 279–281; *Pearce* v. *Lederer*, 262 Fed. Rep. 993; affirmed, *Lederer* v. *Pearce*, 266 Fed. Rep. 497.

It is tacitly admitted that the rule obtains in Illinois, and we shall so assume.

But the existence of the power does not of itself vest any estate in the donee. *Collins* v. *Wickwire*, 162 Massachusetts, 143, 144; *Keays* v. *Blinn*, 234 Illinois, 121, 124; *Walker* v. *Treasurer*, 221 Massachusetts, 600, 602–603; *Shattuck* v. *Burrage*, 229 Massachusetts, 448, 451. See *Carver* v. *Jackson*, 4 Pet. 1, 93.

Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate; *Clapp* v. *Ingraham*, 126 Massachusetts, 200, 203; *Patterson & Co.* v. *Lawrence*, 83 Georgia, 703, 707; and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience and because he represents the rights of creditors. *O'Grady* v. *Wilmot* [1916] 2 A. C. 231, 248–257; *Smith* v. *Garey*, 2 Dev. & Bat. Eq. (N. C.) 42, 49; *Olney* v. *Balch*, 154 Massachusetts, 318, 322; *Emmons* v. *Shaw*, 171 Massachusetts, 410, 411; *Hill* v. *Treasurer*, 229 Massachusetts, 474, 477.

Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. *Patterson & Co.* v. *Lawrence*, 83 Georgia, 703, 708;

Walker v. *Treasurer*, 221 Massachusetts, 600, 602–603; *Shattuck* v. *Burrage*, 229 Massachusetts, 448, 452.

It is settled that (in the absence of statute) creditors have no redress in case of a failure to execute the power. *Holmes* v. *Coghill*, 7 Ves. 499, 507, affirmed, 12 Ves. 206, 214–215; *Gilman* v. *Bell*, 99 Illinois, 144, 150; *Duncanson* v. *Manson*, 3 App. D. C. 260, 273.

And, whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment to volunteers, then, subject to whatever charge creditors may have against it, it goes not to the next of kin or the legatees of the donee, but to his appointees under the power.

It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).

We deem it equally clear that it was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own.

It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point [§ 402 (e), 40 Stat. 1097]: "To the extent of any property passing under a general power of

appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except," etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217–218; *United States* v. *Bashaw*, 50 Fed. Rep. 749, 754. The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916 adopted by the Treasury Department; the same report proceeded to declare (p. 102) that "The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax;" and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance.

The tax in question being unsupported by the taxing act, the Court of Claims was right in awarding reimbursement.

Judgment affirmed.

NEW ORLEANS LAND COMPANY *v.* LEADER REALTY COMPANY, LTD.

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

No. 152. Argued January 18, 1921.—Decided February 28, 1921.

In a suit against New Orleans, where jurisdiction rested on diverse citizenship, the District Court, through a receiver, sold certain land to satisfy a money judgment previously recovered by the plaintiff against the city on certain drainage warrants, the sale being decreed upon the ground that under acts of Louisiana the city held the land in trust to secure such warrants. *Held*, that the proceeding was not *in rem*, passed only such title as the city had, and afforded no basis for ancillary jurisdiction of a suit in the same court to protect the title sold against a later judgment of the state courts which adjudged it inferior to another title, derived by independent grant from the State, whose holder and its predecessors were not parties to the receivership proceedings.

Affirmed.

THIS was a direct appeal from a decree of the District Court, Eastern District of Louisiana, dismissing for want of jurisdiction a bill to restrain enforcement of a judgment of the Supreme Court of the State. In addition to the decisions cited in the opinion, see *Peake* v. *New Orleans* (1889), 38 Fed. Rep. 779; *S. C.*, 139 U. S. 342; *New Orleans* v. *Peake* (C. C. A. 1892), 52 Fed. Rep. 74, the latter being in the case in which the receiver's sale occurred. The case is stated in the opinion.

Mr. Charles Louque, with whom *Mr. W. O. Hart* was on the brief, for appellant.

Mr. William Winans Wall and *Mr. Gustave Lemle*, for appellee, submitted. *Mr. Johnston Armstrong* was also on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Having recovered a judgment upon certain drainage warrants issued under Act No. 30, 1871, James W. Peake of New York instituted a second suit in the United States Circuit Court, Eastern District of Louisiana—May 30, 1891—against New Orleans, seeking sale of land which that city held as trustee to secure all such warrants. See *Peake* v. *New Orleans* (1891), 139 U. S. 342. Neither the appellee nor any of its predecessors in interest was party to the proceeding. By direction of the court a duly appointed Receiver sold the land—January 15, 1892—to Dr. Gaudet, who shortly thereafter transferred it to appellant, a Louisiana corporation, which took immediate possession.

Setting up superior title to some of the land under patent from the State issued June 3, 1874, appellee, also a Louisiana corporation, brought suit against appellant in the state court, December 8, 1909, and obtained a favorable judgment, afterwards affirmed by the Supreme Court. *Leader Realty Co.* v. *New Orleans Land Co.*, 142 Louisiana, 169. Thereupon, appellant began this proceeding to restrain enforcement of the judgment of the state court, or interference with its possession, and alleged that the District Court's jurisdiction was invoked solely in aid of the decree for sale in *Peake* v. *New Orleans*. No diversity of citizenship existed, and deeming the bill not ancillary but original the court below dismissed it for want of jurisdiction.

"The rule is well settled that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to such proceedings." *Pittsburgh &c. Ry. Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 515. Clearly, *Peake* v. *New Orleans* (1891) was not a proceeding *in rem* to which all persons having an interest in the land

were deemed parties with the right to intervene. Its only purpose was to secure sale and transfer of such right and title as the city held. Rights of third parties were not subject to adjudication therein. High on Receivers, 4th ed., § 199a. The subsequent action by the state court did not interfere with anything done by the federal court—*Dupasseur* v. *Rochereau*, 21 Wall. 130, 136, 137—and the relief now sought by appellant is not necessary to protect or render effectual any former decree. *Julian* v. *Central Trust Co.*, 193 U. S. 93, and similar cases are not pertinent. Their purpose was to protect or enforce some right theretofore duly adjudicated while here the defendant's claim in no way conflicts with any right arising under the former adjudication, and nothing is required in order to render that effectual.

The decree below is

Affirmed.

EDWARD RUTLEDGE TIMBER COMPANY ET AL. *v.* FARRELL.

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

No. 172. Argued January 21, 1921.—Decided February 28, 1921.

1. Under the Act of March 2, 1899, a lieu selection of unsurveyed land made by the Northern Pacific Railway Company may be designated "with reasonable certainty" by reference to the nearest public survey, 7½ miles distant. P. 269. See *West* v. *Rutledge Timber Co.*, 244 U. S. 90.
2. Where a State's application for a survey under the Act of August 18, 1894, was held excessive and ultimately rejected by the Land Department, and no appeal taken, *held* that it did not so withdraw the included land from the public domain as to invalidate a railroad lieu selection, made while it was pending. P. 270.

258 Fed. Rep. 161, reversed.

THIS was an appeal from a decree of the Circuit Court of Appeals reversing a decree of the District Court dismissing a bill brought by the present appellee against the appellants, to charge them as trustees in respect of lands held under a patent from the United States. The facts are stated in the opinion.

Mr. Stiles W. Burr, with whom *Mr. Charles W. Bunn* and *Mr. Charles Donnelly* were on the briefs, for appellants.

Mr. S. M. Stockslager, with whom *Mr. E. O. Conner* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming equitable title thereto under the homestead laws, appellee's predecessor, Delany, instituted this proceeding in the United States District Court for Idaho to compel the appellants to hold certain lands, patented to the Railway Company, as trustee for him. The insistence is that patent should not have issued to the Company, notwithstanding the attempt to make selection under the Act of March 2, 1899, c. 377, 30 Stat. 993, prior to initiation of any homestead right in the land, because (1) it was then unsurveyed and not designated with reasonable certainty, and (2) it was within a district survey of which had been applied for by the State of Idaho under Act of August 18, 1894, c. 301, 28 Stat. 372, 394.

The District Court decided both points in favor of appellants and dismissed the bill; the Circuit Court of Appeals held against them on the first but did not consider the second point. 258 Fed. Rep. 161.

The facts pertinent to the first point are substantially the same as those presented by the record in *West* v. *Rutledge Timber Co.*, 244 U. S. 90, except that here the land

was 7½ miles from any known survey while there the distance was 3½ miles. The Land Department found the description sufficient for reasonable certainty and we see no adequate ground for disregarding that conclusion.

As the district designated by Idaho for survey contained very much more land than the State was entitled to select, the Land Department refused to consider the application. No appeal was taken. Upon an analysis of pertinent statutes, opinions of the Land Department and of this court, the District Court held that the mere filing of application for survey did not so far withdraw the land from the public domain as to make the Railway's selection wholly ineffective; and further, that if valid for any purpose, the application merely gave an option to select, never exercised in respect of the land now in dispute. We agree with the conclusion reached; and in view of the careful supporting opinion further discussion seems unnecessary.

The decree of the Circuit Court of Appeals must be reversed and the decree of the District Court affirmed.

Reversed.

MAGUIRE ET AL. *v.* REARDON ET AL., AS COMMISSIONERS, CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.

ERROR TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE.

No. 202. Argued January 28, 1921.—Decided February 28, 1921.

The Fourteenth Amendment does not prevent a city from demolishing and removing wooden buildings, built within defined fire limits in face of prohibitory regulations in force at the time. P. 273.
41 Cal. App. 596, affirmed.

THIS was a writ of error to review a judgment of the District Court of Appeal, California, affirming a judgment of the Superior Court of the City and County of San Francisco refusing injunctive relief sought by the present plaintiffs in error. The Supreme Court of California had denied an application for further review. The case is stated in the opinion.

Mr. J. F. Riley, for plaintiffs in error, submitted:

In his brief he contended that, at the time of the erection of the building in question, there was no restriction on the material that might be used, either under the city charter or under the ordinances on the subject then in force; that, if any such ordinance provided otherwise, it and a subsequent prohibitory ordinance were unconstitutional in that they unreasonably discriminated against structures of wood as compared with those made of other inflammable material, such as canvas, paper and "beaver board," and in that they did not forbid the city itself to erect wooden buildings.

The city retained and continued its use of such buildings within the very area in question.

Also, the later ordinance under which destruction of the building was threatened, deprived the owners of their vested rights without due process of law.

The building was substantial, costing $12,000, erected without protest, and an oven, constituting a part of it and costing $700, had been installed with the consent of and under the written permit and supervision of defendants.

Also, from the city's permit to erect was to be implied a contract guarantee of the right to enjoy and maintain, which was now sought to be impaired.

The ordinance was retroactive and unreasonable. The defendants were without legal power, and were estopped.

Mr. Maurice T. Dooling, Jr., with whom *Mr. George Lull* was on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendants in error, officers and agents of the City and County of San Francisco, purporting to act under an ordinance approved May 8, 1917, gave notice of their intention to demolish and remove a wooden building on Van Ness Avenue, the property of plaintiffs in error. Thereupon the latter instituted this proceeding for an injunction upon the ground, among others, that as the building was lawfully erected the ordinance violated the Federal Constitution.

The court below, following *Bancroft* v. *Goldberg, Bowen & Co.*, 166 California, 416, held that the building was erected in 1906 within the fire limits theretofore prescribed in violation of valid local regulations duly enacted under the charter, and consequently there could be no reasonable doubt of the municipality's power to direct its removal.

271. Syllabus.

The meaning and effect of the charter and ordinances thereunder are questions of local law determination of which by the state courts we commonly accept as conclusive. It is admitted that the building was constructed within defined fire limits, and the Supreme Court of the State has said this was contrary to valid regulations then in force. The challenged ordinance must therefore be treated as affecting an unlawful structure, and as so applied we can find no plausible ground for holding it in conflict with the Federal Constitution.

The judgment below is

Affirmed.

EX PARTE IN THE MATTER OF CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER.

ON PETITION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS.

No. 24, Original. Argued December 13, 1920.—Decided February 28, 1921.

1. A writ of prohibition, or of mandamus, to restrain a lower court from assuming jurisdiction, will ordinarily be denied if the lower court's jurisdiction is doubtful, or depends upon findings of fact made upon evidence not in the record; or if the complaining party has another adequate remedy by appeal or otherwise. Pp. 275, 280.
2. The immunity of a person from suit in a district whereof he is not an inhabitant (Jud. Code, § 51) can be waived; and ordinarily is waived by a general appearance. P. 279.
3. In a creditor's suit resulting in a receivership of a railroad company and in a reference to ascertain claims, bonds of the company were actively asserted by the bondholders' committee and the mortgage trustee, and counsel for present petitioner, a large holder of the bonds, appeared in its behalf before the special master as one of the counsel for the committee. *Held:* (1) That the District Court had

jurisdiction to determine, in the first instance, whether petitioner had appeared generally; and that it also had jurisdiction to determine (2) whether a cross-bill, subsequently filed by the defendant railroad company, seeking to avoid the bonds for petitioner's alleged fraud in procuring their issuance and to hold petitioner liable on account of interest paid and bonds negotiated to *bona fide* holders,—was germane to the earlier proceedings on behalf of the bonds; and (3) whether in view of such earlier proceedings and general appearance petitioner was subject to such further proceedings by cross-bill as fully as if the earlier action had been taken in its name as well as on its behalf. P. 279.

Rule discharged and petition dismissed.

THE case is stated in the opinion.

Mr. Lawrence Maxwell and *Mr. William L. Day*, with whom *Mr. Joseph S. Graydon* was on the briefs, for petitioner.

Mr. Thurlow M. Gordon, with whom *Mr. Joseph P. Cotton* was on the brief, for other bondholders, in opposition to the petition.

Mr. Geo. D. Welles, with whom *Mr. Thos. H. Tracy* was on the brief, for Toledo, St. Louis & Western Railroad Company, in opposition to the petition.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Chicago, Rock Island & Pacific Railway Company, commonly called the Rock Island, filed in this court a petition in which it alleged that the District Court of the United States for the Northern District of Ohio, Western Division, was undertaking to proceed against it personally in a suit therein pending; that the Rock Island had not voluntarily become a party to the suit, had not been served with process, and could not under § 51 of the Judicial

Code be made a party without its consent, since it was organized under the laws of Illinois and Iowa and was not a citizen or resident of Ohio; and it prayed for a writ of prohibition, or in the alternative a writ of mandamus, to prevent the court from proceeding further against it. The suit in which it is sought to proceed personally against the Rock Island is one brought by an Ohio creditor of the Toledo, St. Louis and Western Railroad Company, an Indiana corporation, for the appointment of a receiver for that corporation. The particular proceeding by which the personal liability is asserted is a cross-bill which was filed by the Toledo Company against the Rock Island after the appointment of the receiver and after the Rock Island had appeared before a special master for the purpose of protecting its interests in an issue of the Toledo Company's bonds. A rule was granted and the case is now before us on the petition and return. The main questions argued here were whether upon the facts there stated the Rock Island had become a party to the suit and subjected itself generally to the jurisdiction of the court; and, if it had not, whether the case is one which entitles the petitioner to either of the extraordinary remedies applied for.

There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. *In re Rice*, 155 U. S. 396. If, however, the jurisdiction of the lower court is doubtful, *Ex parte Muir*, 254 U. S. 522; or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, *In re Cooper*, 143 U. S. 472, 506, 509; or if the complaining party has an adequate remedy by appeal or otherwise, *Ex parte Tiffany*, 252 U. S.

32, 37; *Ex parte Harding*, 219 U. S. 363; the writ will ordinarily be denied. Tested by this rule the case presented by the petition and the return does not entitle the Rock Island to this extraordinary remedy.

The original bill filed against the Toledo Company in the Northern District of Ohio, Western Division, alleged, among other things, that it had defaulted on an issue of $11,527,000 Collateral Trust Gold Bonds, secured by stock of the Chicago & Alton Railroad Company held by the Central Trust Company of New York, as trustee for the bondholders. These bonds were divided into two classes having somewhat different rights and interests. A single bondholders' committee was formed to protect both classes of bonds. Of the "A" bonds $6,480,000 were outstanding; and of these $5,248,000 were deposited with the committee,—$400,000 of them by the Rock Island. Of the "B" bonds $5,047,000 were outstanding all of which were deposited with the committee by the Rock Island. The special master was directed to ascertain and report the amount, character, lien and priority of all claims; and creditors were notified to present before him their respective claims duly verified, or to file bills of intervention. The bondholders' committee then filed a petition praying that the suit be dismissed as collusive and, in the alternative, that judgment be rendered for the committee in the amount of the face value of the bonds held by it, aggregating $10,295,000 and accrued interest. To that petition an answer in the nature of a cross-bill was filed by the plaintiff who prayed that the committee's petition be held to be an intervention, that the receiver be directed to defend against the bonds held by the committee, and that these bonds be ordered surrendered, if found to be invalid. By leave of court, the committee withdrew its petition, and sought its relief by a dependent bill. An order was thereupon entered making the committee a party defendant to the original bill with leave to answer and file a

cross-bill. This it did; and the Central Trust Company also filed a cross-bill to foreclose the lien on the Chicago & Alton stock held as security for the Collateral Trust Bonds. An order was then made referring the case, on the issues raised by the several pleadings, to the special master to take testimony and report.

At the beginning of the taking of testimony before the special master the appearances of counsel were formally noted by the master, among others, as follows:

"Lawrence Maxwell, Esq., and J. P. Cotton, Esq., appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company, and Mr. Cotton representing the 'A' bonds."

Thereafter the Toledo Company filed an answer and cross-bill in which it claimed, among other things, that the whole issue of the Collateral Trust Bonds was void on account of fraud practiced by the Rock Island; that the Rock Island was liable for all amounts theretofore paid by the Toledo Company on the bonds in excess of dividends received on the Chicago & Alton stock; and that it was liable also for all amounts which the Toledo Company might be required to pay thereafter on account of any of the series "A" bonds which the court should hold to be valid obligations because they had passed into the hands of innocent holders. The cross-bill of the Toledo Company prayed that the necessary accounting be had; that the Rock Island be declared to be a party; that it be required to answer; and that in default of answer a decree be entered against it *pro confesso*. An order was entered in accordance with the prayer of the bill and notice thereof was served on Mr. Maxwell as its solicitor. His name had not appeared as counsel on any pleading filed by the committee.

The Rock Island then filed a motion which stated: "Appearing solely for the purpose of the motion and not intending to submit itself to the jurisdiction of this court

as a party to this suit, moves the court to set aside its finding in the order entered herein March 11, 1918, that the Chicago, Rock Island & Pacific Railway Company has heretofore entered its appearance as a party to this suit and its order . . . ; on the ground that the court was without jurisdiction to make said order, or over this defendant as a party to the cross-bill."

This motion was overruled and an order was entered requiring answer within twenty days. Thereupon a further motion was made by the Rock Island in which, renewing its claim that it had not entered its appearance and asserting that the court was without jurisdiction over it as a defendant to the Toledo Company's cross-bill, "or at all, especially in respect of the pretended cause of action therein set up for the recovery of moneys from it, moves to dismiss so much of said cross-bill as seeks to recover moneys from the Chicago, Rock Island & Pacific Railway Co. upon the ground that it is not suable in this suit in this District upon said pretended cause of action, not being an inhabitant of the District or of the State of Ohio, and neither it nor the Cross Complainant being a resident of the District or State."

This motion also was overruled; and thereupon this petition for a writ of prohibition or of mandamus was filed.

The return of the District Court stated that the Toledo Company's answer had alleged that the Rock Island had intervened in its own right and had become a party to the cause; that at the hearing upon such answer evidence was introduced; and that service thereof was admitted by its solicitor as such. The return further recited:

"The evidence upon which the court acted in making the findings and orders of which complaint is made in said petition is not set out in said petition. Respondent denies the statement in the brief for petitioner that 'The only basis for the claim that the District Court has

jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholders' Committee.' The original entry of appearance by Mr. Maxwell quoted in the petition and in the brief is only one item out of a large number of items of evidence considered by the court on this point.

"No steps were taken by petitioner to preserve and have certified a record of the evidence submitted on the hearings of said motions or to obtain a review of the orders complained of by appeal or error proceedings."

It is argued on these facts that the District Court did not acquire jurisdiction to enforce the personal liability of the Rock Island asserted in the cross-bill of the Toledo Company; but, applying the rule stated above, that question should not be decided in this proceeding. The most that can be said against the District Court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record. The immunity of the Rock Island from suit in the Northern District of Ohio, conferred by § 51 of the Judicial Code, could be waived, *In re Moore*, 209 U. S. 490; and ordinarily a general appearance operates as a waiver. *Gracie* v. *Palmer*, 8 Wheat. 699. The District Court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. *Jones* v. *Andrews*, 10 Wall. 327. It had jurisdiction also to determine whether the relief sought in the Toledo Company's cross-bill was in its nature germane to the proceedings theretofore instituted in the suit by the bondholders' committee or by the Central Trust Company, so that the rights asserted in the cross-bill could be properly litigated in that suit. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Third National Bank of Chicago*, 134 U. S. 276, 287. And finally, it had jurisdiction to determine whether the fact that such earlier proceeding had been

instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross-bill, as fully as if the earlier action had been taken in its name as well as on its behalf. Compare also *Ex parte Gordon*, 104 U. S. 515; *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540; *In re Pollitz*, 206 U. S. 323. If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions it will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review. The same considerations lead to a denial also of the writ of mandamus. *Ex parte Roe*, 234 U. S. 70.

Rule discharged and petition dismissed.

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

ARMOUR & COMPANY ET AL. *v.* CITY OF DALLAS ET AL.

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

No. 149. Argued January 18, 1921.—Decided February 28, 1921.

1. Where a city and a railway company agreed for the removal of the railway's main tracks from a busy street to another location, to promote the public safety and convenience and the operation of the railway, and owners of abutting property alleged that the change, by depriving them of their switch connection, would largely destroy the value of their expensive plant, in violation of their constitutional rights of contract and property, *held*, that the case was not one for

relief by injunction, and that the plaintiffs had a full and complete remedy in an action at law for damages. P. 286.

2. The District Court should not enjoin the performance of a city's contract, as void under the city charter, where the same question is involved in a taxpayer's suit, instituted in the state court by the same parties and still pending, in which a temporary injunction had been granted and is still in force. P. 286.

Affirmed.

THIS was a direct appeal from a decree of the District Court which dismissed, upon the merits, a bill brought by the appellants to enjoin, upon constitutional grounds, the removal of certain railway tracks in the City of Dallas. The facts are stated in the opinion.

Mr. Francis Marion Etheridge, with whom *Mr. Ralph W. Shauman*, *Mr. Samuel B. Cantey*, and *Mr. Joseph Manson McCormick* were on the brief, for appellants:

Their argument on the principal point decided was expressed as follows:

The fact, if it be a fact, that the continued use of Pacific Avenue by the Railway Company by the running of a hundred heavy trains over it every twenty-four hours is incompatible with the safety and convenience of the public, constitutes no answer to the proposition that the restricted use of Pacific Avenue by the maintenance and operation of the switch track serving appellants' plant will not operate injuriously upon the public interest. There is not a scintilla of evidence in the record showing or tending to show that such restricted use of Pacific Avenue will in the least interfere with the safety or convenience of the public. Such being the state of the record, it is not conceivable that appellants should be denied appropriate remedy for the enforcement of their legitimate contract, protected, as it is, by the due process and obligation clauses of the paramount law. It is obvious that the damages incident to the removal of the switch track, which must necessarily result in rendering appellants' plant

valueless and in terminating the conduct of its profitable business, are incapable of ascertainment. Appellants' equities are very great.

They are entitled to have their contract rights specifically enforced by an injunction. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58; *Emporia* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 94 Kansas, 718; *Taylor* v. *Florida East Coast Ry. Co.*, 54 Florida, 635; *International & Great Northern Ry. Co.* v. *Anderson County*, 106 Texas, 60; 246 U. S. 424; *H. & T. C. Ry. Co.* v. *Ennis*, 201 S. W. Rep. 256; *Harper* v. *Virginian Ry. Co.*, 76 W. Va. 788; *McKell* v. *Chesapeake & Ohio Ry. Co.*, 186 Fed. Rep. 39; *American Malleables Co.* v. *Bloomfield*, 83 N. J. L. 728; *Southern Ry. Co.* v. *Franklin & P. Ry. Co.*, 96 Virginia, 693; *Raphael* v. *Thames Valley Ry. Co.*, L. R. 2 Ch. 147; *Greene* v. *West Cheshire Ry. Co.*, L. R. 13 Eq. 44; *Jacksonville &c. Ry. Co.* v. *Hooper*, 160 U. S. 527; *Union Pacific Ry. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 163 U. S. 564, 600; *Atlanta W. P. Ry. Co.* v. *Camp*, 130 Georgia, 1; *Columbus Ry. Co.* v. *Columbus*, 249 U. S. 399.

Mr. Thomas J. Freeman and *Mr. James J. Collins*, with whom *Mr. Allen Charleton*, *Mr. Carl B. Calloway* and *Mr. Rhodes S. Baker*, were on the briefs, for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

In 1872 the Texas and Pacific Railway Company built its single track main line to the west on a street in the village of Dallas, then as now called Pacific Avenue. In 1890 the City granted to the Company a fifty-year franchise to double track its railroad on that street. In the latter year the population of Dallas was 35,057; now it is 158,976;[1] and the existence and operation of the rail-

[1] 12th Census, Vol. I, p. 430; U. S. Census Bureau, Population of Cities Having 25,000 Inhabitants or More, 1920.

road on the Avenue has become a serious menace to life and limb, a great inconvenience to the whole people, burdensome to the Railway, and an injury to neighboring property. North of the Avenue lie largely the residential sections of the City; adjacent and to the south, largely business sections. A part of the Avenue is in the heart of the City. There six of the leading business streets —great thoroughfares—cross it; and on two of them street cars cross the railroad at grade. Two other much travelled streets are parallel. One of these, which is only two hundred feet distant, is the principal business street of the City. The number of trains operated daily over the Avenue had risen in 1918 to more than one hundred; and there were, in addition, switching operations to many neighboring industries. Trains are now longer—some of them consisting of eighty freight cars; and they occasion serious interruption to street traffic. The necessary use of larger engines, due partly to a heavy grade, results in much noise, smoke and cinders. Regulations concerning operation of trains imposed by the City in the interests of safety were necessarily severe; and had proved expensive and embarrassing to the Railway. Still further safeguards and restrictions upon operation appeared to be necessary. Plans were proposed for putting the tracks in subways, for elevating them and for eliminating the grade crossings; all of which the City confessedly had power to require of the Railway. But none of these projects appeared to offer a satisfactory solution of the problem. Finally a plan was worked out for the removal of the tracks from this part of the Avenue for a distance of nearly a mile and for diverting the trains to the line of another railroad with which it was proposed to make connections. This involved establishing a wholesale trade district elsewhere.

This plan proved acceptable to the Railway, its receiver, the City and most of the real estate owners affected. In order to carry out the plan the Wholesale District Track-

age Company was organized; and this corporation, the City, the Railway and its receiver entered into a contract under which the improvement was to be made. Then Armour & Company, owner of a plant served by a switch track connecting with the main line on the Avenue, and its lessee, brought this suit in the District Court of the United States for the Northern District of Texas against all the parties to the contract seeking to enjoin its performance and specifically the removal from Pacific Avenue of the tracks which connected with their switch track. Jurisdiction of the federal court was invoked on the ground that the action proposed would deprive plaintiffs of their property without due process of law and impair the obligation of their contracts in violation of the Federal Constitution. After full hearing on the merits a decree was entered dismissing the bill with costs. The case comes here by direct appeal under § 238 of the Judicial Code.

First. The basis of the plaintiffs' principal claim is this: In 1912 Armour & Company, being desirous of erecting a plant in Dallas, made a contract for the purchase of a lot on the Avenue, the purchase to be conditioned upon the Railway securing from the City a franchise to lay a switch connecting the lot with its main track on the Avenue and upon Armour & Company then securing from the Railway an agreement to build and maintain the switch. Upon satisfying itself through negotiation with officials of the City and of the Railway that these conditions would be complied with, Armour & Company completed the purchase of the lot. The City then passed an ordinance granting such a franchise to the Railway for the period of twenty years, conditioned, among other things, upon Armour & Company dedicating about ninety square feet of their land to the public to round the two corners of their lot. The small parcels were dedicated; the plant was erected; the switch was built by the Railway; and over the switch Armour & Company's lessee customarily receives

about 600 cars of freight a year. The plaintiffs contend that the switch franchise, granted by the City to the Railway, was entered into for Armour & Company's benefit; that it was, in effect, a contract with them; that the City and the Railway are powerless under the Federal Constitution to abrogate that contract either directly by surrendering the switch franchise or, indirectly, by removing the main track with which the switch connects; and that the plaintiffs are entitled to an injunction, because the plant, which cost nearly $80,000 to build, would lose most of its value if deprived of its rail connection.

To this claim several answers are made: (1) That the City did not make any contract with Armour & Company and under its charter would have been without power to do so; (2) that the Railway did not make any contract with Armour & Company to maintain the side track and that it had been authorized to remove the tracks from Pacific Avenue by the Railroad Commission, under appropriate legislation, on the ground that it would "serve the public interests by promoting the public safety and convenience;" (3) that the plaintiffs have already sought and been denied, as against the Railway and its receivers, the same relief here applied for; having intervened for that purpose in the original suit brought for appointment of the receiver in the District Court of the United States for the Western District of Louisiana; that the decree of the District Court therein dismissing its petition asking the same relief had been affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, *Armour & Co.* v. *Texas & Pacific Ry. Co.*, 258 Fed. Rep. 185; and that this court had denied Armour & Company's petition for writ of certiorari, 251 U. S. 551; (4) that even if the franchise had purported to grant an absolute right to maintain the tracks on Pacific Avenue it would have been subject to the fair exercise by the State, through the municipality as its agent, of the police power to promote the public safety; and that, under

the circumstances, removal of the tracks was essential for this purpose since the tracks could not appropriately be placed underground or be elevated. See *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241, 244; *Erie R. R. Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394; (5) that the franchise for the switch was not absolute; that power of revocation had been expressly reserved by clauses in the ordinance which made the franchise subject to the City's charter powers and provided "that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto"; and that the Railway was so required; (6) that even if plaintiffs had the legal right which they assert, they were not entitled to relief in equity by injunction; since an action at law would afford an adequate remedy and an injunction would interfere with a paramount public interest.

It was on the last of these grounds that the Circuit Court of Appeals in *Armour & Co.* v. *Texas & Pacific Ry. Co.*, 258 Fed. Rep. 185, unanimously affirmed the decree dismissing the intervening petition. Among the judges sitting upon appeal in that case was the Circuit Judge who entered the decree in this case here under review. He does not appear to have written an opinion in this case but presumably he dismissed this bill also on that ground. For it is clear that the case is not one for equitable relief. If the plaintiffs as abutting property owners have any legal right which is interfered with, an action at law for damages will afford them a full and complete remedy. See *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, 405; *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496–7. We have no occasion, therefore, to consider any of the other reasons urged for affirming the decree.

Second. Plaintiffs urge, apparently as taxpayers, this additional ground for relief: They allege that the contract

entered into by the City is void and that its performance should be enjoined; because the contract therefor was not countersigned by the Auditor and the expense thereof was not charged to the proper appropriation as required by the City's charter. It was agreed that the plaintiffs had brought a suit on this ground in a state court on behalf of themselves and of other taxpayers of Dallas against the City and others, that it had obtained upon an *ex parte* hearing a temporary injunction restraining the City from carrying out the contract, that this suit was pending on appeal before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas when this case was heard below, and that the temporary injunction, so far as appears, is still in force. The District Court was clearly right, under the circumstances, in refusing to grant an injunction on this ground.

Affirmed.

DAWSON, ATTORNEY GENERAL OF THE STATE OF KENTUCKY, ET AL. *v.* KENTUCKY DISTILLERIES & WAREHOUSE COMPANY.

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

DAWSON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, AND INDIVIDUALLY, ET AL. *v.* J. & A. FREIBERG COMPANY, INCORPORATED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

Nos. 439, 582. Argued January 6, 1921.—Decided February 28, 1921.

1. The tax sought to be imposed by a law of Kentucky of fifty cents a gallon upon whisky either withdrawn from bond within the State or transferred in bond from the State elsewhere, although described as an "annual license tax" on persons engaged "in the business of owning and storing" whisky in bonded warehouses, is not an occupation tax but essentially a property tax, tested by the local law. P. 291.
2. Being a property tax, it is void because it fails to comply with § 171 of the Kentucky constitution, which provides that taxes shall be "uniform upon all property of the same class subject to taxation"; whisky never having been classified separately and being taxed under another law on its fair cash value. P. 291.
3. To pay under protest and sue to recover is not such an adequate legal remedy against an illegal state tax as will prevent the federal courts from exercising their equitable jurisdiction to restrain enforcement if the right to recover back is uncertain under the state law when the injunction suit is begun. P. 295. § 162, Ky. Stats., considered.
4. An equitable remedy available in the state court is not lost by suing in a federal court. P. 296.
5. Under the amendment of Jud. Code, § 266, which provides that

proceedings in a federal court to restrain execution of a state statute shall in certain circumstances be stayed to await determination of a suit in a state court to enforce it accompanied by a stay of proceedings under it, the stay granted in the state court must be sufficiently general to protect the suitors in the federal court from the irreparable injury against which they there sought protection. P. 296.

274 Fed. Rep. 420, affirmed.

DIRECT appeals, under Jud. Code, § 266, from orders granting interlocutory injunctions. The facts are stated in the opinion.

Mr. Chas. I. Dawson, Attorney General of the Commonwealth of Kentucky, with whom *Mr. W. T. Fowler*, Assistant Attorney General of the Commonwealth of Kentucky, was on the briefs, for appellants.

Mr. W. Overton Harris, for Louisville Public Warehouse Company, appellant in No. 582.

Mr. William Marshall Bullitt, with whom *Mr. Levy Mayer* was on the brief, for appellee in No. 439.

Mr. Thomas Kennedy Helm and *Mr. Levi Cooke*, with whom *Mr. Edmund F. Trabue*, *Mr. John C. Doolan* and *Mr. James P. Helm, Jr.*, were on the brief, for appellee in No. 582.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On March 12, 1920, the Legislature of Kentucky passed and the Governor approved an act which imposed upon every person engaged in the business of manufacturing whisky or "in the business of owning and storing" the same in bonded warehouses within the State what was called an "annual license tax" of fifty cents a gallon upon all whisky either withdrawn from bond or transferred in bond from Kentucky to a point outside that State. Acts

1920, c. 13. The act took effect, by its terms, on its approval by the Governor. At that time there were stored in such bonded warehouses about 30,000,000 gallons of whisky worth in bond perhaps $1.50 a gallon. Much of this whisky was owned by citizens of other States, their ownership being evidenced by negotiable warehouse receipts. Shortly after the enactment of the statute two suits were brought in the District Courts of the United States for Kentucky to enjoin its enforcement. The first was brought in the Western District, by the J. & A. Freiberg Company, Incorporated, an Ohio corporation; the second in the Eastern District by the Kentucky Distilleries and Warehouse Company, a New Jersey corporation. The Attorney General of the Commonwealth and the Auditor of Public Accounts were made defendants in each. In the former the Louisville Public Warehouse Company was also a defendant; in the latter, the Commonwealth's Attorney.

In the Freiberg case it was alleged that the whisky was in a general bonded warehouse; [1] that the owner wished to withdraw it for removal in bond to a general bonded

[1] Every bonded warehouseman was required to make to the State on June 1, 1920, and monthly thereafter, a report showing all the whisky in bonded storage and the number of proof gallons withdrawn or transferred. The act provided by § 3 that all bonded warehousemen "shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse . . . or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

warehouse in Massachusetts; and that the defendant warehouseman, acting under provisions of the Kentucky statute, refused to permit such transfer unless the tax in question was paid by the owner. In the Distilleries Company case the plaintiff alleged that it had in its distillery warehouses large quantities of whisky, most of which was owned by others, that requests were being made daily either to withdraw lots from bond upon paying the government tax or to have them transferred in bond to other States; and that the defendants threatened to enforce heavy penalties if any such withdrawal or transfer was permitted without making payment of the fifty cents a gallon state tax. In each case a motion for an interlocutory injunction was made and heard before three judges under § 266 of the Judicial Code. The substantial questions presented in the two suits were the same. The plaintiff contended, in each, that the Kentucky statute was void under both the state and federal constitutions; and in each case the defendants, besides asserting the validity of the act, insisted, among other things, that the suit should be dismissed for want of equity because there was an adequate remedy at law. The District Courts granted plaintiffs' motions, holding that there was no adequate remedy at law and that the statute was invalid under the constitution of the State because it was a property tax, was not uniform in its operation, and was confiscatory. The case comes here by direct appeal under § 266 of the Judicial Code. We shall consider first the validity of the tax.

First. The Attorney General concedes that the tax, if a property tax, is invalid; since it does not comply with the requirements of a property tax specified in § 171 of the state constitution. It is not "uniform upon all property of the same class subject to taxation," [1] and though

[1] If the tax in question were a property tax there would be double taxation of this property and the uniformity clause would be violated,

called an "annual" tax was not intended to be such.[1] He contends, however, that the tax is, as stated in the title of the act, a license tax upon "the business of manufacturing" distilled spirits and upon "the business of owning and storing such spirits in bonded warehouses." Section 181 of the state constitution authorizes license or occupation taxes; and statutes imposing such taxes measured by the amount of the product have been repeatedly sustained by its highest court. *Raydure* v. *Board of Supervisors*, 183 Kentucky, 84; *Strater Bros. Tobacco Co.* v. *Commonwealth*, 117 Kentucky, 604. Here we are concerned only with the taxes which are alleged to be on "the business of owning and storing such spirits in bonded warehouses." The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive. But the validity of the statute does not appear to have been passed upon by any Kentucky court. We are, therefore, called upon, as were the District Courts, to determine this question of state law.

The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the

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because the whisky has never been put into a separate class; and under another statute all whisky stored in bonded warehouses was required to be assessed by the State Tax Commission at its fair cash value; and taxes at the rate of 40 cents per $100 of value were payable thereon. Ky. Stats., § 4019, as amended March 5, 1918, c. 4, Acts 1918. Compare *Campbell County* v. *City of Newport*, 174 Ky. 712, 723. *Raydure* v. *Board of Supervisors*, 183 Ky. 84, 97.

[1] It was admitted that it would be clearly void as being confiscatory unless it was assumed that it was to be levied only once—namely when the whisky is withdrawn from bond or when it is transferred in bond to another State. Compare *Sallsbury* v. *Equitable Purchasing Co.*, 177 Ky. 348, 351, 353.

ordinary incidents of an occupation tax. Unlike the tax of one and one-fourth cents a gallon upon rectifiers sustained in *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, and the tax of two cents a gallon upon distillers and warehousemen sustained in *Greene* v. *Taylor, Jr. & Sons*, 184 Kentucky, 739, this tax is not upon the business or occupation of the warehouseman. A particular lot of whisky may pass through a dozen bonded warehouses without one of them being obliged to pay the tax. For the only warehouseman required to do so, is he who has the whisky on storage at the time of its removal from bond (Government) tax paid or when it is transferred in bond to another State. The tax is made primarily payable by the warehouseman and to secure its payment the State is given a lien upon the warehouse and the whisky therein. But the warehouseman is a collection agency merely empowered to get reimbursement through subrogation to the State's lien on the whisky of others which ultimately bears the burden of the tax. Nor is the alleged business of merely owning and storing whisky in bond made taxable. So long as the whisky is stored in bond within the State it is free of the tax. One may own and store the whisky for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the State, the whisky is sold to another or if, while so owned, it is destroyed or forfeited to the Government. Likewise the tax is not one imposed upon the business of owning, storing and removing whisky from bond. For the tax would become payable on account of whisky removed, although there had not been storage for any appreciable time; thus the tax would be payable on whisky if it had been removed from the warehouse immediately after the approval of the act. Nor is the tax one on the business of removing liquor owned. For the tax is payable in respect to any lot of whisky removed; and a single transaction does not con-

stitute engaging in the business, be it that of buying and selling whisky or in the business of otherwise using it.[1] In fact the tax is one imposed upon each lot of whisky at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale. . . . The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson* v. *Kreutzer*, 112 Mississippi, 165; *Thompson* v. *McLeod*, 112 Mississippi, 383. It can not be made an occupation or license tax by calling it so. See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 148–150; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. The language of the emergency clause in the act discloses that the Legislature considered that it was, in fact, taxing the whisky.[2]

As we hold the tax to be one on property and it is conceded that, if it be such, it is invalid under the state constitution, we have no occasion to consider whether

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[1] That an isolated transaction would not under the law of Kentucky constitute engaging in a business; see *Hays* v. *Commonwealth*, 107 Ky. 655, 658; *Evers* v. *City of Mayfield*, 120 Ky. 73, 77; *Louisville Lozier Co.* v. *City of Louisville*, 159 Ky. 178, 180.

[2] "And whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon, an emergency is hereby declared to exist."

it would be also invalid under the state constitution as a license or excise tax, because confiscatory; compare *Owen County* v. *F. & A. Cox Co.*, 132 Kentucky, 738, 743; *City of Louisville* v. *Pooley*, 136 Kentucky, 286; *Sallsbury* v. *Equitable Purchasing Co.*, 177 Kentucky, 348, 351, 354; or for other reasons. Nor need we consider whether it is not also obnoxious to the Federal Constitution as imposing a burden upon interstate commerce. Compare *Heyman* v. *Hays*, 236 U. S. 178.

Second. The Attorney General insists that these bills in equity should have been dismissed because each plaintiff had a plain, adequate and complete remedy at law. The contention rests upon § 162 of the Kentucky Statutes, which declares that: "When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same."

Greene v. *Taylor, Jr. & Sons*, 184 Kentucky, 739, is cited to show that if the Auditor fails in this duty, a writ of mandamus will issue to compel performance. The plaintiffs, it is said, should have paid the tax under protest and have sued at law to recover the amounts so paid. But when these suits were brought (April and May, 1920) the decisions of the highest court of the State left it at least doubtful whether money so paid could have been recovered at law by the taxpayer, among other reasons, because the money would not have been paid under compulsion of distraint or of a right of distraint or under a mistake of law or of fact.[1] It was not until November 16, 1920, which was after these appeals had been entered in

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[1] Compare *Louisville City National Bank* v. *Coulter*, 112 Ky. 577, 584; *Couty* v. *Bosworth*, 160 Ky. 312; *Louisville Gas Co.* v. *Bosworth*, 169 Ky. 824; and the first opinion in *Craig* v. *Security Producing & Refining Co.*, rendered March 9, 1920.

this court, that *Craig* v. *Security Producing & Refining Co.*, 189 Kentucky, 565, 568, settled that money paid under such circumstances could be recovered. The Court of Appeals of Kentucky recognized the doubt arising from its earlier decisions and in order to remove the doubt found it necessary to overrule several of its recent opinions "so far as they conflict with the construction herein given section 162."

It is well settled that "if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." *Davis* v. *Wakelee*, 156 U. S. 680, 688. But whatever remedies § 162 is now regarded as conferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collection of taxes. *Gates* v. *Barrett*, 79 Kentucky, 295; *Norman* v. *Boaz*, 85 Kentucky, 557, 560; *Negley* v. *Henderson Bridge Co.*, 107 Kentucky, 414; *Louisville Trust Co.* v. *Stone*, 107 Fed. Rep. 305, 309. And if the equitable remedy was available in the state courts it was not lost by suing in the federal court. *Davis* v. *Gray*, 16 Wall. 203, 221; *Cowley* v. *Northern Pacific R. R. Co.*, 159 U. S. 569. Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available. *Beedle* v. *Bennett*, 122 U. S. 71; *Busch* v. *Jones*, 184 U. S. 598. We have no occasion, therefore, to consider other reasons urged why the legal remedy, if any, would have been inadequate.

Third. The Attorney General moved that these suits be abated relying upon the amendment to § 266 of the Judicial Code by Act of March 4, 1913, c. 160, 37 Stat. 1013, which declares that if before the final hearing of an application to restrain the enforcement of a statute or an order made by an administrative board or commission, "a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State,

to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

The suit pending in the state court was this: A liquor dealer who owned whisky in a distillery warehouse had, prior to the enactment of the statute here in question, caused it to be bottled in bond and had paid thereon the two-cent a gallon state tax imposed under the law of 1917. He claimed the right to withdraw the whisky from bond without payment of the fifty cents a gallon tax; and brought suit in a county court to enjoin the warehouseman from preventing his doing so. The latter set up this 1920 Act. Thereupon the plaintiff, by amended petition, joined the Attorney General and the Auditor as codefendants and prayed that they be enjoined from compelling the plaintiff or the warehouseman to pay the fifty-cents a gallon tax on the plaintiff's whisky. A restraining order to that effect issued.

Whether this suit in the county court was of such a character as to entitle the state officials to stay the proceedings in the federal court we do not decide. Strictly speaking it was not "brought . . . to enforce" the statute in question; but it is, at least, arguable that it might have been accepted by the state officials as a means to that end, and so have fulfilled in substance the statutory requirement. See House Report No. 1584, 62nd Cong. 3rd sess. But whether this is true or not, it was not "accompanied by a stay in such State court of proceedings under such statute," within the meaning of the Judicial Code. The stay contemplated by Congress is a general one, which would protect, among others, those who had already sought protection in the federal court. The re-

straining order [1] issued in the purely private litigation between third parties in the county court left the plaintiffs in the suits before us subject to all the danger of irreparable injury against which they had sought protection in the federal courts.

Affirmed.

GOULED *v.* UNITED STATES.

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

No. 250. Argued January 4, 1921.—Decided February 28, 1921.

1. The Fourth and Fifth Amendments are to be liberally construed. P. 303.
2. When a defendant in a criminal case first learns of the Government's possession of his document when it is offered against him on the trial, his objection that it was obtained by an unreasonable search and seizure should not be overruled as coming too late. P. 305.
3. An unreasonable search and seizure, in the sense of the Fourth Amendment, does not necessarily involve the employment of force or coercion, but is committed when a representative of any branch or subdivision of the Government, by stealth, through social acquaintance, or in the guise of a business call, gains entrance to the house or office of a person suspected of crime, whether in the presence or absence of the owner, and, in the owner's absence, searches for and abstracts his papers without his knowledge or consent. P. 305.
4. The admission of a paper so obtained in evidence against and over the objection of the owner when indicted for crime, compels him to be a witness against himself, in violation of the Fifth Amendment. P. 306.
5. The Fourth Amendment permits of searches and seizures under

[1] "You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge, payment of the fifty-cent per gallon license tax on his whiskies described in the petition . . . until the further orders of the court."

valid search warrants, when justified by an interest of the public, or of the complainant, in the property to be seized, or in its possession, or when a lawful exercise of police power renders its possession by the accused unlawful and provides for its seizure; and papers as such are not immune from such search and seizure. P. 308.

6. But papers of no pecuniary value in themselves, which are evidence of criminal fraud against their owner, and are of interest to and are sought by the Government for use as evidence merely and not because they have been or may be used to defraud it, as an executed contract might be, cannot constitutionally be searched for and seized in their owner's house or office by resort to a search warrant. P. 310.
7. Papers lawfully obtained under a valid search warrant may be used as evidence by the Government in prosecuting a person for a different offense than that charged against him in the affidavit upon which the search warrant was issued. P. 311.
8. Where, in the progress of a criminal trial, it becomes probable that there has been an unconstitutional seizure of papers of the accused, it is the duty of the trial court to entertain an objection to their admission in evidence against him or a motion for their exclusion, and to decide the question as then presented, even where a motion to return the papers has been denied before trial and by another judge. P. 312.

THE case is stated in the opinion.

Mr. Charles E. Hughes, with whom *Mr. Martin W. Littleton* and *Mr. Owen N. Brown* were on the brief, for Gouled.

The Solicitor General for the United States:

Either actual force or legal compulsion is necessary to constitute an unreasonable search and seizure.

A search made by invitation or with consent freely given could not be called an unreasonable search.

The holding of *Boyd* v. *United States*, 116 U. S. 616, is that force is a material ingredient in any unreasonable search and seizure, though this need not always be physical force, but that such force is present when a legislative act requires the accused either to surrender his pa-

pers or submit to severe pains and penalties. The rule requiring force as an ingredient has not been further modified by any later decisions of this court. On the contrary, when the rule of the *Boyd Case* has been applied, the court has been careful to show that that rule rests upon the proposition that compulsion by legislative or judicial authority is the equivalent of physical force by which, as a result of a search, a man is dispossessed of his property. *Hale* v. *Henkel*, 201 U. S. 43.

In the present case, the certificate expressly negatives the use of force of any kind. Cohen entered the office, not under any claim of right, but as a friend. He gained access to the papers in the same way. He had and claimed to have no legal process. No legislative act gave him authority, and he claimed no authority under any such act. Physical force was not used and there is no pretense of any legal compulsion to which Gouled was subjected. This alone precludes any conclusion that there was a violation of the Fourth Amendment.

The Fourth Amendment is a limitation upon the powers of the Federal Government. It is not violated by a search and seizure, however wrongful, which is not made under governmental authority, real or assumed, or under color of such authority. *Barron* v. *Baltimore*, 7 Pet. 243, 249; *Boyd* v. *United States, supra; Adams* v. *New York*, 192 U. S. 585, 598; *Weeks* v. *United States*, 232 U. S. 383, 394.

That it was not intended to apply the rule laid down in the *Weeks Case* to the acts of an officer of the Federal Government merely because he happened to be such an officer, but only to such acts of his as are done under color of his office or under a claim of authority, was made clear throughout the opinion.

In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391, the court is again careful to recognize that, in order to be within the protection of the Fourth Amendment, the acts of an officer of the Government must be

done under color of office or authority. See *Flagg* v. *United States*, 233 Fed. Rep. 481, 483.

Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights. These rights are not violated if an officer goes to the accused and asks and is granted permission to enter his house or his office. Equally they are not violated if the officer, without express invitation or permission, enters a place of business which is open to the public. And again, if the personal relations existing between the officer and the accused are such that the former is in the habit of visiting the latter at his office or his home, there is nothing unlawful in his making such a visit, even though he may not disclose that he is in search of evidence. When an officer has lawfully entered a house or an office in any of these ways, the Constitution does not require him to shut his eyes to any evidence of crime that may be open to his observation. *State* v. *Mausert*, 88 N. J. L. 286; *Adams* v. *New York*, *supra*, 597.

These decisions make it clear that if the entry and whatever search is made are made lawfully, any evidence that may be incidentally obtained while thus acting lawfully is not obtained through an unconstitutional search and seizure. In the present case, even if Cohen had been an officer, it could not be said that he entered the office of Gouled or obtained access to his papers unlawfully, for the certificate excludes all idea of force or legal compulsion as a result of which any search was made or information obtained.

It is not a valid objection to the use of papers in evidence that they have been seized as the result of an unreasonable search and their admission is not error unless the court has committed a previous error in refusing,

upon application seasonably made, to order them returned. *Adams Case, supra,* 594–598; *Weeks Case, supra,* 393, 396, 398; *Johnson* v. *United States,* 228 U. S. 457, 458; *Matter of Harris,* 221 U. S. 274, 279, 280; *Perlman* v. *United States,* 247 U. S. 7, 15.

The Act of June 15, 1917, expressly authorizes search warrants for *property* which has been used as the means of committing a felony. That one's private papers are his property in the fullest sense of that word, regardless of whether they may possess any value to another, can scarcely be doubted. See *Boyd Case, supra,* 627. Contracts may be used to and may be the means of bribing public officials and defrauding the Government.

Even if the particular papers seized and subsequently used in evidence were not such as could have been lawfully made the object of a search warrant, their seizure cannot from this record be said to have been in violation of the Fourth Amendment. When the officer went to the office he was serving a warrant which had a legal purpose in the attempt to find the papers described. In making the search, therefore, he was acting legally; and if, while so acting, he discovered evidence of crime and took it, he did not violate the rights of Gouled under the Fourth Amendment. This was held in the *Adams Case, supra.*

An act of Congress which authorizes a search warrant for property which has been used in the commission of a felony is not subject to constitutional objections.

Mr. Justice Clarke delivered the opinion of the court.

In a joint indictment the plaintiff in error, Gouled, one Vaughan, an officer of the United States Army, and a third, an attorney at law, were charged, in the first count, with being parties to a conspiracy to defraud the United States, in violation of § 37 of the Federal Criminal Code, and, in the second count, with having used the mails to

promote a scheme to defraud the United States, in violation of § 215 of that Code. Vaughan pleaded guilty, the attorney was acquitted, and Gouled, whom we shall refer to as the defendant, was convicted, and thereupon prosecuted error from the Circuit Court of Appeals, which certifies to this court six questions which we are to consider.

Of these questions, the first two relate to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under direction of officers of the Intelligence Department of the Army of the United States, and the remaining four relate to papers taken from defendant's office under two search warrants, issued pursuant to the Act of June 15, 1917, c. 30, 40 Stat. 217, 228. It was objected on the trial, and is here insisted, that it was error to admit these papers in evidence because possession of them was obtained by violating the rights secured to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The part of the Fifth Amendment here involved reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Consti-

tution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property"; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

In the spirit of these decisions we must deal with the questions before us.

The facts derived from the certificate, essential to be considered in answering the first two questions, are: that in January, 1918, it was suspected that the defendant, Gouled, and Vaughan were conspiring to defraud the Government through contracts with it for clothing and equipment; that one Cohen, a private in the Army, attached to the Intelligence Department, and a business acquaintance of defendant Gouled, under direction of his superior officers, pretending to make a friendly call upon the defendant, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents; that one of these papers, described as "of evidential value only" and belonging to Gouled, was subsequently delivered to the United States District Attorney, and was by him introduced in evidence over the objection of the defendant that possession of it was obtained by a violation of the Fourth or Fifth Amendment to the Constitution; and that the defendant did not know that Cohen had carried away any of his papers until

he appeared on the witness stand and detailed the facts with respect thereto as we have stated them, when, necessarily, objection was first made to the admission of the paper in evidence.

Out of these facts arise the first two questions, both relating to the paper thus seized. The first of these is:

"Is the secret taking or abstraction, without force, by a representative of any branch or subdivision of the Government of the United States, of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th amendment?"

The ground on which the trial court overruled the objection to this paper is not stated, but from the certificate and the argument we must infer that it was admitted either because it appeared that the possession of it was obtained without the use of force or illegal coercion, or because the objection to it came too late.

The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.

The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and

seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative.

The second question reads:

"Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th amendment? "

Upon authority of the *Boyd Case, supra,* this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

The remaining four questions relate to three other papers which were admitted in evidence on the trial over the same constitutional objections as were interposed to the admission of the first paper. One was an unexecuted form of contract between the defendant and one Lavinsky, another was a written contract, signed by the defendant and one Steinthal, and the third was a bill for

disbursements and professional services rendered by the attorney at law to the defendant Gouled.

Of these papers, the first was seized in defendant's office under a search warrant, dated June 17, and the other two under a like warrant dated July 22, 1918, each of which was issued by a United States Commissioner on the affidavit of an agent of the Department of Justice. It is certified that it was averred in the first affidavit that there were in Gouled's office "certain property, to wit: certain contracts of the said Felix Gouled with S. Lavinsky [which] were used as a means of committing a felony, to wit: . . . as means for the bribery of a certain officer of the United States." It is also certified that the second affidavit declared that Gouled had at his office "certain letters, papers, documents and writings which . . . relate to, concern and have been used in the commission of a felony, to wit: a conspiracy to defraud the United States." Neither the affidavits nor the warrants are given in full in the certificate, but no exception was taken to the sufficiency of either.

After the seizure of the papers, a joint indictment was returned, as stated, against Gouled, Vaughan and the attorney, and before trial a motion was made by Gouled, for a return of the papers seized under the search warrants, which was denied, and when the motion was renewed at the trial, but before any evidence was introduced, it was again denied. The denial of this motion is not assigned as error.

The contract of the defendant with Steinthal, which was seized under the warrant, was not offered in evidence but a duplicate original, obtained from Steinthal, was admitted over the objection that the possession of the seized original must have suggested the existence and the obtaining of the counterpart, and that therefore the use of it in evidence would violate the rights of the defendant under the Fourth or Fifth Amendment. *Silverthorne*

Lumber Co. v. *United States*, 251 U. S. 385. The unsigned form of contract and the attorney's bill were offered and also admitted over the same constitutional objection. There is no statement in the certificate of the contents of these papers, but it is said of them only, that they belonged to Gouled, that they were without pecuniary value and that they constituted evidence "more or less injurious to" the defendant.

It is apparent from this statement that to answer the remaining four questions involves a consideration of the applicable law of search warrants.

The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the *Boyd* and *Weeks Cases*, *supra*, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling "and many other things of like character" might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed.

Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases, supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd Case*, pp. 623, 624.

There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People*, 133 Illinois, 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana*, 2 Metc. 329, and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

With these principles of law in mind, we come to the remaining questions.

The third question reads: "Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under

Sections 37 and 215 of the United States Criminal Code, when taken under search warrants issued pursuant to the Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th Amendment? "

That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners and are property of a most important character (*Boyd Case, supra*, pp. 627, 628), and since those here involved possessed "evidential value" against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that under the principles of law stated it would have the right to take it into its possession to prevent injury to the public from its use. The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment. It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality in the bribing of a public servant and in perpetrating frauds upon the Government so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds, but the facts necessary to give this contract such a character do not appear in the certificate. On the con-

trary, this third question recites that the papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are "of evidential value only," so that it is impossible to say, on the record before us, that the Government had any interest in it other than as evidence against the accused, and therefore as to all three papers the answer to the question must be in the affirmative.

The fourth question reads: "If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the 5th amendment? "

The same papers being involved, the answer to this question must be in the affirmative for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the *Boyd Case*, to compel the defendant to become a witness against himself.

The fifth question reads: "If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, —can such property so seized be introduced in evidence against said party when on trial for a different offence? "

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described

in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

The sixth question reads: "If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted? "

The papers being of "evidential value only" and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider

and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

Each question is answered, Yes.

AMOS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 114. Argued December 13, 1920.—Decided February 28, 1921.

1. When it is clear and undisputed that property used in evidence against a defendant on a criminal trial was procured by the Government through an unconstitutional search and seizure in his home, his petition for its return is not too late when made immediately after the jury was sworn, and his motion to exclude the property, and testimony concerning it, from evidence should not be denied as inviting a collateral issue. P. 316.
2. The act of a man's wife in allowing government officers to enter his home without a warrant upon their demand for admission for the purpose of making a search is *held* not to be a waiver of his con-

stitutional privilege against unreasonable search and seizure, even assuming that a wife may waive her husband's right in that regard. P. 317.

Reversed.

THE case is stated in the opinion.

Mr. H. H. Obear, with whom *Mr. R. Dozier Lee* and *Mr. Charles A. Douglas* were on the brief, for plaintiff in error.

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

MR. JUSTICE CLARKE delivered the opinion of the court.

The plaintiff in error, whom we shall designate defendant as he was in the court below, was tried on an indictment containing six counts. He was found not guilty on the first four counts, but guilty on the fifth, which charged him with having removed whisky on which the revenue tax had not been paid to a place other than a Government warehouse, and also on the sixth, which charged him with having concealed whisky on which the tax required by law had not been paid.

After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his, which it was averred the District Attorney intended to use in evidence at the trial and which had been seized by P. J. Coleman and C. A. Rector, officers of the Government, in a search of defendant's house and store "within his curtilage," made unlawfully and without warrant of any kind, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Upon reading of this petition and hearing of the applica-

tion it was denied, and, exception being noted, the trial proceeded.

Coleman and Rector were called as witnesses by the Government and testified: that as deputy collectors of Internal Revenue, they went to defendant's home and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers and had come to search the premises "for violations of the revenue law"; that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whisky, which they called "blockade whisky"; and that they then went into the home of defendant and on searching found two bottles under the quilt on the bed, one of which contained a full quart, and the other a little over a quart of illicitly distilled whisky. The Government introduced in evidence a pint bottle containing whisky, which the witness Coleman stated "was not one of the bottles found by him; but that the whisky contained in the same was poured out of one of the two bottles that he had found in the defendant's house on the bed under the quilt, as above stated." On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

After these two Government witnesses had described how the search was made of defendant's home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by Government agents without warrant of any kind, in plain violation of the

Fourth and Fifth Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; and also denied his motion to exclude such property and the testimony relating thereto given by the Government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

The answer of the Government to the claim that the trial court erred in the two rulings we have described is, that the petition for the return of defendant's property was properly denied because it came too late when presented after the jury was empaneled and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the Government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

Plainly the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, *Gouled* v. *United States*, *ante*, 298.

There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the Government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court

by the Government itself. The petition should have been granted, but it having been denied the motion should have been sustained.

The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.

It results that the judgment of the District Court must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

UNION PACIFIC RAILROAD COMPANY *v.* BURKE.

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

No. 183. Argued January 27, 1921.—Decided February 28, 1921.

An agreement between an interstate railroad company and a shipper to limit the carrier's liability upon an interstate shipment to a valuation stated in the bill of lading, will not relieve the carrier of its common-law obligation to pay the actual value in case of loss by its negligence if its schedules, filed with the Interstate Commerce Commission, provide but one rate applicable to the shipment. P. 321. *Reid* v. *American Express Co.*, 241 U. S. 544, distinguished. 178 App. Div. 783; 226 N. Y. 534, affirmed.

THIS case was submitted, in the first instance, to the Supreme Court of New York, Appellate Division, and

decided in favor of the defendant, the railroad company. The Court of Appeals of the State reversed the decision and directed the entry of the judgment for the plaintiff, which is here reviewed by certiorari—and affirmed. The case is stated in the opinion.

Mr. Oscar R. Houston, with whom *Mr. D. Roger Englar* was on the brief, for petitioner.

Mr. Arthur W. Clement, with whom *Mr. Wilson E. Tipple* was on the brief, for respondent.

Mr. Justice Clarke delivered the opinion of the court.

On March 10, 1915, S. Ontra & Brother delivered to the Pacific Mail Steamship Company at Yokohama, Japan, 56 cases of "Drawn work goods and Renaissance," consigned to their own order at New York, and received a bill of lading for ocean transportation to San Francisco and thence by the Southern Pacific Company and its connections, by rail, to destination. The property was delivered to the Southern Pacific Company and without new billing was carried to a junction with the line of the petitioner, the Union Pacific Railroad Company, and while in its custody was totally destroyed in a collision. The respondent, successor in interest to the consignor, claimed in this suit the right to recover the fair invoice value of the goods, $17,549.01, and the petitioner conceded his right to recover, but only to the amount of the agreed valuation of $100 per package, $5,600, to which it contended he was limited by the bill of lading. All of the facts are stipulated or proved by undisputed evidence.

The Appellate Division—First Department New York Supreme Court—rendered judgment in favor of respondent for $5,600, with interest and costs, but on appeal to the Court of Appeals of that State the judgment of the Appellate Division was reversed and an order was entered that

a judgment should be rendered by the Supreme Court in favor of respondent for $17,549.01, with interest and costs. The case is brought here on certiorari.

On the face of the bill of lading received at Yokohama was the notation: "Weight 26,404 lbs.; Ocean weight rate, 50¢, Freight $132.02. Rail, minimum carload weight 30,000 lbs., wgt. rate $1.25, Freight $375.00." (Thus the ocean and rail rates are separately stated, and the latter is $1.25 per 100 lbs., minimum carload.) On the back of the bill of lading were printed thirty-one conditions, the thirteenth of which contained the provision that, "It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100.00 per package . . . and the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package."

The petitioner was an interstate common carrier by rail at the time of the shipment involved and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic. *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 638. The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules. (34 Stat. 587, § 6.)

In these schedules was included a rule, designated as Rule 9A, which reads: "Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading,' 'Straight' or 'Order' as shown on pages 87 to 90, inclusive."

For the purposes of this case, only, it is admitted, and

accepted by this court, that this rule 9A permitted and required that the property should be treated as moving east of San Francisco under the Uniform Bill of Lading, although, in fact, no other than the Yokohama bill of lading was issued. This Uniform Bill of Lading contained, among other conditions, the following: "*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* (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper or *has been agreed upon* or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

Upon the facts thus stated the petitioner contends that the agreed valuation of $100 per package or case in the Yokohama bill of lading is necessarily imported into the Uniform Bill of Lading, becomes the valuation "agreed upon" within the terms and conditions quoted from that bill, and limits the respondent's recovery to that amount, $5,600, regardless of the value of the property and of the fact that it was lost by the carrier's negligence.

To this contention it is replied by the respondent: that it is admitted by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokohama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect.

In many cases, from the decision in *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331, decided in 1884, to *Boston & Maine R. R.* v. *Piper*, 246 U. S. 439, decided in 1918, it has been declared to be the settled federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.

As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained—but the rule and the effect of it are clearly established.

The petitioner admits all this, but contends that it has never been held by this court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.

With this contention we cannot agree.

This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439,444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where "the rate was tied to the release." Thus, in the *Hart Case* (p. 343), it is said: "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is

fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

And in the *Piper Case* it is said (p. 444): "In the previous decisions of this court upon the subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service."

The *Reid Case*, *supra*, does not conflict with these decisions, for in that case the bill of lading containing the undervaluation, which was there sustained, expressly recited that the freight was adjusted on the basis of the agreed value and that the carrier's liability should not exceed that sum "unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." The bill of lading was for ocean carriage only, London to New York, to which, of course, the Interstate Commerce Act was not applicable, (36 Stat. 544, § 1; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 78; *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266) and the carrier, therefore, was in a position to tender to, and, by the quoted provision of the bill, did tender to, the shipper the choice of paying a higher rate and being subject to less restricted recovery in case of loss. The case was plainly within the scope of the prior decisions of this court upon the subject.

Thus this valuation rule, where choice is given to and ac-

cepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception. Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the Uniform Bill of Lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner, would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made, only with the ignorant, the unwary or with persons deliberately deceived. It results that the judgment of the Supreme Court of the State of New York, entered upon the order of the Court of Appeals of that State, must be

Affirmed.

UNITED STATES *v.* DIAMOND COAL & COKE COMPANY.

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

No. 87. Argued November 11, 1920.—Decided March 7, 1921.

1. The Government has no equity to maintain a suit to set aside a fraudulently procured land patent, after the expiration of the statutory period of limitation, upon the ground that the fraud was concealed, (*Exploration Co.* v. *United States*, 247 U. S. 435), if it has been guilty of laches in discovering the fraud. P. 333.
2. In a suit by the Government to annul coal land patents, outstand-

ing 14 to 20 years, where the bill alleged that the entries were made by hirelings for the exclusive benefit of a coal company, operating nearby, which had taken possession of the land applied for and paid all expenses of the entries, but that the land office officials believed and relied upon the false statements of the entrymen that they were in possession and acting only for themselves; and where the bill further alleged that the entrymen deeded to the company soon after entering the land, and that the company afterwards extracted from it large quantities of coal, but that the proceedings concerning the entries were, and were intended to be, such that the fraud was concealed and that no knowledge or notice of it came to the United States until it was in part revealed by a report of a special agent made shortly before the institution of the suit, *held*, that the allegations excused the delay in bringing the suit, and that it was error to dismiss the bill by resorting to mere inferences and conjectures of notice, as by assuming that the deeds were promptly recorded (the bill not stating when), and by assuming that the company's possession was such as to give notice to the Government. P. 334.

254 Fed. Rep. 266, reversed.

THIS was an appeal from a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the District of Wyoming, dismissing, on defendant's motion, a bill brought by the United States to set aside numerous patents for coal land, on the ground of fraud, and for an accounting for coal extracted.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for the United States:

The rule laid down in *Wood* v. *Carpenter*, 101 U. S. 135, 140, 141, relied on by both courts below, is not applicable. A clear distinction exists between this case and those cases in which that rule has been applied, and this distinction has been recognized by this court. *Galliher* v. *Cadwell*, 145 U. S. 368, 372; *Hammond* v. *Hopkins*, 143 U. S. 224, 250. This court has never applied the rule of *Wood v. Carpenter* and kindred cases to a case

where gross fraud was clearly made out and where the delay in bringing suit was due to concealment. *McIntire* v. *Pryor*, 173 U. S. 38.

The sufficiency of the bill is fully sustained by the decision in *Rosenthal* v. *Walker*, 111 U. S. 185. *Bailey* v. *Glover*, 21 Wall. 342; *Traer* v. *Clews*, 115 U. S. 528, 536, 538. The doctrine of *Bailey* v. *Glover* was recently reaffirmed in *Exploration Co.* v. *United States*, 247 U. S. 435, and declared to be the true rule of federal jurisprudence in the application of statutes of limitation.

If this distinction does not exist, between cases where there was notice of the fraud, or where the fraud is not clearly established, and cases in which, as here, the fraud is clear, then the decisions in *Rosenthal* v. *Walker*, and *Traer* v. *Clews* are irreconcilable with the rule laid down in *Wood* v. *Carpenter*.

The United States, suing in vindication of its own rights, cannot be held guilty of laches.

Mr. W. B. Rodgers, with whom *Mr. L. O. Evans*, *Mr. D. M. Kelly* and *Mr. B. M. Ausherman* were on the brief, for appellee:

No facts are pleaded to show the defendant guilty of any concealment of the alleged frauds subsequent to the date of the issuance of the patents, or of any conduct which would excuse the plaintiff from sooner instituting its suit. The allegations, "and said defendant fraudulently, unlawfully and dishonestly concealed from the aforesaid officers of the United States . . . the aforesaid fraudulent practices and the true circumstances under which said entries and purchases were made," and that said frauds "were perpetrated secretly and were of such a nature as to conceal themselves," are mere conclusions.

The concealment of the frauds might be accomplished in many and various ways, and it is for the court to say

whether the conduct of the defendant constituted concealment in the legal sense, such as to excuse the Government from bringing the suit within the time limited, and likewise for the court to say whether the frauds "were of such a nature as to conceal themselves." *United States* v. *Puget Sound Traction Co.*, 215 Fed. Rep. 436; *Beatty* v. *Nickerson*, 73 Illinois, 605.

The most that can be claimed for the pleading, is that the charge is equivalent to an allegation that, after the consummation of the frauds leading to the patents, the defendant "failed to seek out the plaintiff and voluntarily confess to it, or its officers, the wrong which had been perpetrated upon it." This assertion is without warrant in any facts set out, but, even if by fair implication the bill contained such an allegation, it would be insufficient to toll the running of the statute. *Bailey* v. *Glover*, 21 Wall. 346; *Wood* v. *Carpenter*, 101 U. S. 135; *Felix* v. *Patrick*, 145 U. S. 318; *Bates* v. *Preble*, 151 U. S. 162; *Pearsall* v. *Smith*, 149 U. S. 231; *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593; *United States* v. *Exploration Co.*, 203 Fed. Rep. 387; 225 id., 854; 235 id., 110; 247 U. S. 435; *United States* v. *Norris*, 222 Fed. Rep. 16; *Keithly* v. *Mutual Life Ins. Co.*, 271 Illinois, 584.

Not passive concealment of the original fraud, but concealment brought about by a fraud superadded for the purpose, is the basis of these decisions and the latest decision by this court on the subject. *Exploration Co.* v. *United States*, 247 U. S. 435. See also *Keithly* v. *Mutual Life Ins. Co.*, 271 Illinois, 584; *Jackson* v. *Jackson*, 47 N. E. Rep. 964.

Nor does the allegation that "it was a part of said conspiracy and understood and agreed among said conspirators, said defendant and said entrymen, that said frauds and said conspiracy and the true facts surrounding said entries and purchases should at all times be concealed

from the plaintiff, etc.," aid the plaintiff. It is distinctly alleged that this agreement was a part of the original conspiracy charged and set out in the bill of complaint. It was therefore a part of the initial fraud and merged in the cause of action which accrued upon the issuance of patents to the several entrymen. See *United States* v. *Puget Sound Traction Co., supra,* 440.

Since the silence of the defendant, after the accrual of the cause of action and the full completion of the wrong, does not amount to fraud in law, and does not toll the running of the statute, it follows that the agreement alleged does not add to such silence any evil quality.

Altogether apart from the question whether or not the bill charges facts showing a fraudulent concealment of the cause of action, or that the frauds committed were of a self-concealing nature, when the bill shows, as in this instance, that the action was not brought within the time limited by the statute, the duty devolved upon the plaintiff to show by the allegations that it has not been wanting in diligence; and in order to do this, it is necessary to allege the time when the fraud charged was discovered, and what the discovery was, how it was made, and why it was not made sooner, in order that the court may be able to say whether, by ordinary diligence, the discovery might not have been made within the period of the statute of limitations. *United States* v. *Puget Sound Traction Co., supra,* pp. 441, 443; *Wood* v. *Carpenter, supra,* 140; *Badger* v. *Badger,* 2 Wall. 94; *Stearns* v. *Page,* 7 How. 826.

But plaintiff says it is excused from showing diligence and for its inaction covering a period of 20 years, because the defendant failed to disclose the frauds to it. The proposition denies the rule of diligence.

We search the bill in vain for any allegation as to when the United States first discovered the alleged frauds. The only thing that is made clear is that this

discovery was made some time before November, 1916, for it is clear that during that month a special agent of the Department of the Interior made a report in the line of his duties to the Secretary of the Interior, disclosing the fraudulent conduct of the defendant, but when the facts reported by him were discovered neither implication nor direct averment furnish any information, and it can hardly be open to controversy that information acquired by him in the line of his duties, as an agent of the Government, or of the Secretary of the Interior, and therefore of the Government, is chargeable to the plaintiff and to the Secretary, in his official capacity, as well.

It is true that direct authority of the Secretary to appoint special agents to investigate the fraudulent acquisition of public lands, so far as the statutes of the United States are concerned, is found only in the appropriation laws, but those laws clearly vest the Secretary with this authority, and likewise clearly charge such agents with the discharge of the duties in which the special agent was engaged.

It is alleged that, at the time of the entries of the lands in question, the defendant was in possession thereof, and also of the mines therein, and has since continued in the possession, and has been engaged for many years in mining and selling the coal contained therein, and that other mines of the defendant lie in close proximity. It also clearly appears that these eighteen entries were made in quick succession, and that the several entrymen contemporaneously, or almost contemporaneously, with the respective dates of entry, executed deeds to the defendant.

There is no allegation that the defendant did not promptly record these deeds, and as the failure to record a deed is a badge of fraud, and fraud cannot be presumed against the defendant without distinct allegations relating thereto in the bill, it follows that for the purpose

of the question here under discussion the defendant must be deemed to have duly recorded said deeds at the time of the receipt of the same.

From this it not only appears that there was no concealment, but it also appears, when the legal presumption of notice of these facts is indulged in, that the United States had sufficient notice from the date of the issuance of these patents to call for action upon its part by way of investigation. *United States* v. *Norris*, 222 Fed. Rep. 16, 19; *Felix* v. *Patrick*, 145 U. S. 329, 331; *Niles* v. *Cooper*, 98 Minnesota, 39; *Hughes* v. *United States*, 4 Wall. 235, 236; *McDonald* v. *Bayard Savings Bank*, 98 N. W. Rep. 1025; *Van Gunden* v. *Virginia Coal & Iron Co.*, 52 Fed. Rep. 838, 849; *Piekenbrock & Sons* v. *Knoer*, 114 N. W. Rep. 200; *Nash* v. *Stevens*, 65 N. W. Rep. 825; *Simmons* v. *Baynard*, 30 Fed. Rep. 537; *Clark* v. *Van Loon*, 108 Iowa, 250; *Teall* v. *Slaven*, 40 Fed. Rep. 774, 780; *Burling* v. *Newlands*, 39 Pac. Rep. 49; *Scruggs* v. *Decatur Co.*, 5 So. Rep. 440; *Wood* v. *Carpenter*, *supra*.

When the Government seeks to avoid the bar of the statute of limitations, its rights are determined by the same rules as would be the rights of a private litigant. *United States* v. *Puget Sound Traction Co.*, 215 Fed. Rep. 441.

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

This suit, begun by the United States against the Diamond Coal & Coke Company in October, 1917, had a threefold object: (1) To cancel 18 patents granted to that number of persons, at dates ranging from 14 to 20 years prior to the commencement of the suit, and covering 2,283 acres of coal land situated in the Evanston Land District, State of Wyoming; (2) to cancel deeds of conveyance to the corporation made by the entrymen who

had purchased from the United States the land which the patents embraced; (3) to recover the value of coal which it was alleged had been taken by mining operations of the corporation from the land in question during the period stated.

It suffices from the view we take of the matters requiring consideration to briefly resume the averments of the bill. It was alleged that in the year 1894 the defendant corporation had formed a conspiracy to defraud the United States of the land covered by the patents by procuring the purchase of said land from the United States by persons acting ostensibly for themselves but really as the representatives of the corporation and for its sole account and benefit. In furtherance of the conspiracy thus formed, it was alleged, 18 persons, described as entrymen, at the suggestion and in the pay of the corporation, made application at the proper land office of the United States to purchase in their own names the land covered by the patents, the land so applied for having been designated by the corporation and the entries being exclusively intended for its benefit. It was charged that these entrymen falsely swore, for the purposes of their applications to purchase, that the applications were made for their own benefit, when in fact they were solely made for the benefit of the corporation; that the entrymen, additionally, falsely swore that they were in possession of the land, had developed coal mines on it, and were engaged in working the same, when in truth the lands had never been in the possession of the applicants, who had expended no money and had done no work thereon, since the lands were, prior to and at the time of the applications, in the possession of the corporation through its officers or some persons or agents acting for it and for its benefit.

It was further alleged that, shortly after the entries were made, in furtherance of the fraudulent purpose and

upon the false allegations and affidavits above stated and before patent issued, the entrymen conveyed the land applied for by warranty deed to the corporation, although there was no allegation concerning the registry or non-registry of the deeds of conveyance thus made. The bill in addition charged that, for the purpose of securing the right which was contemplated for the benefit of the corporation, further false affidavits as to the exclusive interest of the entrymen were made and that all the money paid by way of price for the land or for expenses or otherwise was furnished by the corporation for its own account. It was alleged that the corporation for many years before the transactions thus stated had engaged in the mining, production, and sale of coal in the State and district in which the land covered by the entries was situated; that its operations had been principally carried on in the vicinity of such lands, and that the lands involved in the suit had been mined for coal and large quantities of coal had been and were still being removed therefrom, to the irreparable injury of the United States; the value of the coal thus removed being the subject-matter of the claim in that respect to which we have at the outset referred.

There were general averments that the previously alleged acts concerning the making of the entries, which were alike in all, were done, not only for the purpose of defrauding the United States and enriching the corporation, but in order to conceal the wrong which was being accomplished, and that the acts of concealment were of such a character as to deceive the officers of the United States and to lead them to believe that the entries were what they purported to be, that is, purchases by the entrymen, and to exclude, therefore, not only the knowledge that they were for the account of the corporation, but also to exclude all basis for affording any reasonable ground to put the United States upon inquiry as to the

real situation. Additionally, it was averred that, so completely did the fraud which was committed and its concealment accomplish the purposes thus intended, that the officers of the United States had no knowledge whatever of the fraudulent title acquired by the corporation and no reason to believe in its existence until a short time before the bringing of the suit when, by report of a special agent of the Land Office, knowledge of the true situation was in part conveyed, leading up to a further investigation by the Department of Justice, consequent upon which the suit was commenced.

It was moved to dismiss on four grounds: (1) That the bill stated no cause of action; (2) that it was barred by the limitation of the Act of March 3, 1891, c. 559, 26 Stat. 1093, as the six-year period fixed by that act had elapsed; (3) because the facts as to fraud and concealment alleged in the bill were not of such a character as to suspend the operation of the statute, and (4) because those facts were of such a nature as necessarily to impute the knowledge of the fraud complained of, or if not, to make it clear that the failure to seek relief within the statutory time was the result of inexcusable laches. The court, not questioning that in an adequate case the fraud and the concealment thereof would suspend the operation of the statute until the discovery of the fraud (*Exploration Co.* v. *United States*, 247 U. S. 435, 445), based its conclusion upon the qualifications and limitations inhering in that rule, as stated in the *Exploration Case* and as previously expounded in *Bailey* v. *Glover*, 21 Wall. 342. Concluding that the averments of the bill were insufficient to establish that the failure to discover within the statutory time was not solely attributable to laches, and finding the bar of the statute under these circumstances absolute, the court applied the statute and dismissed the bill. The United States having elected not to avail of leave to amend within a period of 90 days, allowed by

the court of its own motion, but to stand on its bill, a final decree was entered dismissing the bill, and the case was taken to the court below.

That court, while considering the subject in the light of the burden cast upon the United States resulting from the fact that the time fixed by the statute had run before the suit was brought, and the technical sufficiency of the bill viewed merely from that aspect, proceeded to consider the averments of the bill comprehensively. As a result, it concluded (a) that the allegations of the bill did not meet the requirements as to the exertion of due diligence to discover the fraud which they charged had been committed, and (b) that the bar of the statute was applicable because the allegations of the bill stated the existence of facts and circumstances from which knowledge of the fraud was necessarily to be imputed, or from which such inferences were plainly deducible as would have led to discovery if diligence had been exerted; in other words, that there was either knowledge of the fraud within the statutory period, or such laches resulting from failure to make inquiry as to take the case out of the equitable principle by which the positive bar of the statute could be avoided.

Before testing the accuracy of the deductions from the averred facts upon which these conclusions are necessarily based, we dispose of a legal contention of the United States, that in any event the propositions were wrongfully applied, because under the statute laches in discovering the fraud could not be imputed to the United States. As the statute in express terms deals with the rights of the United States and bars them by the limitation which it prescribes, and as that bar would be effective unless the equitable principle arising from the fraud and its discovery be applied, it must follow, since the doctrine of laches is an inherent ingredient of the equitable principle in question, that the proposition is wholly without

merit, because, on the one hand, it seeks to avoid the bar of the statute by invoking the equitable principle suspending its operation, and, on the other, rejects the fundamental principle upon which the equitable doctrine invoked can alone rest.

Coming, then, to consider the allegations of the bill for the purpose of testing the conclusions based upon them by the court below, as just stated, we are of opinion that such conclusions cannot be sustained without drawing unauthorized inferences from the facts alleged and thus deciding the case by indulging in mere conjecture. Without going into detail, we briefly advert to the inferences from two subjects dealt with by the court below which illustrate the necessity for the conclusion just stated. In the first place, let it be conceded *arguendo* that the conveyances from the entrymen to the corporation, as alleged, following almost immediately the initiation of the right to purchase and preceding the patents, the uniformity of the method employed, and the surrounding circumstances, would all, if known, have constituted badges of fraud of such a character as to produce the result which the court below based upon them. But the result thus stated depends upon the existence of knowledge of such facts or of knowledge of other facts from which they were reasonably deducible,—a situation which does not here exist, as the averments of the bill as to concealment exclude that conclusion. True it is, that, in dealing with the question of the technical sufficiency of the pleading, the court below directed attention to the fact that it contained no allegation that the conveyances made by the entrymen had not been seasonably recorded; but that in no way justifies the inference that they had been recorded and therefore gave notice of the fraud, even if it be conceded, for the sake of the argument, that such recording was adequate to give such notice,—a question which we do not now decide.

So also, let it be conceded, as held by the court below, that the allegations of the bill as to the possession of the land by the corporation at the time of the purchase by the entrymen and subsequent to their conveyances; of the propinquity of the land to the field of operations of the corporation; of its exploitation by the corporation for the purpose of taking coal therefrom, all in and of themselves, if open and public so as to be known, constituted such indications of fraud as to give notice to the United States, or at least to put it upon inquiry. But again, that concession is here irrelevant since the averments of concealment and other allegations in the bill are susceptible of the construction that the possession of the corporation was clandestine and that its operations as to the property were of the same character because not conducted in its own name but by persons interposed with the very object of concealment.

Viewing the case in the light of these considerations, as well as of others to the same effect to which we do not stop to refer, we are of opinion that error was committed in disposing of the bill upon the motion to dismiss, and that the ends of justice require that it should be only finally disposed of after hearing and proof, thus excluding the danger of wrong to result from a final determination of the cause upon mere inferences without proof.

It follows that the decree of the court below must be and it is reversed and the case remanded to the District Court with directions to set aside its decree of dismissal and to overrule the motion to dismiss and for further proceedings in conformity with this opinion.

Reversed and remanded.

WILLIAMS ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 159. Motion to dismiss or affirm submitted November 22, 1920.—Decided March 7, 1921.

The Act of March 3, 1917, prohibiting the transportation in interstate commerce of intoxicating liquors into a State whose laws prohibit manufacture or sale of such liquors for beverage purposes, is not repugnant to Art. I, § 9, cl. 6, of the Constitution, prohibiting any regulation of commerce which gives preference to the ports of one State over those of another State. P. 338.

Affirmed.

WRIT of error to review directly a sentence in the District Court under an indictment charging interstate transportation of whisky in violation of the Reed Amendment.

Mr. Milton W. Mangus for plaintiffs in error.

The Solicitor General and *Mrs. Annette Abbott Adams*, Assistant Attorney General, for the United States.

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

In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699) which prohibited the movement in interstate commerce into any State of intoxicating liquor for purposes prohibited by the laws of such State, was sustained. It was held (a) that the law in question was appropriate as a regulation of commerce; (b) that any want of uniformity which might arise in its operation

caused from differences in the laws of the several States was to be attributed to such divergent state laws and not to any inherent want of uniformity in the act of Congress; (c) that it was competent for Congress, in regulating commerce as to the movement of intoxicants, to adapt its laws, as far as it deemed advisable, to the regulations prevailing in the several States; (d) that in regulating such commerce the authority of Congress was as complete as that which government possessed over intoxicants and was to be measured by the extent of such power and not by the authority which controlled the power of government as to other subjects.

In *United States* v. *Hill*, 248 U. S. 420, there came under consideration an indictment for violating the statute known as the Reed Amendment (Act of March 3, 1917, c. 162, § 5, 39 Stat. 1058, 1069), prohibiting the transportation in interstate commerce of intoxicating liquor into any State whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes. Reiterating the grounds upon which the constitutionality of the statute considered in the *Clark Distilling Co. Case* was upheld, and additionally pointing out the reasons why the statute under consideration was within the authority of Congress to enact as a regulation of commerce, the indictment was sustained and the statute of necessity upheld.

The decided cases in this court and in the lower federal courts which are noted in the margin [1] make it certain

[1] *United States* v. *Gudger*, 249 U. S. 373; *United States* v. *Simpson*, 252 U. S. 465; *United States* v. *James*, 256 Fed. Rep. 102; *Hardy* v. *United States*, 256 Fed. Rep. 284; *Malcolm* v. *United States*, 256 Fed. Rep. 363; *United States* v. *Simpson*, 257 Fed. Rep. 860; *Robilio* v. *United States*, 259 Fed. Rep. 101; *United States* v. *Luther*, 260 Fed. Rep. 579; *Laughter* v. *United States*, 261 Fed. Rep. 68; *Whiting* v. *United States*, 263 Fed. Rep. 477; *District of Columbia* v. *Gladding*, 263 Fed. Rep. 628; *Collins* v. *United States*, 263 Fed. Rep. 657; *United States* v. *Collins*, 264 Fed. Rep. 380; *Moran* v. *United States*, 264 Fed. Rep. 768; *Berman* v. *United*

that the *Clark Distilling Co.* and the *Hill Cases* were accepted as determining the validity of both the Webb-Kenyon Law and the Reed Amendment.

The case before us concerns an indictment found and conviction thereon had for a violation of the Reed Amendment after the decision in the *Hill Case,* and was brought directly here upon the theory that that law was repugnant to Art. I, § 9, cl. 6 of the Constitution, prohibiting any regulation of commerce which gives a preference to the ports of one State over those of another. We do not pause to consider whether the constitutional validity of the Reed Amendment had been in terms so completely settled by the *Clark Distilling Co.* and the *Hill Cases* as to cause the contention here relied upon to be frivolous at the time the writ of error was sued out, but content ourselves with saying that, in any event, the want of merit in the constitutional question relied upon is so plainly and unequivocally established by the cases in question and the authorities which have followed them, as to require us to do no more than direct attention to that condition and consequently to affirm the judgment.

Judgment affirmed.

States, 265 Fed. Rep. 259; *Payne* v. *United States,* 265 Fed. Rep. 265; *Hockett* v. *United States,* 265 Fed. Rep. 588; *Gross* v. *United States,* 265 Fed. Rep. 606; *Durst* v. *United States,* 266 Fed. Rep. 65; *Ciafirdini* v. *United States,* 266 Fed. Rep. 471; *Block* v. *United States,* 267 Fed. Rep. 524.

OREGON—WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 134. Argued January 13, 1921.—Decided March 7, 1921.

1. Personal property of army officers, transported for them, when changing stations, on government bills of lading at government expense, pursuant to army regulations, is not property of the United States within the meaning of the railroad land-grant acts and is not entitled to the special freight rates which those acts allow to the Government. P. 344.
2. Where a railroad company for a long period, exceeding the period of the statute of limitations, made a uniform practice of charging on its books and billing and collecting the reduced land-grant rates, for transportation of property of army officers on which it was entitled to claim the higher commercial rates, acquiescing without protest, in the practice and decisions of government officials, which treated the property as public property to which the lower rates were applicable, *held* that its conduct was inconsistent with any intention to reserve its right to more than it collected, and that it could not recover more in the Court of Claims. P. 345.

54 Ct. Clms. 131, affirmed.

THE case is stated in the opinion.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the briefs, for appellant:

The presentation of claimant's accounts for the transportation services involved at commercial rates less land-grant deductions, does not, under the circumstances of this case, estop it from suing for the balances lawfully due therefor in the Court of Claims within the six-year period of limitation. *Pickley* v. *United States*, 46 Ct. Clms. 77, 91; *Pennsylvania* v. *United States*, 36 Ct. Clms. 507; *Great Northern Ry. Co.* v. *United States*, 42 Ct. Clms. 234, 238; *Cape Ann Granite Co.* v. *United States*, 20 Ct. Clms. 1; *Chicago & Northwestern Ry. Co.* v. *United States*, 104 U. S. 680, 686.

The claimant was bound, by law and its contracts, to carry the household goods and other personal property of army officers and other government officials, when offered them by the shipping quartermasters of the Army, and it had a right to rely on the provisions of law and the terms of its contracts for the proper adjustment of its compensation, and was not precluded from claiming the full amount due for such transportation, under the law and its contracts, simply because it accepted payment of a less amount, without protest, from the disbursing officers or the accounting officers of the Government, especially when, as held by the Court of Claims, it would have been useless, so far as payment was concerned, for it to have presented its accounts for this transportation without land-grant deductions.

The *Railway Mail Service Cases*, 13 Ct. Clms. 199; 103 U. S. 703, cited in the opinion of the Court of Claims in the *Baltimore & Ohio Railroad Case*, 52 Ct. Clms. 468—a similar case to the one at bar and the opinion in which is relied upon by the court in this case—falls clearly within the principle of estoppel.

In the case at bar there was no contention that the Government has been prejudiced by the attitude of the railroads. On the contrary, the Government has profited by the failure of the companies to sue earlier in the Court of Claims for full tariff rates, to the extent of the items that are barred by the statute of limitations and by the use by the Government of the amounts now claimed. Moreover, appellant expressly requested a finding by the Court of Claims on the question of prejudice, but its request was overruled.

Part payment alone did not satisfy the debt. *People* v. *Hamilton County*, 56 Hun, 459; *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577; *Finney* v. *United States*, 32 Ct. Clms. 546.

The settlements were simply matters of accounting

and not of contract, and hence subject to subsequent correction and restatement by the carrier subject only to the limitations of time fixed by law.

An account stated or settled is only prima facie evidence of the extent of the liability of the debtor, and may be impeached for fraud, omission or mistake in law or fact. *Perkins* v. *Hart*, 11 Wheat. 237, 256; *Burrill* v. *Crossman*, 91 Fed. Rep. 543–545; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark*, 92 Fed. Rep. 968.

The rule as to mistake of law is usually invoked where a party seeks relief from some instrument he has executed, or from some payment that he has made, or from some action that he has taken, on the ground that he executed such instrument or paid such money or took such action while laboring under a mistake as to his legal rights in the premises. Such are *Bank* v. *Daniel*, 12 Pet. 32, and *United States* v. *Edmondston*, 181 U. S. 500, relied on by the Court of Claims. But such is not the case here.

The situation here is that the Government is endeavoring to avoid responsibility for the balances due claimant under this plea of mistake of law, having set up, by way of defense to this suit, that the claimant rendered its bills for less than the full amount due it by mistake as to its full legal rights in the premises. This claimant denies, and there is no finding by the court to any such effect. On the contrary, the fair presumption from what the Court of Claims said in its opinion, and from the allegations of the petition, is that claimant was not laboring under any mistake as to its legal rights, but merely rendered its bills at land-grant rates because it knew the disbursing and accounting officers of the Government, following the Comptroller's views and decisions would not pay full commercial rates therefor, although in some instances, and probably at first, it or some of its officers might not have known that the prop-

erty shipped was not government property, which would be a mistake of fact.

But even if claimant had been laboring under a mistake as to whether the Government was entitled to land-grant rates on this class of transportation, that fact would not preclude it from recovering any balances due, since the debt owing it by the Government was not entirely extinguished by part payment only. Claimant would be entitled to recover the balances due by suit in the Court of Claims within the statutory period, unless the failure of the claimant to claim the full amount in the first instance can be said to have so prejudiced the Government as to make it unjust and inequitable for the claimant to maintain a suit for the balances, which it is clear from this record is not the case here, no matter in estoppel being pleaded or proved. *Perkins* v. *Hart*, 11 Wheat. 237, 256; *Pickley* v. *United States*, 46 Ct. Clms. 77; *Ward* v. *Ward*, 12 Ohio Civ. Dec. 59. Distinguishing: *Utermehle* v. *Norment*, 197 U. S. 40, 56; *Central Pacific R. R. Co.* v. *United States*, 28 Ct. Clms. 427, 164 U. S. 93.

There was no estoppel by reason of the provisions in the Army Appropriation Acts.

Mr. Assistant Attorney General Davis for the United States.

Mr. Justice McKenna delivered the opinion of the court.

This action brought by appellant is for the recovery of certain balances amounting to the sum of $4,288.01, being the difference between the amounts paid at certain rates for transportation of the effects of Army officers changing stations and those which it is alleged were legally chargeable.

The Court of Claims adjudged that appellant was not

entitled to recover and dismissed its petition. The cost of printing the record in the case was awarded to the United States.

There were findings of fact which show that the accounts were presented for payment to the proper accounting officers of the Government in the regular way and payments were made by the disbursing officers of the Government on vouchers certified to be correct and presented by appellant. The charges so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "Land-grant equalization agreements," by which, to quote from the findings, "the carriers agreed, subject to certain exceptions, not material here to be noted—to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement." That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance as provided in the Railroad Land-grant Acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the Government.

After stating the action to be "for the recovery of various amounts, aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States," the

court by Mr. Justice Downey said, the action "is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items." And further, "the case therefore involves not only the question of the applicability of land-grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed."

The decision referred to is *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Clms. 412, and the ground of its ruling was that the freight transported was not the property of the United States, it being the effects of Army officers, and, therefore, was not entitled to land-grant deductions but was subject to the commercial tariff. Necessarily, therefore, the pending case must turn on other questions, for the property transported was the property of Army officers and subject, therefore, independently of other considerations, to the commercial rates. Appellant in the present case was paid sums less than those rates and there is left for consideration only its present right to recover the difference between them and the land-grant rates, the latter being those that were paid.

The Government, however, is not inclined to that limitation of the issue, and attacks the ruling of which it is the consequence, and repeats the contention decided against it in that case, and again insists that the property transported was government property and entitled to land-grant rates and all else is irrelevant. To this appellant replies that the Government did not appeal from the decision and must be considered as having accepted it. The effect is rather large to attribute to mere non-action, but we need not make further comment upon it

because we think the decision of the Court of Claims was correct. The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates, and we are brought to the grounds of recovery urged by appellant.

There are reasons for and against them. The assertion is of a right of action and recovery against apparently a concession during a long course of years to an explicit and contrary assertion by the Government. Appellant attempts to explain the concession or, let us say, its non-action, as the compulsion of circumstances, and of a belief of the futility of action, and now urges that it never intended to relinquish but always intended to assert its right. The record, however, has much against this explanation, or that can not be accommodated to it, if we may ascribe to appellant the usual impulses and interest that influence men.

It "and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books" the transportation charges at land-grant rates and not at regular commercial rates, so rendered its bills to the Government, and received payment without protest or the assertion of a greater compensation. And there was prompting to protest and such assertion. In 1901, according to a finding, "the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the Army over the railroad bridge at Quincy, Illinois." The claim was disallowed and thereafter the Union Pacific stated its accounts at land-grant rates. It is also found that in 1891 and in 1904 there was conversation between the Comptroller of the Treasury and counsel in regard to the rulings of the Comptroller though not, the Court of Claims says, to a claim then pending before the officer. Appellant, however, was not stirred to either opposition or protest by the incident

with the Union Pacific or the conversation with the Comptroller but continued to render its accounts at land-grant rates, and accepted payment without opposition or action until the decision of the Court of Claims in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States, supra.*

Counsel seem to make a merit of this uncomplaining and unresisting acquiescence and observe that the Government by it obtained the advantage of the plea of the statute of limitations. The fact is significant. It is inconsistent with the reservation of a right and an intention to subsequently make a judicial assertion of it. Creditors are not usually so indulgent and the appellant had remedies at hand. The courts were open to it, certainly protest was open to it. Its explanation for this non-action is not satisfactory. "It is advised and believes," is its allegation, and now its contention, that "its auditors and agents were led and constrained to render its bills and vouchers . . . at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's Department of the Army and upon *Government* bills of lading which in terms are only applicable to 'Government property' and 'public property,' *and also (because) the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates,*" and that it did not intend to waive its right to payment in full or to sue, "if so advised" for the balances due "so far as the same were not barred by the statute of limitations."

The italics are counsel's and we repeat them as they give emphasis to counsel's conviction of the justification

of the excuse. We do not share it. The mere mechanism of the bills of lading or their false designations of the property transported could not have imposed on anybody, certainly not on "the auditors and agents" of a railroad company; and the decisions of the Comptroller were as much open to dispute then as now and resort to suit an inevitable prompting, and yet, we have seen, the statute of limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its "auditors and agents" were not ignorant of affairs, nor unpractised in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the rights of the companies they represent. We do not say this in criticism, for such is their duty, the necessary condition of their places.

We are forced, therefore, to conclude that appellant's non-action was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the Government until stirred to acquisitiveness by the decision in the *Chicago, Milwaukee & St. Paul Case*, a decision which we may say, in passing, was declared by the Court of Claims to have been improvidently given. *Baltimore & Ohio R. R. Co.* v. *United States*, 52 Ct. Clms. 468.

The case therefore falls within the rulings of *United States* v. *Bostwick*, 94 U. S. 53; *Baird* v. *United States*, 96 U. S. 430; *Railroad Company* v. *United States*, 103 U. S. 703; *Central Pacific R. R. Co.* v. *United States*, 164 U. S. 93. And they have supplemental force in *United States* v. *Edmondston*, 181 U. S. 500; *Utermehle* v. *Norment*, 197 U. S. 40.

These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the concessions of appellant to the action of the accounting officers, and the

Court of Claims makes this a point in its decision. The court said that from the "long continued uniform course of action by" appellant "for a long period of years," "it had no intention of claiming anything more as to these transactions than that claimed in the certified vouchers and paid." And added, "All the facts justify this conclusion, for a course of conduct is more potent than assertions of belief unacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that plaintiff's (appellant's) charge upon its books was only of the amount claimed in its vouchers and that when that amount was paid 'the transaction was behind us.' The quoted language is the language of plaintiff's auditor."

In explanation of this, it may be said, and in contradiction of its implication, appellant requested findings by the court that the transaction of the appellant and its predecessor company "was regarded by the auditing department of the company as closed, so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect." And further, that the Government considered the accounts between "the carriers as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts." And it is contended that the evidence supports such conclusion. This is disputed by the Government, and it is doubtful. The Government concedes that a motion to remand the case for additional findings has foundation in the record, but contends "that the requests are without merit and that the case is fully covered by the facts as found." And adds, "of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive."

The Government further urges that the proposed amendment to Finding VI is covered by Findings VI

and IX, and is only a request "to change a negative to a positive finding"; that the amendment to Finding X is "rather an argument that certain conclusions should follow from facts found" and that the court's "conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative." The amendment to Finding XI, is, the Government says, "a request to find evidence," which is contrary to the rules, and besides the evidence is immaterial.

We concur with the Government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the Government as final, and not as tentative.

Judgment affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in the result.

WESTERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 136. Argued January 13, 1921.—Decided March 7, 1921.

1. A railroad company, acquiescing in the practice and rulings of government officials, charged and collected the reduced "land grant" rates for transportation of army officers' effects, upon which it was entitled to collect higher, commercial rates. *Held*, that it had waived its right to collect more and could not recover more in the Court of Claims. P. 355. See *Oregon-Washington R. R. & Navigation Co.* v. *United States*, *ante*, 339.

2. The transportation of army officers' effects for the Government at government expense may be done at special reduced rates under § 22 of the Interstate Commerce Act. P. 356.

54 Ct. Clms. 215, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss for appellant:

We are here concerned with the case of a final carrier of interline interstate movements, and it is immaterial whether land-grant mileage was directly involved in any movement embraced in the claim, or whether the shipments were routed entirely over non-land-grant lines. In the first case the land-grant factor would be injected by the land-grant act applicable. In the latter case the land-grant factor would be injected solely by the equalization agreements entered into by the railroads generally with the Quartermaster General, whereby they agreed to accept.

Thereby the railroad companies accorded the United States reduced rates, as authorized by § 22 of the Interstate Commerce Act, but only as to property, "for which the United States is lawfully entitled to reduced rates over land-grant roads," and such reduced rates to be the "lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."

As we are concerned here only with property for which the United States is not lawfully entitled to reduced rates over land-grant roads, both the land-grant acts and the equalization agreements disappear from the equation, and there remains the plain case of shipments made at the published tariff rates, on account of which the claimant, as the final carrier, has been paid less than the full amount and is suing for the difference.

Under the Interstate Commerce Act the final carrier is

not only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same. *Poor* v. *Chicago, Burlington & Quincy Ry. Co.*, 12 I. C. C. 418; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, 98.

The provision in § 22 of the Interstate Commerce Act "that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments," etc., is special authority for carriers to depart from established tariff rates (I. C. C. Conference Ruling 208*e*), and extends only to government property (I. C. C. Conference Rulings 33, 36 and 452). The fact that the Government assumes the freight charge is immaterial (I. C. C. Conference Rulings 107, 431).

And that the Government recognizes that (except as provided in § 22) it is reciprocally bound by, and entitled to the benefit of, the Interstate Commerce Act, is evidenced by the numerous instances where it has applied to the Interstate Commerce Commission for relief. *United States* v. *Adams Express Co.*, 16 I. C. C. 394; *United States* v. *Baltimore & Ohio R. R. Co.*, 15 I. C. C. 470; *United States* v. *Denver & Rio Grande R. R. Co.*, 18 I. C. C. 7; *United States* v. *New York, P. & N. R. R. Co.*, 15 I. C. C. 233; *United States* v. *A. & V. Ry. Co.*, 40 I. C. C. 406.

Even if § 22 could be construed to authorize the carriers to contract with the Government for reduced rates on other than government property—officers' effects, for instance—the situation here would not be changed, for the shipments in question were made expressly at the regular tariff rates. The equalization agreements did not apply, because the property of officers and employees was not property as to which the Government was lawfully en-

titled to land-grant rates. The regular tariff rates became the rates fixed by law and the final carrier could not by settlements, voluntary or otherwise, with the government officers, waive its right and obligation to collect the full amount.

Acquiescence has no application here as raising an implied agreement as to rates or as injecting into the bill of lading contracts an intent contrary to the plain language thereof.

The shipments were made upon bills of lading each constituting a separate and distinct contract. The right of action upon each of these contracts was separate and distinct. Settlement under one, or any number, at less than the contract rate, could not prejudice the right of action on any other. And outlawry of claim on earlier such contracts could not prejudice the rights of action on the later ones within the period of limitation.

Any defense to the items in suit, therefore, must arise out of the particular contracts under which the shipments were made and the conduct of the parties in connection therewith, and, however phrased, such defense resolves in final analysis into the contention that payment and acceptance in each instance constituted accord and satisfaction.

But, the doctrine of accord and satisfaction, as a defense to freight charges, has been eliminated by the Interstate Commerce Act.

Even aside from the controlling effect of the Interstate Commerce Act, the doctrine of accord and satisfaction would not apply, for there would then be presented the plain case of payment by the Government of less than it contracted to pay in each of the numerous express contracts, without any consideration to the claimant and without any prejudice to the Government.

Mr. Assistant Attorney General Davis for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The basic proposition in this case, and most of its subsidiary considerations, are the same as in No. 134, *ante*, 339. It was argued at the same time as the latter case, and, as in that case, it is to recover amounts withheld by the accounting officers of the Government as land-grant deductions in settlements for transportation of the personal effects of Army officers.

It is asserted, however, that this action differs from No. 134 in that the Western Pacific Railroad was not completed and in operation until 1910 so that it is said "there is absent the element of previous course of dealings relied upon by the Government, and in that there was introduced in evidence" testimony to the effect that the first voucher presented for transportation service was for full tariff rates.

It is stated in the findings that the real claimants in the case are the receivers of the railroad but that its name is used to designate claimants for convenience, and that between June 10, 1910, and March 18, 1915, the railroad, at the request of the United States as shipper or consignor, received from other railroad companies at connecting points, on government bills of lading, and transported over its lines, the effects and property of officers of the United States Army, changing stations under orders.

It further appears that from June 10, 1910, to March 18, 1915, the presentation of claims, character of vouchers accompanying the same, action thereon by the accounting officers of the Government, payment and receipt, were the same as in No. 134, except, it is found, that "settlements for charges on freight shipments on Government bills of lading were in charge of one David A. McLean, head of the freight revising bureau in the office of the general auditor

of the plaintiff [appellant] at San Francisco." And it is found "it was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bills of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences, as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plantiff; that he had had no experience in the rendering of bills for Government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates until after the decision

of the *Chicago, Milwaukee & St. Paul Case* by this court." [1]

It is further found that "the difference between the amounts claimed by the plaintiff and paid on account of said transportation during said period and the amount it would have received had it claimed and been paid full commercial rates without land-grant deduction is $5,760.89." The rulings of the accounting officers are detailed in the findings.

From March 18, 1915, to August 1, 1916, it is found that appellant was entitled "to payment . . . at the regular published tariff rates applicable." The government accounting officers, notwithstanding, "issued warrants for net amounts after making land-grant deductions." Against this appellant protested. The amounts deducted amounted to $851.78.

The conclusion of the court was, and its decision was, that appellant was entitled to judgment for the sum of $851.78 and that as to the other amounts its petition should be dismissed. For this the court gave as authority its decision in *Denver & Rio Grande R. R. Co.* v. *United States*, decided on the same day, 54 Ct. Clms. 125.

The opinion in the latter case is set out in the record at page 16.

The argument in this case is the same as in No. 134, and rests on the same considerations. This case, as we have seen, was decided on the authority of *Denver & Rio Grande R. R. Co.* v. *United States*, 54 Ct. Clms. 125, and the latter on *Baltimore & Ohio R. R. Co.* v. *United States*, 52 Ct. Clms. 468 and 534.

A contention, however, is made that was not made in No. 134, that is, that "under the Interstate Commerce Law the final carrier [appellant was final carrier of the transportation with which this case is concerned] is not

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[1] 50 Ct. Clms. 412.

only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same."

The further contention is that within this obligation is the property in the pending case. The immediate answer is that § 22 of the Interstate Commerce Act permits reduced rates to the United States, and that by Conference Ruling of the Interstate Commerce Commission No. 33 of February 3, 1908, § 22 is made applicable to property transported for the United States. The transportation in the present case was for the Government, and in providing for it and paying for it the Government performed a governmental service.

Judgment affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in the result.

SUPREME TRIBE OF BEN-HUR *v.* CAUBLE ET AL.

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

No. 274. Submitted January 10, 1921.—Decided March 7, 1921.

1. A suit brought against a fraternal benefit association, and its officers, by some, in behalf of all, of the members of a class of its beneficiaries so numerous that it would be impracticable to join all as parties, to determine their rights as a class respecting the disposition and control of trust funds held by the association, is cognizable by the District Court, where diversity of citizenship exists between the parties complainant and defendant, and the decree will bind all members

of the class, including those not parties who are co-citizens with the defendant. P. 363.

2. Recognition of the jurisdiction to bind absentees in such cases is manifest in the omission from Equity Rule 38, promulgated in 1912, of the earlier provision making the decree without prejudice to their rights and claims. P. 366.
3. Equity Rule 38, dealing specifically with this subject, controls Equity Rule 39. P. 366.
4. Having rendered a decree in a class suit defining the rights of a class of beneficiaries of a fraternal benefit association, the District Court has ancillary jurisdiction of a bill brought by the association against members of the class who are citizens of the same State as itself and were not parties to the original suit, to restrain them from reopening the questions thus settled by suits against it in the state courts. P. 367.

264 Fed. Rep. 247, reversed.

THE case is stated in the opinion.

Mr. Charles M. McCabe, Mr. Samuel D. Miller, Mr. William H. Thompson, Mr. Benjamin Crane and *Mr. Frank C. Dailey* for appellant.

Mr. William C. Bachelder for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon a question of jurisdiction. Jud. Code, § 238. Appellant is a fraternal benefit association organized under the laws of the State of Indiana. It filed a bill against Aurelia J. Cauble and others, citizens and residents of Indiana, to enjoin them from prosecuting in the state courts certain suits which, it is averred, would relitigate questions settled by a decree of the United States District Court for Indiana; it being the contention that all the members in Class A in the Supreme Tribe of Ben-Hur, including the appellees, were bound and concluded by the federal decree.

The bill was filed upon the theory that it is ancillary in character, and justifies a decree to protect the rights

adjudicated in the original proceeding. A motion to dismiss for want of jurisdiction was sustained. 264 Fed. Rep. 247.

The ancillary bill alleges that the questions decided in the original suit determined:

(1) The right of the Supreme Tribe of Ben-Hur to create a new class of benefit certificate holders known as Class B. (The membership in such society up to July 1, 1908, having been in the class thereafter to be designated as Class A.) (2) The right of the society to determine that all benefit certificates issued after July 1, 1908, should be Class B certificates, and that no Class A certificates should be issued after that date, and no new members taken into Class A, from that time. (3) The right of the Supreme Tribe of Ben-Hur to require members of Class B to pay different rates for their insurance from members of Class A. (4) The right of the Supreme Tribe of Ben-Hur to require that the mortuary funds of the two classes be kept separate and distinct, and that the death losses occurring therein should be paid out of the funds of each class respectively. (5) The right of the Supreme Tribe of Ben-Hur to authorize members of Class A to transfer, upon a written application therefor, to Class B, and to take with them into Class B their interest in the mortuary and other funds of the society, created, or arising prior to July 1, 1908, and require the Class B members to pay a monthly payment and rate in excess of that paid by Class A members. (6) The right of the Supreme Tribe of Ben-Hur to require members remaining in Class A, and not transferring to Class B, to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class A. (7) The right of the Supreme Tribe of Ben-Hur to use the expense fund of the society for the purpose of creating Class B, and to induce Class A members to transfer to Class B, and to secure new members in Class B. (8) Whether

the Supreme Tribe of Ben-Hur had used the expense fund in a manner justified by its constitution and by-laws and a general examination of expenditures which had been made by that society, out of its expense fund, and the purpose for which these expenditures had been made, and whether any of them were made in violation of the rights of Class A members. (9) The right of the Supreme Tribe of Ben-Hur to use its expense fund, including all questions as to whether payments made out of it were equitable and just, or inequitable, wrongful and unlawful; and the question of whether the maintenance of a general expense fund, and the payment of the entire expenses of the society therefrom, was fair, just and legal. (10) Whether the Supreme Tribe of Ben-Hur had wrongfully, or unlawfully, inaugurated a campaign to persuade and induce the members of the society belonging to Class A to give up their certificates in Class A, and to apply for and procure membership and certificates in Class B; or whether the action of the society, and its officers, in that connection, was rightful, just and equitable. (11) The question of whether the rates in Class A, in effect prior to July 1, 1908, were adequate or inadequate, or whether they were sufficient to provide for the current death losses in Class A, and the expenses of the society; or whether it was necessary, in order to prevent the insolvency of the Supreme Tribe of Ben-Hur, to create a new class, and induce the members of the old class, in so far as it was possible to induce them, to transfer to the new class, and the right of the society to take all action necessary for this purpose.

Other details of the reorganization are set forth, and it is averred that in the original suit it was finally determined and adjudged that the reorganization adopted by the Supreme Tribe of Ben-Hur was valid and binding upon all the members of the society, including the members known as Class A.

The ancillary bill alleges that the prosecution of the suits in the state courts of Indiana will have the effect to relitigate questions conclusively adjudicated against the defendants as members of Class A in the action in the United States District Court; that to permit them to do so would destroy the effect of the decree rendered in that suit; that in the several suits commenced in the state courts plaintiffs therein challenged the rights of the society to create Class B; and that the plan of reorganization of the society to create Class B, and the questions of fact and law involved in the causes in the state court are the same questions and none other than those conclusively adjudged and determined in the main suit.

The district judge dismissed the suit for want of jurisdiction upon the following certificate:

"I hereby certify that I dismissed the ancillary bill of complaint in the above cause of the *Supreme Tribe of Ben-Hur* v. *Aurelia J. Cauble*, et al., solely because of the lack of jurisdiction of the United States District Court for the District of Indiana to entertain said ancillary bill of complaint.

"I dismissed said ancillary bill of complaint upon a motion filed by the defendants thereto and also upon my own motion.

"The jurisdictional question arose as follows:

"On April 16, 1913, George Balme, a citizen of the State of Kentucky, and five hundred and twenty-three other complainants residing in fifteen different states of the Union outside of the State of Indiana, and one complainant residing in the Dominion of Canada, filed their bill of complaint in the United States District Court for the District of Indiana against the Supreme Tribe of Ben-Hur, a fraternal beneficiary society organized under the laws of the State of Indiana with its principal office at Crawfordsville in said state and district aforesaid, and its officers, all citizens and residents of the State of In-

diana, to enjoin what was claimed to be an unlawful use of trust funds of said defendant, Supreme Tribe of Ben-Hur, in which all the complainants and other members of Class A of said Supreme Tribe of Ben-Hur had a common but indivisible interest, and attacking a plan of reorganization adopted by the Supreme legislative body of the Supreme Tribe of Ben-Hur to prevent threatened insolvency and disruption of said society; the suit was a class suit brought and prosecuted for the benefit of all members of Class A of said society of whom there were more than seventy thousand at the time of the commencement of said suit, to wit, April 16, 1913; an answer was filed by the defendants setting up a full answer to the facts averred in the bill of complaint; a long hearing was had before the Master, the Master filed a written report and in this report it was found that this was strictly a true class suit presenting questions of common interest to all the members of Class A and affecting their joint interests in funds and in internal management of the society, written exceptions were filed thereto both by complainants and defendants, and a final decree was entered dismissing complainants' bill of complaint for want of equity, which said decree has never been appealed from, modified or vacated, but is still in full force and effect. No Indiana members of the society intervened or were made parties to the suit by any subsequent proceeding prior to the filing of said ancillary bill in said cause.

"In 1919 the defendants to the ancillary bill, all being residents of the State of Indiana, and all having been members of said Class A of said Supreme Tribe of Ben-Hur or being beneficiaries of persons who were members of said Class A at the time of the commencement, prosecution and final decree in said cause of *Balme and others* v. *Supreme Tribe of Ben-Hur and others,* commenced actions in the Circuit Court of Montgomery County,

Indiana, and in the Circuit Court of Marion County, Indiana, in which they seek to relitigate questions determined in favor of the defendant, Supreme Tribe of Ben-Hur, in said suit brought by George Balme and others in the United States District Court for the District of Indiana.

"The ancillary bill of complaint filed herein seeks to enjoin the maintenance and prosecution of the actions commenced by said several defendants to the ancillary bill of complaint in the State Courts of Indiana, all of which actions were commenced subsequent to the final decree in said cause of *Balme and others* v. *The Supreme Tribe of Ben-Hur*, which final decree was entered and rendered on the 1st day of July, 1915.

"That a copy of said ancillary bill, together with the motion of the defendants thereto to dismiss the same, and the order of dismissal are contained in the judgment roll filed herein, to which reference is made for a more particular description thereof, and that there is attached to said ancillary bill contained in said judgment roll a full copy of all the pleadings and proceedings had in said cause of *Balme et al.* v. *The Supreme Tribe of Ben-Hur et al.*, together with the report and findings of the Master and the judgment and decree of the court.

"I dismissed the ancillary bill of complaint on the ground only that members of Class A of the Supreme Tribe of Ben-Hur residing in the State of Indiana could not be bound by representation by complainants in the class suit of *Balme et al.* v. *The Supreme Tribe of Ben-Hur et al.*, as the presence of such Indiana members of Class A as plaintiffs would have ousted the jurisdiction of the court in the main suit, such jurisdiction being based only on diversity of citizenship and not on any Federal question, and that therefore the decree in the main case was and is not *res adjudicata* as to Indiana members of Class A of the Supreme Tribe of Ben-Hur.

"The only question which arose on the dismissal of the ancillary bill of complaint was the question of jurisdiction, and such question of jurisdiction only, as above stated, is hereby certified to the Supreme Court of the United States for its decision thereon."

From this statement of the case it is apparent that two points are involved in determining the jurisdictional question before us: First. Was the original decree binding upon citizens of Indiana who were in the class for whom the suit was prosecuted, but not otherwise parties to the bill? Second. Was the present suit ancillary in character, and such as to justify an injunction in the federal court to restrain the proceedings in the state court?

Class suits have long been recognized in federal jurisprudence. In the leading case of *Smith* v. *Swormstedt*, 16 How. 288, 303, of such suits this court said: "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The subject is provided for by Rule 38 of the Equity Rules of this court promulgated in 1912, which reads: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,

one or more may sue or defend for the whole." As the rule formerly read it contained the following provision "but in such cases the decree shall be without prejudice to the rights and claims of the absent parties."

The District Court held that this change in the rule could not affect the jurisdictional authority of the court, and added, that in its view Rule 39 was the applicable one. Rule 39 provides: "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties."

Under the latter rule the District Court held that the Indiana citizens were out of the jurisdiction of the federal court in the original suit, and that their joinder would have ousted the jurisdiction of the court, although that fact would not prevent the court from proceeding in the case to a decree without prejudice to their rights. "In other words," said the judge, "although the original bill was a class suit, the class did not include Indiana citizens."

That the persons in Class A of the society were so numerous that it would have been impossible to bring them all before the court, is apparent from a statement of the case. They numbered many thousands of persons, and resided in many different States of the Union. There was the requisite diversity of citizenship to justify the bringing of a class suit in the United States District Court for the District of Indiana. The court, therefore, properly acquired jurisdiction of the suit, and was authorized to proceed to a final decree.

The District Court held that in its view joinder of In-

diana citizens would have defeated jurisdiction in the federal court, which conclusion was necessarily decisive of the case.

In *Stewart* v. *Dunham*, 115 U. S. 61, a creditor's bill was filed in equity to set aside a conveyance of a stock of merchandise. The suit was removed from the state court to the Circuit Court of the United States on the ground of diversity of citizenship. After the cause was removed, co-claimants, citizens of the same State as were the defendants, were admitted into the suit. This, it was contended, prevented the court from proceeding to a decree, as it was without jurisdiction because the controversy became one not wholly between citizens of different States. Of this contention this court said (p. 64): "This, of course, could have furnished no objection to the removal of the cause from the State court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

This principle controls this case. The original suit was

a class suit brought by a large number of the class as representatives of all its membership.

The change in Rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. Street's Federal Equity Practice, vol. 1, § 549.

The District Courts of the United States are courts of equity jurisdiction, with equity powers as broad as those of state courts. That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, we can have no doubt. *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 672; *Royal Arcanum* v. *Green*, 237 U. S. 531.

Owing to the number of interested parties and the impossibility of bringing them all before the court, the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. The intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired. *Stewart* v. *Dunham, supra.* Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree.

Rule 38, as amended, was intended to apply to just such cases. Rule 39 does not apply to a subject already specifically covered in Rule 38. Of course, mere considerations of inconvenience cannot confer jurisdiction, but it is to be noted that if the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which

may be repudiated in another forum as to a part of the same class.

If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

As to the other question herein involved, holding, as we do, that the membership of Class A were concluded by the decree of the District Court, an ancillary bill may be prosecuted from the same court to protect the rights secured to all in the class by the decree rendered. *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, and cases cited.

It follows that the decree of the District Court, dismissing the ancillary bill for want of jurisdiction, must be

Reversed.

PAYNE, SECRETARY OF THE INTERIOR, ET AL. *v.* STATE OF NEW MEXICO.

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

No. 128. Argued October 6, 1920.—Decided March 7, 1921.

1. Under the acts of Congress entitling the State of New Mexico to waive its rights to any place section which has passed to it as school land and subsequently has been included within a public reservation

of the United States, and to select other public land of equal acreage in lieu, the State, having made such waiver and selection in due form, complying with all conditions precedent, acquires a vested right to the selected land which cannot lawfully be canceled or disregarded by the Land Department upon the ground that the base land has since been eliminated from the reservation. P. 370.

2. The provision making such a selection "subject to the approval of the Secretary of the Interior," does not postpone the vesting of the right of the State until the Secretary approves, but empowers and requires him to determine judicially the lawfulness of the selection as of the time when it was made. P. 371.

3. Where the Secretary of the Interior and the Commissioner of the General Land Office refused approval of such a lieu selection because, after it was made, the base tract was eliminated from the reservation, *held*, that the proper injunctive relief, in the courts of the District of Columbia, was to direct that the selection be disposed of in due course without regard to such elimination, rather than to forbid its cancelation or annulment. P. 373.

49 App. D. C. 80; 258 Fed. Rep. 980, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for appellants.

Mr. Patrick H. Loughran for appellee.

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

This is a suit by the State of New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling or annulling a lieu land selection of that State under a mistaken conception of their power and duty. A hearing on the bill and answer resulted in a decree for the State, which the Court of Appeals affirmed, 49 App. D. C. 80; 258 Fed. Rep. 980, and the defendants appealed to this court.

There was no controversy or difference in the land department about any question of fact, but only in respect of the time as of which the officers were authorized and required to determine the validity of the selection.

Congress granted to New Mexico for the support of common schools designated sections of land in each township, subject to specified exceptions, with a provision enabling and entitling the State to select other lands in lieu of those excepted, and with a further provision whereby, in the event any of the designated sections after passing under the grant should be included within a public reservation, the State was to be entitled to waive its right to them and select instead other land of equal acreage. See *California* v. *Deseret Water, etc., Co.*, 243 U. S. 415. All lieu lands were to be selected "under the direction and subject to the approval of the Secretary of the Interior." Acts of June 21, 1898, c. 489, §§ 1, 8, 30 Stat. 484; March 16, 1908, c. 88, 35 Stat. 44; June 20, 1910, c. 310, §§ 6, 10–12, 36 Stat. 557; February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276, Rev. Stats.

Some of the tracts in place after passing under the grant were included within a public reservation called the Alamo National Forest. Afterwards, on March 9, 1915, the State filed in the local land office a selection list waiving its right to one of these tracts and selecting in its stead other land of like area lawfully subject to selection. The list conformed to the directions given by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was duly posted and published, proof of publication was submitted and the publisher's charge was paid. In other words, the waiver and selection were regularly presented and all was done by the State that needed to be done by it to perfect the selection. The notice did not bring forth any protest or objection, and in due course the local land officers forwarded the list and supporting proofs and papers to the General

Land Office with a certificate stating that there was no adverse filing, entry or claim to the land selected and that the list had been accepted and approved by them. The list remained pending in that office until May 16, 1916, when the Commissioner directed that the selection be canceled solely on the ground that in the meantime, on April 3, 1916, the base tract—the one the right to which was waived—had been eliminated from the reservation by a change in its boundaries. The State appealed to the Secretary of the Interior and he affirmed the Commissioner's action. Both officers proceeded on the theory that the validity of the selection was to be tested by the conditions existing when they came to examine it and not by those existing when the State made it—in other words, they conceived that although the selection was lawful when made they could and should disapprove it and direct its cancelation by reason of the elimination of the base tract from the reservation a year later.

The courts below rejected that view and held that those officers were required to give effect to the conditions existing when the selection was made and that, if it was valid then, they were not at liberty to disapprove or cancel it by reason of the subsequent change in the status of the base tract. In our opinion the courts were right. The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated nonmineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

In the brief for the officers it is frankly and rightly conceded to be well settled that "a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time"; and also that this rule "is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him." See *Lytle* v. *Arkansas*, 9 How. 314, 333; *Stark* v. *Starrs*, 6 Wall. 402, 417–418; *Ard* v. *Brandon*, 156 U. S. 537, 543; *Payne* v. *Central Pacific Ry. Co.*, *ante*, 228. But it is said that as the selection is "subject to the approval of the Secretary of the Interior" no right can become vested, nor equitable title be acquired, thereunder unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is "judicial in its nature" and not only involves the authority but implies the duty "to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 388; *Daniels* v. *Wagner*, 237 U. S. 547, 557, *et seq.*; *Payne* v. *Central Pacific Ry. Co.*, *supra*. This view of it has been enforced where the Secretary, misconceiving his authority and the rights of the selector, erroneously declined to approve and canceled selections lawfully made. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720; *Daniels* v. *Wagner*, *supra*. And it should be observed that this view has been recognized and applied by the land department, although not

with uniformity. In the case of *Gideon F. McDonald*, 30 L. D. 124, which involved a lieu land selection and a state of facts much like those now before us, it was said by the Secretary of the Interior: "When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your [Commissioner's] office, of the character subject to such selection and free from other claim or appropriation. By this deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your [Commissioner's] office will therefore carefully examine the papers and records pertaining to this selection and if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection."

In *California* v. *Deseret Water, etc., Co., supra*, which involved a like waiver and selection alleged to have been lawfully made and to be awaiting action by the Secretary, the United States, in a brief presented by leave of the court, took the position that by the waiver it acquired such an

equitable right in the base tract as prevented a condemnation of the tract as the property of the State. The state court held the waiver and selection of no effect and this court reversed that decision.

We conclude that an injunction was rightly awarded, but that it will be better suited to the occasion if it be confined to directing a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation. With this modification the decree is

Affirmed.

WINTON, ADMINISTRATOR OF WINTON, ET AL. *v.* AMOS AND OTHERS, KNOWN AS THE MISSISSIPPI CHOCTAWS.

BOUNDS, ATTORNEY-IN-FACT FOR BOUNDS, *v.* SAME.

LONDON *v.* SAME.

FIELD ET AL. *v.* SAME.

BECKHAM *v.* SAME.

VERNON *v.* SAME.

HOWE, EXECUTRIX OF HOWE, *v.* SAME.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 6–12. Argued January 14, 15, 1919; restored to docket for reargument January 5, 1920; reargued April 21, 22, 1920.—Decided March 7, 1921.

1. The acts authorizing these suits against Mississippi Choctaws (April 26, 1906, c. 1876, § 9, 34 Stat. 140; May 29, 1908, c. 216, § 27, 35 Stat. 457), contemplate, not an action *in personam* to es-

tablish personal liability against individual Indians, or a group of them, but an equitable class suit against those who, by successfully asserting citizenship in the Choctaw Nation, acquired allotments out of the tribal land and participation in funds held in trust by the United States, to impose an equitable charge upon their lands and interests, so acquired, for a reasonable and proportionate contribution towards the value of the services rendered and expenses incurred by the claimants in securing such lands and interests for the class. Pp. 375, 391, 397.

2. The acts, in treating the Indians affected as a class, and in providing for their representation by the Governor of the Choctaw Nation for the purpose of receiving notice of the suit and by the Attorney General of the United States for the purpose of appearing and defending it, and in omitting to make the United States a party, are within the constitutional authority of Congress over tribal Indians and their property, and do not deprive the Indians of their property in violation of the Fifth Amendment, although they are citizens. P. 392.
3. For proper professional services rendered and expenses incurred in successfully promoting legislation to rescue substantial property interests of a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests so secured, the same as if a like result had been reached through litigation in the courts. P. 392.
4. Where such services, enuring to the benefit of a class, are performed under express contracts with some of its members, the party performing them may exact compensation from such individuals directly, under the express contracts if they are valid or under implied contracts if they are not, (in which case they would have contribution from their co-beneficiaries,) or, in avoidance of circuity of action, he may waive his rights under the contracts and proceed against all the beneficiaries directly. P. 393.
5. To sustain such an equitable charge, the services rendered must have been substantially instrumental in producing a result beneficial to the class upon whose interests it is to be imposed. P. 394.
6. Where the acts performed by certain claimants in behalf of a class of Mississippi Choctaws were in part such as to assist in procuring the legislative and administrative measures which secured their property interests, and in part apparently of the opposite tendency, so that the effect of the service as a whole was in doubt, *held*, that the Court of Claims should not have limited its findings to what the claimants did, but should have found specifically on whether

the service was of benefit, and if so, what compensation was equitably and justly due on the principle of *quantum meruit*. P. 395.

7. When requests under Rules 90-95 for additional findings are not filed within the prescribed 60 days after judgment, the Court of Claims has a discretion to reject them upon that ground, but when it rejects them for other reasons evincing a misconception of the case and of the significance of the requested findings, it will not be assumed that they would have been rejected upon the ground of delay if the misconception had not existed. P. 395.

No. 6. Reversed.

Nos. 7–12. Affirmed.

THE cases are stated in the opinion. The decisions of the Court of Claims are reported in 51 Ct. Clms. 284; 52 *id.* 90.

Mr. William W. Scott, for appellants in No. 6.

Mr. Guion Miller for appellants in Nos. 7–12.

Mr. Assistant Attorney General Davis for appellees.[1]

MR. JUSTICE PITNEY delivered the opinion of the court.

These are appeals from a judgment of the Court of Claims rejecting claims for alleged services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation. The decision of the Court of Claims is reported in 51 Ct. Clms. 284. In the Winton case (No. 6), a request for additional findings, equivalent to an application for rehearing, was denied, 52 Ct. Clms. 90. The appeals were taken under § 182, Jud. Code.

The jurisdiction of the court below arose under an Act of April 26, 1906, c. 1876, § 9, 34 Stat. 137, 140, and an

[1] At the first hearing the case was argued by *Mr. Assistant Attorney General Thompson. Mr. Solicitor General King* and *Mr. George M. Anderson* were also on the briefs.

amendatory provision in the Act of May 29, 1908, c. 216, § 27, 35 Stat. 444, 457. The former provided: "That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of said Choctaws."

The original petition was filed October 11, 1906, by Wirt K. Winton, one of the heirs-at-law of Charles F. Winton, in behalf of himself and the other heirs and also in behalf of the associates and assigns of Charles F. Winton. Thereafter it was provided by the amendatory act that the court be authorized and directed to hear, consider, and adjudicate claims of like character on the part of William N. Vernon, J. S. Bounds, and Chester Howe, their associates or assigns, and render judgment on the same principle of *quantum meruit;* the judgment, if any, to be paid from "any funds now or hereafter due such Choctaws as individuals by the United States"; Vernon, Bounds, and Howe were authorized to intervene in the pending suit of the estate of Winton, and it was "*provided further*, That the lands allotted to the said Mississippi Choctaws are hereby declared subject to a lien to the extent of the claims of the said Winton and of the other plaintiffs authorized by Congress to sue the said defendants, subject to the final judgment of the Court of Claims in the said case. Notice of such suit or intervention shall

be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of the said Choctaws."

Thereafter a second amended petition was filed by Wirt K. Winton, as administrator of the estate of Charles F. Winton, deceased, in behalf of the estate of Winton and also of Winton's associates and assigns. In this petition James K. Jones, administrator of James K. Jones, deceased, and Robert L. Owen, in his own behalf, joined. Intervening petitions were filed by William N. Vernon; Chester Howe, who died pending suit and in whose place his administratrix, Katie A. Howe, was substituted; and several others.

As shown by the findings the claim of Winton and associates arose as follows: By Article 3 of the Treaty of September 27, 1830 (7 Stat. 333), known as the Treaty of Dancing Rabbit Creek, the Choctaw Nation of Indians ceded to the United States the entire country possessed by them east of the Mississippi River, and agreed to remove beyond the Mississippi during the three years next succeeding. But, in view of the fact that some of the Choctaws preferred not to move, it was provided in Article 14 that each head of a family who desired to remain and become a citizen of the States should be permitted to do so, and should thereupon be entitled to a reservation of one section of land, with an additional half section for each unmarried child living with him over ten years of age, and a quarter section for each child under ten. If they resided upon said lands intending to become citizens of the States for five years after the ratification of the treaty, a grant in fee simple should issue; and it was further provided: "Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity." By another article (19) reservations were provided for certain prominent Choctaws by name,

and for limited numbers of heads of families and captains.

The mixed-blood Choctaws who elected to remain in Mississippi were provided for under Article 19, while the full bloods who remained and elected to become citizens of the State were provided for under Article 14; hence full-blood Mississippi Choctaws have always been called "Fourteenth Article Claimants." Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the State. They had no tribal or band organization or laws of their own, but were subject to the laws of the State. They did not live upon any reservation, nor did the Government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi, and the Department held it had no authority to approve contracts made with them.

Pending the negotiation of the treaty, the Legislature of the State of Mississippi passed an Act, January 19, 1830, abolishing the tribal customs of Indians not recognized by the common law or the law of the State, making them citizens of the State, with the same rights, immunities, and privileges as free white persons, extending over them the laws of the State, validating tribal marriages, and abolishing the tribal offices and posts of power. Recognition of their citizenship was afterwards embodied in the state constitution.

The right of the Fourteenth Article Mississippi Choctaws to citizenship in the parent tribe appears to have been recognized at one time by the Choctaw Nation west, which had removed to Indian Territory pursuant to the treaty.

On December 24, 1889, the Nation, through its legislature, memorialized Congress, reciting that there were "large numbers of Choctaws yet in the States of Mississippi and Louisiana who are entitled to all the rights and privileges of citizenship in the Choctaw Nation," and requesting the United States Government to make provision for the emigration of these Choctaws from said States to the Choctaw Nation. In 1891 a commission was provided for and funds appropriated by the Choctaw Council for the removal and subsistence of Mississippi Choctaws to the Nation, and during that year 181 were removed and admitted to citizenship.

By Act of March 3, 1893, c. 209, § 16, 27 Stat. 612, 645, Congress created the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission, with the object of procuring through negotiation the extinguishment of the national or tribal title to the lands of those tribes in the Indian Territory, either by their cession to the United States or allotment in severalty among the Indians, with a view to the ultimate creation of a State. By Act of June 10, 1896, c. 398, 29 Stat. 321, 339–340, the Commission was directed to make a complete roll of citizenship of each of the Five Civilized Tribes, and applicants for enrollment were to make application to the Commission within three months from the passage of the act and have the right of appeal from its decision to the "United States District Court" (construed by this court, in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 476–477, to mean the United States Court in the Indian Territory).

At this time the full-blood Mississippi Choctaws were extremely poor, living in insanitary conditions and working at manual labor for daily wages. Their children were not permitted to attend schools provided for the whites, and they were denied all social and political privileges. As already appears, they were receiving neither care nor attention from the Indian Office or the Department of the

Interior; and they were so far overlooked by the Dawes Commission that the time limited by the act just mentioned expired without their being included in the enrollment.

The activities of Winton and associates for which recovery is asked date from this point. Soon after the passage of the Act of June 10, 1896, Messrs. Owen and Winton entered into an agreement under which the latter was to proceed to Mississippi and procure contracts with such Indians as might be entitled to participate in any distribution of lands or moneys of the Choctaw and Chickasaw Nations, arranging to secure evidence, powers of attorney, and contracts, as prescribed by Mr. Owen; Owen was to prepare the necessary forms and represent the claims of the Indians before the proper officers of the United States or Indian Governments, with the assistance and coöperation of Winton; Winton to receive one-half of the net proceeds of the contracts. A supplementary agreement between the same parties provided in terms that Owen should have a half interest in the contracts, and in the event of accident to Winton should take them up as attorney in Winton's place. Immediately thereafter Winton proceeded to Mississippi, and during the year 1896 and the years following procured approximately 1,000 contracts with full-blood Mississippi Choctaws, some in the name of Winton, some in the name of Owen, by the terms of which Winton and Owen agreed to use their best efforts to secure the rights of citizenship for said Mississippi Choctaws, as members of the Choctaw Nation, in the lands and funds of said tribe, for a fee of one-half the net interest of each allottee in any allotment thereafter secured. These contracts were subsequently abandoned by Owen and Winton because void and unenforceable under the Acts of June 28, 1898, and May 31, 1900, referred to below, and new contracts were thereafter taken, principally in the name of Charles S. Daley, but in behalf

of Owen and Winton, with whom Daley was associated. These contracts recognized the previous services of Winton and associates as beneficial to the Indians, employed Daley and associates, including Winton and associates, as attorneys to look out for, protect, defend, and secure the interest of the Indians in the lands in Indian Territory to which they might be entitled as Mississippi Choctaws or as members of the Choctaw Nation, and to procure the recognition of their rights in said lands and in and to any funds arising from the Choctaw-Chickasaw lands, and provided that as compensation for all services rendered and to be rendered the attorneys should receive a sum of money equal to one-half of the value of the net recovery, based upon the actual value of the lands recovered. They seem to have contained other provisions looking to the sale or encumbrance, in part at least, of the lands secured for the Indians. The validity of these contracts has not been discussed.

Early in 1897 Mr. Owen spoke to Hon. John Sharp Williams, then Representative in Congress from the Fifth Congressional District of Mississippi, wherein practically all full-blood Mississippi Choctaws resided, calling his attention to the possible rights of such Choctaws to participate in the partition of the lands of the Choctaw Nation, at the same time submitting to him a copy of the Dancing Rabbit Creek Treaty, and calling his attention to Article 14. This was the first time the matter had been called to the attention of Mr. Williams. Thereafter, and until March 4, 1903, when he ceased to represent that District, he was active in all matters of legislation concerning the Mississippi Choctaws.

In December, 1896, Winton presented to Congress a memorial in behalf of Jack Amos and other full-blood Mississippi Choctaws asking that their rights under Article 14 of the Treaty of 1830 be accorded to them, and that they be provided for by enrollment either by the

Dawes Commission or by a special agent under the direction of the Commissioner of Indian Affairs. In January, 1897, a second memorial in behalf of Jack Amos and 246 other full-blood Mississippi Choctaws being heads of families was presented to Congress through Winton, asking that they be enrolled so as to participate in the proposed allotment of Choctaw lands in Indian Territory; and setting up that by the true construction of Article 14 of the Treaty of 1830, when viewed in connection with other treaties and laws and the history of the Choctaw Tribe, the Mississippi Choctaws were entitled to remain in Mississippi as United States citizens and still retain the rights of a Choctaw citizen, except as to a participation in the annuity.

In September, 1897, Winton presented a third memorial of like purport to the Secretary of the Interior.

Prior to the presentation of the first of these memorials, and in September or October, 1896, Mr. Owen appeared before the Dawes Commission in behalf of Jack Amos and 97 other full-blood Choctaws residing in Mississippi, and attempted to secure their enrollment under the Act of June 10, 1896. The Commission refused, on the ground that they were not resident in the Indian Territory. Owen appealed to the United States Court for the Central District of Indian Territory, where the ruling of the Commission was affirmed. This decision was "indirectly affirmed" by this court on May 15, 1899, in the case of *Stephens* v. *Cherokee Nation*, 174 U. S. 445, where it was held that the legislation under which the judgment was rendered was constitutional, and that this court was without jurisdiction to review decisions of the courts of Indian Territory in citizenship cases except upon the question of the constitutionality or validity of the legislation.

On February 11, 1897, a resolution drawn up by Mr. Owen was passed by the Senate, directing the Secretary

of the Interior to transmit certain historical data and information respecting the rights of the Fourteenth Article claimants. This was referred by the Secretary to the Commissioner of Indian Affairs for reply, and his reply, containing material supporting the claims of the Mississippi Choctaws, was transmitted by the Secretary to the Senate, February 15, 1897 (Senate Doc. 129, 54th Cong., 2d sess.).

About the same time, Mr. Owen made an argument before the Committee on Indian Affairs of the House in support of House Bill No. 10,372, intended to permit the Mississippi Choctaws to continue to reside in that State and still claim the rights of Choctaw citizens. A favorable report was made by the Committee, March 3, 1897 (House Report 3,080, 54th Cong., 2d sess.), but the bill never passed either House.

In the Indian Appropriation Act of June 7, 1897, however, the following provision was contained: "That the commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities" (c. 3, 30 Stat. 62, 83).

Following the passage of this act Mr. Owen appeared before the Dawes Commission in the interest of the Mississippi Choctaws with whom he had contracts. On January 28, 1898, the Commission made a report to Congress as required by the act last mentioned (House Doc. 274, 55th Cong., 2d sess.), setting forth in brief the history of the Mississippi Choctaws and their then present condition; and submitting an elaborate argument in opposition to the contention that those Choctaws might continue their residence and political status in Mississippi as in the past and still enjoy all the rights of Choctaw citizenship except to share in the Choctaw annuities;

declaring that in order to avail himself of the privileges of a Choctaw citizen, any person claiming to be a descendant of those provided for in Article 14 of the Treaty of 1830 "must first show the fact that he is such descendant, and has in good faith joined his brethren in the Territory with the intent to become one of the citizens of the Nation. Having done so, such person has a right to be enrolled as a Choctaw citizen and to claim all the privileges of such a citizen, except to a share in the annuities. And that otherwise he can not claim as a right the 'privilege of a Choctaw citizen.'" The Commission further said that, if they were correct in this, still any person presenting himself claiming the right must be required by some tribunal to prove the fact that he was a descendant of some one of those Indians who originally availed themselves of and conformed to the requirements of the Fourteenth Article of the Treaty of 1830. "The time for making application to this commission to be enrolled as a Choctaw citizen has expired. It would be necessary, therefore, to extend by law the time for persons claiming this right to make application and be heard by this commission, or to create a new tribunal for that purpose."

On June 28, 1898, Congress passed an act, commonly known as the Curtis Act, which contained in § 21 provisions for the making of rolls of the Five Civilized Tribes by the Dawes Commission, and among others the following: "Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

* * * * * * * *

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however,* That nothing contained in this Act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States." (C. 517, 30 Stat. 495, 503.)

Public notice having been given in Mississippi as to the times and places at which the Commission would hear applications for identification under the above provision, one of the Commissioners, A. S. McKennon, proceeded to Mississippi in January, 1899, with a force of clerks and stenographers and there identified and made up a schedule of 1923 persons as being Mississippi Choctaws entitled to citizenship in the Choctaw Nation under Article 14 of the treaty. The principle adopted was that proof of the fact that a claimant was a full-blood Indian whose ancestors were living in Mississippi at the date of the treaty was sufficient evidence to report his name as a Mississippi Choctaw under § 21 of the Curtis Act. This schedule, known as the "McKennon Roll," was subsequently approved by the Commission, who forwarded it with a report dated March 10, 1899, to the Secretary of the Interior. The schedule never was approved by the Secretary, and was attempted to be withdrawn by the Commission December 20, 1900, errors having been discovered in it. It was formally disapproved by the Secretary March 1, 1907. The Court of Claims finds that "the work of Commissioner McKennon, covering a period of about three weeks, in identifying and making up said schedule, was interfered with and retarded by said Charles F. Winton, who endeavored to prevent the Indians from appearing for identification." No explanation of this appears. At the same time it is found that Mr. Owen (who of course was associated with Winton) furnished to Commissioner McKennon a list

of 16,000 Choctaw Indians, which aided McKennon in his official work.

Because of material errors discovered by the Commission in the McKennon roll, another party was organized and sent out by the Commission for the purpose of making a more accurate and complete roll of the Mississippi Choctaws under the Act of 1898, whose hearings were commenced in Mississippi in December, 1900, resumed in April of the following year, and continued until the latter part of August, 1901.

February 7, 1900, Winton and associates presented a memorial to Congress praying that the treaty rights of the Mississippi Choctaws be so construed as to afford them the rights of Choctaw citizens without removal, or that they be permitted to have those rights determined in the courts. Congress took no action upon this.

April 4, 1900, Winton and his associates memorialized Congress requesting the following amendment to the Indian appropriation act then pending: "Provided, That any Mississippi Choctaw duly identified and enrolled as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Mississippi Choctaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement they shall be enrolled by the Secretary of the Interior as Choctaws entitled to allotment."

The act as passed contained the following: "*Provided*, That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be enrolled by such

United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided further,* That all contracts or agreements looking to the sale or encumbrance in any way of the lands to be allotted to said Mississippi Choctaws shall be null and void." (Act of May 31, 1900, c. 598, 31 Stat. 221, 236–237.)

The Dawes Commission thereafter required from all applicants for enrollment proof of descent from Choctaw Indians who remained in Mississippi and received patents for lands under the Fourteenth Article of the Treaty of 1830. This constituted a reversal of the principle previously adopted in making the McKennon Roll, to wit, a presumption that the ancestors of full-blood Choctaws residing in Mississippi had fully complied with the requirements of Article 14. It resulted that only six or seven persons claiming as Mississippi Choctaws were enrolled under the Act of May 31, 1900, although from 6,000 to 8,000 applications were filed in 1900 and the early part of 1901.

On April 1, 1901, the second party, already mentioned, sent by the Dawes Commission to Mississippi for the purpose of making a complete and accurate roll of Mississippi Choctaws, resumed hearings at Meridian, Mississippi, and held continuous sessions there and at other places in the State until the latter part of August. The Court of Claims finds that during these hearings and the making of this roll the conduct of Winton and associates increased the work of enrollment and impeded its progress. Being advised by Owen and believing that the McKennon Roll was a finality and constituted a favorable judgment in behalf of the Choctaws whose names appeared therein, Winton and associates advised all Indians who had been previously enrolled not to appear again before the Commission for identification. Nevertheless, as already stated, 6,000 or 8,000 applications for enrollment were made, of which only six or seven were accepted under the stringent rule of proof adopted by the Commission.

June 20, 1901, Winton, under advice of counsel, began taking new contracts with individual Choctaws living in Mississippi, in lieu of the previous contracts already mentioned. The new contracts were 834 in number, and embraced in all about 2,000 persons.

March 21, 1902, while preparation of the identification roll of Mississippi Choctaws was still in progress, an agreement was entered into between the Choctaw and Chickasaw Nations and the Dawes Commission in which, by sections 41, 42, 43 and 44, it was proposed to fix the status of the Mississippi Choctaws. This agreement, after some amendments in Congress, was approved by Act of July 1, 1902, and ratified by the Choctaws and Chickasaws on September 25, 1902 (c. 1362, 32 Stat. 641, 651–652). It was under this agreement, known as the Choctaw-Chickasaw Supplemental Agreement, that practically all Mississippi Choctaws were enrolled and secured their rights to allotments of Choctaw tribal lands. Section 41 as signed by the parties did not contain the full-blood rule of evidence—that is, that full-blood Choctaws living in Mississippi should be presumed to be descendants of Choctaws who had complied with the requirements of Article 14 of the Treaty of 1830. It permitted all persons identified by the Commission under the provisions of § 21 of the Act of June 28, 1898, as Mississippi Choctaws entitled to benefits under Article 14 of the treaty to make *bona fide* settlement within the Choctaw-Chickasaw country at any time within six months after the date of the final ratification of the agreement, and upon proof of such settlement to the Commission within one year after the date of such ratification they were to be enrolled by the Commission as Mississippi Choctaws entitled to allotment; but declared: "The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after the date of the final ratification of this agreement." While the supplemental agreement

as thus proposed was pending in the Senate, Winton and associates presented a memorial to that body in behalf of the full-blood Mississippi Choctaws, reviewing prior legislation and praying that the provisions of the agreement then pending should be amended so that the full-blood rule of evidence should be established and the Mississippi Choctaws given time after identification to remove to the Choctaw country and longer time within which to make application. (Senate Doc. 319, 57th Cong., 1st sess.) The memorial prayed that sections 41, 42, 43, and 44, which, it was alleged, imposed onerous conditions upon Mississippi Choctaws, should be struck out and plain provision made that persons whose names appeared upon the McKennon Roll, and such full-blood Mississippi Choctaws as might be identified by the Commission, and the wives, children, and grandchildren of all such, should alone constitute the "Mississippi Choctaws" entitled to benefits under the agreement; and that all of them who should have removed to the Choctaw-Chickasaw lands within twelve months after official notification of their identification should be enrolled upon a separate roll designated "Mississippi Choctaws" and lands equal in value to lands allotted to citizens of the Choctaw and Chickasaw tribes should be selected and set apart for each of them, and that after a *bona fide* residence for a period of a year and proof thereof they should receive patents as provided in the Atoka Agreement, and be treated in all respects as other Choctaws. An amendment embodying these suggestions was introduced in the Senate at Mr. Owen's request, submitted to the Department of the Interior, and adversely reported upon. Section 41, however, was subsequently amended, and as finally enacted (32 Stat. 651) established the full-blood rule as a rule of evidence, allowed six months after date of final ratification of the agreement within which applications for identification might be made, six months after

identification within which settlement might be made within the Choctaw-Chickasaw country, and one year after identification for making proof of such settlement to the Commission.

The passage of the Act of July 1, 1902, as thus amended, was opposed by Mr. Owen and the associates of Winton, who protested against the conditions contained in the amended sections relating to the Mississippi Choctaws as finally adopted.

The Indian Appropriation Act of March 3, 1903, c. 994, 32 Stat. 982, 997, contained the following: "That the sum of twenty thousand dollars, or so much thereof as is necessary, is hereby appropriated, to be immediately available, for the purpose of aiding indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, to be expended at the discretion and under the direction of the Secretary of the Interior." The special disbursing agent of the Dawes Commission was sent to Mississippi to carry out this provision. He there organized parties and assembled all Indians who could be found and induced to come, and they were later transported by special trains to Indian Territory and there further maintained until placed upon allotments, and supplied with tools and other equipment and rations for six months, all at the expense of the United States. The total number thus transported, maintained, and equipped was 420.

The Dawes Commission received applications from approximately 25,000 persons for enrollment as Mississippi Choctaws. Of this number 2,534 were identified by the Commission; but of these 956 failed to remove to Indian Territory or submit proof of their removal and settlement within the time prescribed by law. The total number of applicants identified and finally enrolled and who have received allotments as members of the Choctaw Nation is 1,578, of whom only 833 appear on the McKennon Roll,

and only 696 had contracts with Winton and his associates; 181 Mississippi Choctaws had voluntarily removed to the Territory in 1889 and were received into the Choctaw Nation. These were carried on the rolls as Mississippi Choctaws, making the total enrollment 1,759; but the 181 Indians just mentioned were not regarded as defendants in this proceeding.

The funds derived from sales of allotted lands of enrolled Mississippi Choctaws subject to the restrictions upon alienation prescribed by § 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, are held by the Government to the credit of the individual Indians entitled thereto. All other funds belonging to enrolled Mississippi Choctaws are held as tribal funds, the names being carried on a separate roll.

As we construe the jurisdictional acts under which these claims were submitted to the Court of Claims, they contemplate not an action *in personam* to establish a personal liability against individual Indians, or a group of Indians, but a suit of an equitable nature against that class of Mississippi Choctaws who, through successful assertion of the right of citizenship in the Choctaw Nation, acquired allotments of lands in what formerly was the tribal domain, and a participation in funds held in trust by the United States; a suit having the object of imposing an equitable charge upon their funds and lands for a reasonable and proportionate contribution towards the value of services rendered and expenses incurred by the claimants in securing for said class of Indians a beneficial participation in the trust estate, according to the principle applied in *Trustees* v. *Greenough*, 105 U. S. 527, 532, *et seq.*, and *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116, 122–127. The present suit is of that nature.

It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.

The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564, *et seq.*; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310–316. In authorizing the present suit Congress evidently recognized that it was impracticable to bring before the court all interested individual Choctaws; hence, treating them as a class, it designated the representatives who should defend for them, by analogy to the familiar practice in equity, recognized in Equity Rule 38 (226 U. S. 659). To the objection that the Government's trusteeship of the funds of these Indians and its guardianship over their interests in the allotted lands made it necessary that the United States should be a party to the proceeding, it is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the governor of the Choctaw Nation the representative of the defendants upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. We are clear, therefore, that there is no substantial basis for the contention that the jurisdictional acts have the effect of depriving the Indians of their property without due process of law and hence are in conflict with the Fifth Amendment; a contention which, while overruled by a majority of the Court of Claims, was acceded to by the Chief Justice in a concurring opinion, 51 Ct. Clms. 324–327.

The claim of Winton, Owen, and associates, is based wholly upon services rendered—nothing being asked because of expenses incurred or moneys disbursed. According to the findings the services rendered were in the nature of professional services before Congress and its committees, individual Representatives and Senators, the

Dawes Commission, etc., intended to establish the right of the Mississippi Choctaws to participation in the material benefits of citizenship in the Choctaw Nation, and to secure such legislation by Congress as might be needed for the practical attainment of the object sought. The findings render it clear that services of this nature, altogether proper in character—not lobbying, in the odious sense—were rendered by these claimants under particular employment by many individual Mississippi Choctaws, but with the object, incidentally, of benefiting the Mississippi Choctaws as a class, because only so could the clients of the claimants be benefited. We make no doubt that, for proper professional services rendered and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who receive the benefit, the same as if a like result had been reached through successful litigation in the courts. In either case there is the same curious analogy to the salvage services of the maritime law; and while it may be more difficult to weigh the effect of a service rendered in promoting legislation and to estimate its value than in a case of successful litigation, we think the principle of *Trustees* v. *Greenough* and *Central Railroad & Banking Co.* v. *Pettus* applies in the one case as in the other.

The fact that in the present case the services were rendered under contracts with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither *mala in se* nor *mala prohibita*, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value. *King* v. *Brown*, 2 Hill (N. Y.) 485, 487; *Erben* v. *Lorillard*, 19 N. Y. 299, 302; *Smith* v. *Administrators of Smith*, 28 N. J. L. 208, 218;

McElroy v. *Ludlum*, 32 N. J. Eq. 828, 833; *Gay* v. *Mooney*, 67 N. J. L. 27, 687; *New York Central & Hudson River R. R. Co.* v. *Gray*, 161 App. Div. (N. Y.) 924, 932; affirmed 239 U. S. 583, 587.

And assuming the last set of contracts made by Winton and Owen with the Mississippi Choctaws (including the Daley contracts) be regarded as valid, they still do not create an obstacle to the present suit. As between the claimants and their own clients, the existence of valid express contracts would bar recovery upon an implied contract. But there was no privity between claimants and the Mississippi Choctaws as a class, no contract having been made with them in their aggregate capacity and the individual contracts not including all members of the class. Under the equitable doctrine that we hold applicable, claimants, having substantially performed the agreements, might demand compensation under them as against their own clients, and the latter would then be entitled to a ratable contribution upon the basis of a *quantum meruit* from their fellow beneficiaries whose interests in the trust estate were secured and rendered available through the services of claimants. And by way of avoiding circuity of action the equitable proceeding may well be brought, as it has been brought, by claimants directly against the beneficiaries of the trust; claimants waiving, as they must, any right to recover under the contracts the measure of compensation prescribed therein. Hence, whether valid or invalid, the contracts are important merely as they show that claimants were not intermeddlers but were employed by large numbers of Mississippi Choctaws, members of the benefited class, and that their services were not intended to be gratuitous.

But, in order that there may be an equitable charge in such a case, it is essential that the services rendered shall have been substantially instrumental in producing a result beneficial to the class of *cestuis que trustent* upon whose

interests the charge is to be imposed. And while from the facts found it is altogether probable that the services of Winton and associates did materially conduce to bring about a result beneficial to the Mississippi Choctaws by furthering the measures of legislation and administration that were needed to give them a participation in the lands and funds of the Choctaw Nation, there is no specific finding of fact upon that subject. If, from the circumstantial facts as found, it followed as a necessary inference that the services did materially contribute to produce the effect indicated, it might be held that the ultimate fact resulted as a conclusion of law. See *United States* v. *Pugh*, 99 U. S. 265, 269–272. But the facts as found are inconclusive respecting the crucial point. Some of the services set forth in the findings clearly tended to produce a beneficial result; but there were others having apparently a contrary tendency. The interference by Winton with the work of Commissioner McKennon in making up his roll, and with the work of the second party in making identifications; the insistence before Congress upon measures for granting to the Mississippi Choctaws the rights of citizenship in the Nation while retaining their residence in Mississippi; and the opposition to the passage of the Act of July 1, 1902, in its final form, may be mentioned. However reasonable and well-intended these acts on the part of the claimants may have been—attributable as probably they were to zeal in the interests of the Indians—it cannot be said to be free from doubt that the efforts of claimants, taken as a whole, advanced the claims of the Mississippi Choctaws as a class to citizenship in the Nation and constituted a material factor in producing the ultimate advantageous result.

But there were requests for additional findings, directed to the very point upon which findings are wanting. These requests were preferred under Rules 90–95, but were filed more than the prescribed sixty days after judgment. The

court in its discretion might have rejected them on this ground. Not doing this, however, it passed upon the merits of the requests, as was reasonable in a case so important and so complicated; and since, from the reasons given for rejecting them, it appears that the court to some extent misapprehended the nature of the main issue, and the bearing of the requested findings thereon, it cannot be said that had it not done so it would have rejected the requests because not filed in due season.

Many of the requests, while suggestive of matters that might well have been included in the findings, either are not framed with sufficient definiteness to enable us to say that there was error in rejecting them, or are objectionable for other reasons. But those here stated ought to have been acceded to:

XXIX-R (52 Ct. Clms. 128). "Whether or not the labor of Robert L. Owen in behalf of the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation, from July, 1896, to 1906, resulted in any benefit or value whatever to the Mississippi Choctaws."

XXXI-E (52 Ct. Clms. 130). "Whether or not the 1,643 Mississippi Choctaws who were admitted to citizenship in and received allotments as members of the Choctaw Nation obtained the right to become such citizens and thereby receive allotments as a result to any extent whatever of any of the labor and work done by Robert L. Owen and associates during the period of several years prior to the passage of the acts under which they were enrolled and allotted; and what compensation is equitable or justly due therefor on the principle of *quantum meruit* as required by the jurisdictional act in this case."

The reasons given for the rejection of these requests are not satisfactory; and for failure to make findings in response thereto, the judgment in the case of Winton and associates, No. 6, must be reversed, and the cause remanded for additional findings as requested.

The claim in No. 12, Katie A. Howe, executrix of Chester Howe, deceased, like the one we have been discussing, is based upon alleged legal services rendered before Congress and the Interior Department in representing and protecting the interests of the Mississippi Choctaws and establishing their rights in and to lands in the Choctaw Nation. The findings show that Chester Howe, having acquired an interest in a large number of contracts taken by a firm of Hudson & Arnold, or the members of the firm, with individual Mississippi Choctaw claimants, having the object of securing the rights of the latter to allotments in the tribal lands of the Choctaw Nation and removing the Indians to the Indian Territory, was actively engaged for about a year and a half in pressing the claims of those Choctaws upon Congressmen and Senators, the Sub-Committee on Indian Affairs of the House of Representatives, the officials of the Indian Office, and the Secretary of the Interior. It is found not to have been established by the evidence that Howe's services were effective in establishing the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, or that such legislation as was enacted, under which they received allotments in the tribal lands, was the result of his professional services. The vital element of a benefit conferred upon the Mississippi Choctaws as a class is lacking, and from what we have said it is manifest that the judgment of the Court of Claims as to this claim must be affirmed.

In the other cases covered by the present appeals, viz., Bounds, No. 7, London, No. 8, Field and Lindly, No. 9, Beckham, No. 10, and Vernon, No. 11, the findings show no benefit conferred upon the Mississippi Choctaws as a class for which recovery can be had under the jurisdictional acts. The claims of Bounds, Beckham, and Vernon are based upon services rendered and expenses incurred in behalf of individual Indians. London did nothing to advance the claims of the Mississippi Choctaws to citizen-

ship in the Nation. Lindly and Field claim as associates of Chester Howe; it does not appear that Lindly performed any meritorious service for the Indians; Field was active in impressing upon Congressmen and Senators his views as to necessary and proper legislation for securing the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation; but the extent and effect of such services do not appear, nor does it appear that the legislation finally enacted was the result of said services. In none of these cases does the record show any proper foundation laid for a remand for further findings. All these claims were properly rejected.

No. 6. Judgment reversed, and the cause remanded for further findings of fact as above specified.

Nos. 7, 8, 9, 10, 11, and 12. Judgments affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

PIERCE ET AL. *v.* UNITED STATES.

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

No. 173. Argued January 24, 1921.—Decided March 7, 1921.

1. A judgment for a fine imposed in a criminal case is enforceable, like a civil judgment, by execution (Rev. Stats., § 1041), and by creditor's bill. P. 401.
2. A corporation against which an indictment was pending for taking rebates in violation of the Elkins Act, divested itself of its assets by distributing them among its stockholders, who were also its officers and had notice of the prosecution. *Held*, that the United States, having secured a conviction a year later upon which a fine

was imposed, was entitled to pursue the assets by creditor's bill against the stockholders to satisfy the judgment. P. 402.

3. The United States, to satisfy a judgment recovered and upon which execution has been returned unsatisfied in one district, may bring a creditor's bill in another district in another State, without a preliminary issue of execution and return of *nulla bona* there. So *held* where it was agreed that the judgment debtor had no property out of which the judgment could have been satisfied at law. P. 404.
4. A corporation against which an indictment was pending under the Elkins Act, sold all its property to another corporation which assumed its "debts, obligations and liabilities" as part of the purchase price. *Held*, that, assuming the second corporation thus became liable to satisfy a judgment for a fine imposed upon a subsequent conviction in the criminal case, the existence of such legal remedy did not operate to debar the United States from seeking satisfaction of the judgment in equity by a creditor's bill against the stockholders of the first corporation; nor did the institution by the United States of a suit against the second company to subject land, part of the property purchased, to its judgment, amount to an election of remedies. P. 404.
5. Inasmuch as a judgment in favor of the United States may be made the basis of an execution in any State and district (Rev. Stats., § 986), the objection that a corporation against which the United States has a judgment in one district is a necessary party to a creditor's bill brought by the Government in another State and district to obtain satisfaction from the stockholders, is purely technical and, if not made in the Circuit Court of Appeals, cannot be availed of in this court as a ground for attacking a decree against the stockholders. P. 405.
6. Under Rule 24 of the Circuit Court of Appeals for the Eighth Circuit, a plain error may be noticed though not assigned or specified. *Held*, that such an error, refused consideration in that court because first called to its attention by petition for rehearing, was assignable and reviewable here. P. 405.
7. A judgment recovered by the United States as a fine in a prosecution by indictment does not bear interest, since interest is statutory, and Rev. Stats., § 966, the provision most nearly applicable, applies only to judgments recovered by civil process. *Id.*

257 Fed. Rep. 514, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court in favor of the

United States in a creditor's suit, brought by the Government against stockholders to satisfy a fine recovered from their corporation.

Mr. Louis Marshall for appellants.

The Solicitor General, with whom *Mr. Robert P. Frierson* was on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

In 1907 the Waters Pierce Oil Company, a Missouri corporation, was indicted in the District Court of the United States for the Western District of Louisiana under the Elkins Act (February 19, 1903, c. 708, § 2, 32 Stat. 847), for receiving rebates. In 1913 the Company sold and transferred all its property to the Pierce Oil Corporation; all the proceeds were paid to Henry S. Priest and Clay Arthur Pierce as trustees; and they distributed the same among the stockholders. Of these Henry Clay Pierce and the Pierce Investment Company, received millions in cash and stock and Clay Arthur Pierce a small amount. In 1914 the case under the Elkins Act was tried. The Company was convicted and sentenced to pay a fine of $14,000, and in the following year the judgment was affirmed by the Circuit Court of Appeals. 222 Fed. Rep. 69. An execution issued thereon to the marshal for that district and was returned *nulla bona.* Thereafter this bill in equity was brought by the United States in the Federal District Court for the Eastern District of Missouri against the Waters Pierce Oil Company, the trustees, and these three stockholders to obtain satisfaction of the judgment out of the money remaining in the hands of the trustees and that received by these stockholders. The District Court entered a decree dismissing the bill as against the Waters Pierce Company and the trustees, but granted, as against the stockholders

named, the relief prayed by the Government. The decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit, one judge dissenting. The case is brought here by these defendants, under § 241 of the Judicial Code. Reversal is sought on several grounds.

First. The ground for reversal most strongly urged is that the judgment imposing a fine on the Waters Pierce Company is not a debt on which a creditor's bill will lie. The argument is that a judgment for a definite sum of money does not necessarily endow the holder with all the rights of a creditor; that a court will look behind a judgment and will grant or deny relief according to the nature of the original cause of action, as it did in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; *Louisiana* v. *New Orleans*, 109 U. S. 285; and *Wetmore* v. *Markoe*, 196 U. S. 68; and that, since liability for a penalty is criminal in its nature and not strictly a debt, a creditor's bill cannot be brought upon a judgment for a penalty. It is true that to the liability for penalties imposed by the United States certain incidents of a criminal proceeding attach; see *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Stevenson*, 215 U. S. 190, 199. But the liability is often enforced by civil proceedings and specifically by the action of debt. *Lees* v. *United States*, 150 U. S. 476. See *Adams* v. *Woods*, 2 Cranch, 336, 340. And then certain incidents of civil proceedings attach. *Hepner* v. *United States*, 213 U. S. 103.

By § 1041 of the Revised Statutes it is provided (in addition to the power existing by general usage to commit a defendant to jail until his fine has been paid, see *Ex parte Barclay*, 153 Fed. Rep. 669) that judgments for penalties "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." The statute applies to all judgments for penalties, whether recovered by civil or criminal proceedings. A judgment creditor's bill is in

essence an equitable execution comparable to proceedings supplementary to execution. See *Ex parte Boyd*, 105 U. S. 647. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders.[1] There is no good reason why the rule should be limited to judgments arising out of civil proceedings. To the contention that the statute has not made this process available for the Government in enforcing a penalty, it may be answered as was done by the King's Bench a hundred years ago, in *King* v. *Woolf*, 2 Barn. & Ald. 609, 611, when it was insisted that a fine due to the Crown was not a judgment debt for which execution could be levied: ". . . mischievous consequences would ensue to the crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and . . . the preventing that will not be a mischievous consequence to any one but himself. Here there is a judgment that the defendant do pay to the king a fine of a certain sum. By that judgment the debt becomes a debt to the king, of record; and it is payable to the king instanter. . . . if we were to say that the crown shall not be at liberty to issue an immediate execution for its own debt, we should place the crown in a worse situation than any subject."

Second. It is contended that the right to bring a creditor's bill did not exist, because the judgment against

[1] *Wood* v. *Dummer*, 3 Mason, 308; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, 502; *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 240 U. S. 166; *Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 101; *Hastings* v. *Drew*, 76 N. Y. 9.

the Company was not entered in the trial court until a year after the Company had divested itself of the property sought to be reached in this suit; and the Government did not become a creditor, at all events until after its claim for penalties had ripened into a judgment. But when a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied, *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; but, as a matter of substantive law, the right to follow the distributed assets (see *Railroad Co.* v. *Howard*, 7 Wall. 392, 409; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 240 U. S. 166) applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract, *Baltimore & Ohio Telegraph Co.* v. *Interstate Telegraph Co.*, 54 Fed. Rep. 50, or the holder of a claim in tort, *Hastings* v. *Drew*, 76 N. Y. 9; *Jahn* v. *Champagne Lumber Co.*, 157 Fed. Rep. 407; and there is no good reason why the United States with a claim for penalties should be in a worse plight. Here the stockholders receiving the assets are in the position of volunteers; and there is not even the excuse that they were ignorant of the Government's claim. They were officers of the corporation, and the indictment was pending when the transfer of the assets was made. See *Baltimore & Ohio Telegraph Co.* v. *Interstate Telegraph Co., supra.*

Third. It is contended that the bill should have been dismissed because the execution issued to the marshal for the Eastern District of Missouri was not returned unsatisfied until after the commencement of the suit. It has been held that in litigations between private parties a creditor's bill cannot be maintained in a federal court upon a judgment recovered in a State other than that in which suit is brought, *National Tube Works Co.* v. *Ballou*, 146 U. S. 517, 523; and that a return unsatisfied of the execution issued on the judgment sued on is held essential to the maintenance of the creditor's suit, *Taylor* v. *Bowker*, 111 U. S. 110. But this strict rule is not applicable where the United States is the judgment creditor. Under § 986 of the Revised Statutes an execution issued in favor of the United States by any of its courts runs in every part of the United States; just as under § 985 an execution on a judgment obtained in favor of any party in a District Court, where the State is divided into two or more districts, may run and be executed in any part of the State. *Toland* v. *Sprague*, 12 Pet. 300, 328. Here the execution issued to the Louisiana marshal had been returned *nulla bona* before this suit was brought; and it is agreed that when this suit was begun the Waters Pierce Oil Company had no property in Missouri or elsewhere out of which the judgment could be satisfied at law. To hold that under such circumstances the suit must fail, because the return of *nulla bona* was not made by the marshal for the Eastern District of Missouri until after the filing of the original bill, would apply a well settled rule to a case not within its scope.

Fourth. It is contended that the bill should have been dismissed because the Government had an adequate remedy by suing the Pierce Oil Corporation, and, indeed, had commenced such a suit. That corporation assumed, as part of the purchase price of the Waters Pierce Oil Company, its "debts, obligations, and liabilities." Be-

fore commencing this suit the Government had brought, in a Federal District Court for Louisiana, a suit against the Pierce Oil Corporation to subject to the satisfaction of its judgment certain parcels of land conveyed to the corporation by the Waters Pierce Oil Company. But in the Louisiana suit the Pierce Oil Corporation denied liability insisting that the Government was not a creditor of the Waters Pierce Oil Company. The United States could not have been required to accept in lieu of its claim against the judgment debtor even an admitted obligation of the new corporation to pay it. The existence of that possible remedy did not bar the Government from following by a creditor's bill the assets of the corporation into the stockholder's hands. Nor did the suit against the Pierce Oil Corporation amount to an election of remedies which should have led the lower courts to dismiss this bill. The two remedies were consistent. See *Zimmerman* v. *Harding*, 227 U. S. 489, 494.

Fifth. The contention is faintly made that the decree should be reversed because the District Court dismissed the bill as against the Waters Pierce Oil Company, a necessary party; citing *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 610. The argument ignores the fact that this judgment being in favor of the United States is, under § 986 of the Revised Statutes, effective and may be made the basis of an execution running in a State and district other than that in which the judgment was rendered. It was doubtless for this reason that the District Judge concluded that it was unnecessary, if not improper, to enter in this suit judgment against Waters Pierce Oil Company. The objection is purely technical. Since it was not set up among the many errors assigned in the Court of Appeals and in this court, it cannot be availed of here.

Sixth. It is urged that the District Court erred in allowing interest on the penalty ($14,000) from the date

of the indictment, January 29, 1907. This was not assigned as error in the Circuit Court of Appeals, and for this reason that court refused to consider it on a petition for rehearing. In the assignment of errors filed in this court the objection was properly raised. Under Rule 24 of the Circuit Court of Appeals for the Eighth Circuit the court may "notice a plain error not assigned or specified," and we think it should have done so in this case. In allowing interest from January 29, 1907, the District Court was clearly under the misapprehension that that was the date of the judgment, for the decree so recites; whereas, in fact, judgment was not entered until March, 1914. But interest was not even allowable from that time. At common law judgments do not bear interest; interest rests solely upon statutory provision. *Perkins* v. *Fourniquet,* 14 How. 328; *Washington & Georgetown R. R. Co.* v. *Harmon,* 147 U. S. 571, 584–5. The only applicable statute of the United States is § 966 of the Revised Statutes which provides that "Interest shall be allowed on all judgments in civil causes, . . ." Since the penalty was not recovered by civil process but by judgment in a proceeding initiated by a criminal indictment, it obviously does not fall within the terms of the statute. Interest, therefore, is allowable only on the judgment from the date when it was entered against the defendants in this case, namely March 11, 1918.

The judgment of the Circuit Court of Appeals as modified is

Affirmed.

Syllabus.

UNITED STATES EX REL. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY *v.* BURLESON, POSTMASTER GENERAL OF THE UNITED STATES.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 155. Argued January 18, 19, 1921.—Decided March 7, 1921.

1. The provision of the Espionage Law (Act of June 15, 1917, c. 30, Title XII, § 3, 40 Stat. 217) which denies the mails to newspapers and other publications violating its prohibitions, was within the power of Congress. P. 409.
2. The second-class mail privilege, previously granted for a newspaper, was revoked by the Postmaster General, upon due notice and hearing, because, from the time the United States entered the World War to the time of the revocation, the paper frequently and persistently printed articles conveying false reports and false statements with intent to promote the success of the enemies of the United States and constituting a wilful attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service. *Held*, that the procedure satisfied due process of law, p. 409; that the publication was clearly violative of § 3 of the Espionage Law, p. 413; that the order did not deprive the publisher of constitutional rights of free speech, or free press, or of property without due process of law, and was amply justified by the evidence. Pp. 409, 415.
3. The conclusion of a head of an executive department upon a matter of fact within his jurisdiction will not be disturbed by the courts unless clearly wrong. P. 413.
4. By long executive practice, admission to the second-class mail privilege is obtained for a publication only by a permit, issued by the Postmaster General, after a hearing and upon a showing satisfactory to him or his authorized assistants, that it contains and will continue to contain only mailable matter and that it will meet the other requirements of the law. Pp. 410, 415.
5. The power of the Postmaster General to revoke the privilege is an incident of the power to grant it, recognized by Congress (31 Stat. 1107) and by decisions of this court. Pp. 411, 415.

6. When a newspaper which has been admitted to the second-class privilege publishes non-mailable matter so frequently as to justify the presumption that it will continue to do so, the Postmaster General is empowered (Rev. Stats., § 396) to revoke the privilege, not merely as to particular issues containing such matter, but indefinitely for the future, subject to the publisher's right to secure a renewal upon proper application and proof that the paper will conform to the law. P. 416.

49 App. D. C. 26; 258 Fed. Rep. 282, affirmed.

ERROR to review a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment of the Supreme Court of the District dismissing the relator's petition for a writ of mandamus against the Postmaster General. The facts appear in the opinion of the court.

Mr. Henry F. Cochems, with whom *Mr. Hubert O. Wolfe* and *Mr. Seymour Stedman* were on the brief, for plaintiff in error.

The Solicitor General and *Mr. William H. Lamar* for defendant in error.

Mr. S. John Block and *Mr. Seth Shepard*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

After a hearing on September 22, 1917, by the Third Assistant Postmaster General, of the time and character of which the relator (plaintiff in error) had due notice and at which it was represented by its president, an order was entered, revoking the second-class mail privilege granted to it in 1911 as publisher of the Milwaukee Leader. So far as appears, all that the relator desired to say or offer was heard and received. This hearing was had and

the order was entered upon the charge that articles were appearing in relator's paper so violating the provisions of the National Defense Law, approved June 15, 1917, which has come to be popularly known as the Espionage Act of Congress (c. 30, 40 Stat. 217), as to render it "non-mailable" by the express terms of Title XII of that act. On appeal to the Postmaster General the order was approved. Thereupon the relator filed a petition in the Supreme Court of the District of Columbia, praying that a writ of mandamus issue, commanding the Postmaster General to annul his order and restore the paper to the second-class privilege. To a rule to show cause the Postmaster General answered, and a demurrer to his answer being overruled and the relator not pleading further, the court discharged the rule and dismissed the petition. The Court of Appeals of the District of Columbia affirmed the judgment of the trial court, and the constitutional validity of laws of the United States being involved the case was brought here by writ of error.

The grounds upon which the relator relies, are, in substance, that, to the extent that the Espionage Act confers power upon the Postmaster General to make the order entered against it, that act is unconstitutional, because it does not afford relator a trial in a court of competent jurisdiction, that the order deprives relator of the right of free speech, is destructive of the rights of a free press, and deprives it of its property without due process of law.

That a hearing, such as was accorded the relator, on precisely such a question as is here involved, when fairly conducted, satisfies all of the requirements of due process of law, has been repeatedly decided. *Smith* v. *Hitchcock*, 226 U. S. 53, 60; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

Since the petition in this case was filed, it has also become settled that the Espionage Act is a valid, constitu-

tional law. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616, 619.

The first comprehensive law providing for the classification of mails was enacted on March 3, 1879 (c. 180, 20 Stat. 355). From that time to this, mail classification, frequently approved by this court, has dealt only with "mailable matter." In § 7 of that act, still in effect, "mailable matter " is divided into four classes, and, by § 10, the second class of such "mailable matter" is defined as including newspapers and periodicals. By § 1 of Title XII of the Act of June 15, 1917, *supra*, any newspaper violating any provision of the act is declared to be "non-mailable matter," which shall "not be conveyed in the mails or delivered from any post office or by any letter carrier."

The extremely low rate charged for second-class mail—to carry it, was said, in argument, to cost seven times the revenue which it yields—is justified as a part of "the historic policy of encouraging by low postal rates the dissemination of current intelligence." It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. 229 U. S. 301, 304.

By now more than forty years of departmental practice, admission to the privilege of this second-class mail has been obtained for a publication only by a permit, issued by the Postmaster General after a hearing and upon a showing made, satisfactory to him, or his authorized assistants, that it contains and will continue to contain only mailable matter and that it will meet the various statutory and other requirements. *Houghton* v. *Payne*, 194 U. S. 88, 94.

That the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it has long been recognized by statute and by many decisions

of this court. (31 Stat. 1107; *Smith* v. *Hitchcock*, 226 U. S. 53, 57; *Houghton* v. *Payne*, 194 U. S. 88; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.) Under these statutes and decisions, if the newspaper of the relator had come to be so edited that it contained other than "mailable matter," plainly it was the intention of Congress that it should no longer be carried as second-class mail and therefore the order to revoke the permit which had been granted to relator was proper and justified,—and that it had become so changed in character is the holding of the Postmaster General and of the two lower courts which we are reviewing.

For the purpose of preventing disloyalty and disunion among our people of many origins, and to the end that a united front should be presented to the enemy, the Espionage Act, one of the first of the National Defense laws enacted by Congress after the entry of the United States into the World War (approved June 15, 1917, 40 Stat. 217), provided severe punishment for any person who "when the United States is at war" shall wilfully make or convey false reports or false statements with intent to interfere with the operation and success of the military or naval forces of the country, or with the intent to promote the success of its enemies, or who shall cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in such forces, or who shall wilfully obstruct the recruiting and enlistment service of the United States (§ 3). One entire title of this act (Title XII) is devoted to "Use of Mails," and in the exercise of its practically plenary power over the mails (*Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506, 507; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313), Congress therein provided that any newspaper published in violation of any of the provisions of the act should be *"non-mailable"* and *should not be "conveyed in the mails or delivered from any post office or by any letter carrier."*

It was under the provisions of this war-time act, and under the specific injunction of § 396 of the Revised Statutes of the United States, declaring it to be the duty of the Postmaster General to "superintend generally the business of the [Post Office] department, and execute all laws relative to the postal service," that the order in this case was entered.

The Postmaster General avers that, upon the hearing which we have described, he found that, beginning within a week after the declaration of war against the German Government and continuing to the date of the revocation of the second-class privilege herein, the relator had published in its newspaper frequently, often daily, articles which contained false reports and false statements, published with intent to interfere with the success of the military operations of our Government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service. For this cause, exercising the power which we have seen had been invested in the Postmaster General by statute for almost forty years, and which had frequently been exercised by his predecessors, the respondent revoked the second-class privilege which had been granted to the relator. A similar executive authority with respect to matters within their jurisdiction has been given to the heads of all the great departments of our Government and is constantly exercised by them.

This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts [the claim of the relator was heard and rejected by two courts before this re-examination of it in this court] but it is also subject to control by Congress and by the President of the United States. Under the Constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all three departments of the Government, if those rights

should be invaded by any ruling of the Postmaster General.

All this being settled law, there remains the question whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer, which are admitted by the demurrer, for the law is, that the conclusion of the head of an executive department of the Government on such a question, when within his jurisdiction, will not be disturbed by the courts unless they are clearly of the opinion that it is wrong. *Smith* v. *Hitchcock*, 226 U. S. 53, 60; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484, and cases cited.

In the answer of the Postmaster General there were quoted more than fifty excerpts from editorial articles which appeared in relator's newspaper at intervals between April 14 and September 13, 1917,—the first five months after our country entered the great war—upon consideration of which, with others not reproduced, he averred, his order was based.

Without going much into detail: It was declared in the quoted articles, that the war was unjustifiable and dishonorable on our part, a capitalistic war, which had been forced upon the people by a class, to serve its selfish ends. Our Government was denounced as a "plutocratic republic," a financial and political autocracy, and resident Russians were praised for defaming it. Other articles denounced the draft law as unconstitutional, arbitrary and oppressive, with the implied counsel that it should not be respected or obeyed, and it was represented that soldiers in France were becoming insane in such numbers that long trains of closed cars were being used to convey them away from the battle front. It was confidently asserted that the Constitution of the United States was purposely made difficult of amendment in order that we might not have real democracy in this country, the President was de-

nounced as an autocrat, and the war legislation as having been passed by a "rubber stamp Congress." In the guise of argument these articles sought to convince the readers of them that soldiers could not legally be sent outside the country and that our Government was waging a war of conquest when Germany was ready to make an honorable peace. The Food Control Law was denounced as "Kaiserizing America." It was declared that we were fighting for commercial supremacy and world domination only and that when the "financial kings" concluded that further fighting might endanger their loans to the Allies, they would move for peace, which would quickly come. Our "Allies" were repeatedly condemned and our enemies frequently praised.

These publications were not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of, them. Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it.

Without further discussion of the articles, we cannot doubt that they conveyed to readers of them, false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law (*Schenck* v. *United States, Frohwerk* v. *United States,* and *Debs* v. *United States, supra*), and that therefore their publication brought the paper containing them within the express terms of Title XII of that law, declaring that such a publication shall be

"non-mailable" and "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

While written more adroitly than the usual pro-German propaganda of that time, they nevertheless prove clearly that the publisher of these articles was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our Government was engaged and to induce them to lend aid and comfort to its enemies. The order of the Postmaster General not only finds reasonable support in this record but is amply justified by it.

We shall notice further only the contention that if it should be found that the Postmaster General had authority to revoke the second-class privilege as to a single issue of the paper, nevertheless he did not have power to make such an order applicable to the indefinite future.

The second-class privilege ever since 1879 has been granted to a newspaper, as we have seen, only on application of its publisher for entry of it to that class. Upon such an application, a searching investigation of the character of the publication is made by the Postmaster General, under rules and regulations prescribed by him, which experience has proved necessary to prevent frauds upon the Government (United States Postal Laws and Regulations, 1913, §§ 411 to 435, inclusive; 229 U. S. 306), and two representative copies of the issue nearest to the date of the application are required to be filed. If the publication is found to be entitled to the second-class privilege, a permit to that effect is issued, which contains, as did the permit to the relator, the provision that "the authority herein given is revocable upon determination by the Department that the publication does not conform to the law." Such a permit, however, would be equally revocable without any such specific reservation. (31 Stat. 1107; *Smith* v. *Hitchcock*, 226 U. S. 53, 60).

It is a reasonable presumption that the character of the publication as one entitled to the second-class privilege, when thus established, will continue to be substantially maintained, and therefore such a permit is made applicable to the indefinite future. For the same reason, and because it would not be practicable to examine each issue of a newspaper, the revocation of a permit must continue until further order. Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it "non-mailable," it was reasonable to conclude that it would continue its disloyal publications and it was therefore clearly within the power given to the Postmaster General by Rev. Stats., § 396, to "execute all laws relative to the postal service," to enter, as was done in this case, an order suspending the privilege until a proper application and showing should be made for its renewal. The order simply withdrew from the relator the second-class privilege, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do, but, for reasons not difficult to imagine, it preferred this futile litigation, undertaken upon the theory that a Government competent to wage war against its foreign enemies was powerless against its insidious foes at home. Whatever injury the relator suffered was the result of its own choice and the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRANDEIS, dissenting.

This case arose during the World War; but it presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether in times of peace our press shall be free.

The denial to a newspaper of entry as second-class mail, or the revocation of an entry previously made, does not deny to the paper admission to the mail; nor does it deprive the publisher of any mail facility. It merely deprives him of the very low postal rates, called second class, and compels him to pay postage for the same service at the rate called third class, which was, until recently, from eight to fifteen times as high as the second-class rate.[1] Such is the nature and the only effect of an order denying or revoking the entry. See Postal Laws and Regulations, §§ 421, 422 and 423. In this case entry to the second-class mail was revoked because the paper had, in the opinion of the Postmaster General, systematically inserted editorials and news items which he deemed unmailable. The question presented is: Did Congress confer upon the Postmaster General authority to deny second-class postal rates on that ground? The question is one of statutory construction. No such authority is granted in terms in the statutes which declare what matter shall be unmailable. Is there any provision of the postal laws from which the intention of Congress to grant such power may be inferred? The specific reason why the Postmaster General deemed these editorials and news items unmailable was that he considered them violative of Title XII of the Espionage Act. But it is not contended that this specific reason is of

[1] Act of March 3, 1885, c. 342, § 1, 23 Stat. 387; Act of March 3, 1879, c. 180, § 17, 20 Stat. 359–360. Compare Act of October 3, 1917, c. 63, § 1101, 40 Stat. 327. See Message of the President, February 22, 1912, transmitting the Report of the Commission on Second-Class Mail Matter, 62d Cong., 2d sess., H. R. Doc. 559, pp. 56–61.

legal significance. The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.[1] The question of the scope of the Postmaster General's power is presented to us on the following record:

Some years prior to 1917 The Milwaukee Leader, a daily newspaper published by the Milwaukee Social Democratic Publishing Company, made application to use the second-class mail, was declared entitled to do so, and thereafter used it continuously. It built up a large circulation, of which about 9,000 copies were distributed daily through the second-class mail. In September, 1917, its publisher was directed to show cause "why the authorization of admission . . . to the second class mail matter . . . should not be revoked upon the following ground:

"The publication is not 'a newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½ Postal Laws and Regulations."

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[1] Criminal Code, § 211 (obscene matter, information concerning abortion); § 212 (obscene, libelous or threatening matter upon envelopes or postal cards); § 213 (matter concerning lotteries); § 215 (schemes to defraud); § 217 (poisons, insects, reptiles, explosives, intoxicating liquors); by Act of March 4, 1911, c. 241, § 2, 36 Stat. 1339, § 211 of the Criminal Code, *supra*, was amended to include matter of a character to incite arson, murder, or assassination; by Act of March 3, 1879, c. 180, § 15, 20 Stat. 359, matter violating copyright laws was excluded; by Act of July 31, 1912, c. 263, § 1, 37 Stat. 240, prize-fight films were excluded; by Act of March 3, 1917, c. 162, § 5, 39 Stat. 1069, advertisements and solicitations for orders for intoxicating liquors in prohibition States.

That section relates not specifically to the second-class mail; but to all mail. It recites the provisions of Title XII of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 230, which declares unmailable all letters, pictures, publications and things "in violation of any of the provisions" of that act, and prescribes fine and imprisonment as punishment for the use or attempt to use the postal service for the transmission of such unmailable matter.[1] On this notice to show cause the Third Assistant Postmaster General held the customary informal hearing. The publisher of The Milwaukee Leader had not been convicted by any court of violating the Espionage Law; and its representative denied that it had ever committed any act in violation of it. But the Third Assistant Postmaster General issued on October 3, 1917, to the postmaster at Milwaukee the instruction that The Milwaukee Leader "is not entitled to transmission in the mails at the second-class rates of postage because it appears from the evidence in possession of the Department that the publication is not a 'newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations."

This determination and action were confirmed by the Postmaster General; and the postmaster at Milwaukee thereafter denied to the publication transmission at the rates provided by law for second-class mail. The order did not forbid to The Milwaukee Leader all use of the mails; nor did it limit in any way the use of the mail facilities; it merely revoked the so-called second-class mailing permit; and the effect of this was to impose a

[1] Like punishment is provided in all statutes referred to in note 1, p. 418, *supra* except that mailing matter violative of the copyright law is not punishable criminally. The maximum punishment for mailing prize-fight films is a fine of $1,000 and imprisonment for one year.

higher rate of postage on every copy of the newspaper thereafter mailed.

The return filed herein by the Postmaster General alleges that this order "involved the exercise of judgment and discretion on his part" and is "not subject to be reviewed, set aside, or controlled by a court of law;" but he gives this justification for his action:

"By representations and complaints from sundry good and loyal citizens of the United States and from personal reading and consideration of the issues of the said relator's publication, from the date of the declaration of war down to the time of service of the citation upon it, and the hearing granted in pursuance thereof, it seemed to this respondent, in the exercise of his judgment and discretion and in obedience to the duty on him reposed as well by the general statutes as by the special provisions of said Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication"

It thus appears that the Postmaster General, in the exercise of a supposed discretion, refused to carry at second-class mail rates all future issues of The Milwaukee Leader, solely because he believed it had systematically violated the Espionage Act in the past. It further appears that this belief rested partly upon the contents of past issues of the paper filed with the return and partly upon "representations and complaints from sundry good and loyal citizens," whose statements are not incorporated in this record and which do not appear to have been called to the attention of the publisher of The Milwaukee Leader at the hearing or otherwise. It is this general refusal thereafter to accept the paper for transmission at the second-class mail rates which is challenged as being without warrant in law.

In discussing whether Congress conferred upon the Postmaster General the authority which he undertook to exer-

cise in this case, I shall consider, first, whether he would have had the power to exclude the paper altogether from all future mail service on the ground alleged; and second, whether he had power to deny the publisher the second-class rate.

First. Power to exclude from the mails has never been conferred in terms upon the Postmaster General. Beginning with the Act of March 3, 1865, c. 89, § 16, 13 Stat. 507, relating to obscene matter and the Act of July 27, 1868, c. 246, § 13, 15 Stat. 196, concerning lotteries, Congress has from time to time forbidden the deposit in the mails of certain matter. In each instance, in addition to prescribing fine and imprisonment as a punishment for sending or attempting to send the prohibited matter through the mail, it declared that such matter should not be conveyed in the mail, nor delivered from any post office nor by any letter carrier.[1] By § 6 of the Act of June 8, 1872, c. 335, 17 Stat. 285, (Rev. Stats., § 396), the Postmaster General was empowered to "superintend the business of the department, and execute all laws relative to the postal service." As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised.[2] But while he may

[1] Criminal Code, §§ 211, 212, 213, 217; Act of March 3, 1917, c. 162, § 5, 39 Stat. 1069; Espionage Act of June 15, 1917, c. 30, Title XII, 40 Stat. 230.

[2] Orders excluding individual issues of newspapers or periodicals because of unmailable matter contained therein were sustained in *Masses Publishing Co.* v. *Patten*, 246 Fed. Rep. 24; *Anderson* v. *Patten*, 247 Fed. Rep. 382. In *Post Publishing Co.* v. *Murray*, 230 Fed. Rep. 773; and *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. Rep. 579, such orders were enjoined as being unwarranted by the facts. See also *Davis* v. *Brown*, 103 Fed. Rep. 909.

thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future mail tendered by a particular person or the future issues of a particular paper shall be refused transmission.

Until recently, at least, this appears never to have been questioned and the Post Office Department has been authoritatively advised that the power of excluding matter from the mail was limited to such specific matter as upon examination was found to be unmailable and that the Postmaster General could not make an exclusion order operative upon future issues of a newspaper.

In 1890 Tolstoi's Kreutzer Sonata had been excluded from the mails as indecent. Certain newspapers began to publish the book in instalments and their position was referred to the Attorney General. He replied:

"... I do not see that it necessarily follows that every instalment of the story thus published is obscene, because the story as a whole is declared to be so. It may be, indeed, that one or more chapters of this story are entirely unexceptionable in character. If so, the exclusion, as unmailable, of newspapers containing them might involve serious consequences to yourself." (19 Ops. Atty. Gen. 667, 668.)

Again, in 1908, President Roosevelt asked the Attorney General if the law permitted him to deny the mails to an anarchist newspaper published in the Italian language in which appeared articles advocating the murder of the police force of Paterson and the burning of the city. The Attorney General advised him that such an article constituted a seditious libel (it has since been made criminal by statute, Act of March 4, 1911, c. 241, § 2, 36 Stat. 1339), and that "the Postmaster General (would) be justified in excluding from the mails any issue of any periodical, otherwise entitled to the privileges of second-class mail

matter, which shall contain any article containing a seditious libel and counseling such crimes as murder, arson, riot, and treason." (26 Ops. Atty. Gen. 555.)

But the Attorney General was careful to point out that the law gave no authority to exclude issues of the paper which should contain no objectionable matter:

"It must be premised that the Postmaster General clearly has no power to close the mails to any class of persons, however reprehensible may be their practices or however detestable their reputation; if the question were whether the mails could be closed to all issues of a newspaper, otherwise entitled to admission, by reason of an article of this character in any particular issue, there could be no doubt that the question must be answered in the negative" p. 565.

If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them tantamount to a denial of the right of circulation. Congress has not granted to the Postmaster General power to deny the right of sending matter by mail even to one who has been convicted by a jury and sentenced by a court for unlawful use of the mail and who has been found by the Postmaster General to have been habitually using the mail for frauds or lotteries and is likely to do so in the future. It has, in order to protect the public, directed postmasters to return to the sender mail addressed to one found by the Postmaster General to be engaged in a scheme to defraud or in a lottery enterprise.[1] But beyond this Congress has never

[1] Revised Statutes, § 3929, as amended by Act September 19, 1890, c. 908, § 2, 26 Stat. 465, as amended by Act March 2, 1895, c. 191, § 4, 28 Stat. 964.

By § 2 of the Act of May 16, 1918, c. 75, 40 Stat. 554—enacted after this case had gone to judgment in the trial court—authority was conferred upon the Postmaster General to stop, in like manner, delivery

deemed it wise, if, indeed, it has considered it constitutional, to interfere with the civil right of using the mail for lawful purposes.[1]

The Postmaster General does not claim here the power to issue an order directly denying a newspaper all mail service for the future.[2] Indeed, he asserts that the mail

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of mail to a person whom he finds "upon evidence satisfactory to him" to be using the mails in violation of the Espionage Act.

[1] In the Sixty-third Congress, Third Session (1915) a bill, H. R. 20644, was introduced to deny absolutely the use of the mail to any person who, in the opinion of the Postmaster General, "is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libellous character." It was objected: The "bill would invest one man . . . with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. . . . Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty for an offence not clearly defined. . . . Under such circumstances as these it is not safe to leave to the decision of one man, after an *ex parte* investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power." The bill failed of passage. Hearings before Committee on Post Office and Post Roads, February 1, 1915, On Exclusion of Certain Publications from the Mails, pp. 38, 39, 63rd Cong. 3d sess. See The Postal Power of Congress, by Lindsay Rogers, Johns Hopkins University Studies (1916, Series XXXIV, No. 2), pp. 158, 159.

[2] In a letter to Senator Bankhead the Postmaster General said:

"I will state generally with regard to the action of the Department that no newspaper or periodical has been denied the privilege of the mails as such. Particular issues of certain publications have been found to contain matter which would interfere with the operation or success of the military or naval forces . . . etc., etc. . . . and therefore nonmailable under the act in question." Cong. Rec. Aug. 22, 1917, pp. 6851-6857. See also a letter to Mr. Moon, Chairman of the House Committee on Post Offices and Post Roads, House Report No. 109, 65th Cong., 1st sess.

is still open to the Milwaukee Leader upon payment of first, third or fourth-class rates. He contends however that in regard to second-class rates special provisions of law apply under which he may deny that particular rate at his discretion. This contention will now be considered.

Second. The second-class mail rate is confined to newspapers and other periodicals, which possess the qualifications and comply with the conditions prescribed by Congress.[1] In the present case the Postmaster General insists that by reason of alleged past violations of Title XII of the Espionage Act, two of the conditions had ceased to be fulfilled. His reasons are these: The Mail Classification Act of March 3, 1879, c. 180, 20 Stat. 358, provides by § 14, that a newspaper to be mailable at the second-class rates "must regularly be issued at stated intervals, as frequently

[1] Act of March 3, 1879, c. 180, § 14, 20 Stat. 359: "That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; *Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Act of August 24, 1912, c. 389, § 1, 37 Stat. 550, applying to publications of benevolent, professional, etc., societies, educational institutions, state boards, trade unions, etc.

Act of August 24, 1912, c. 389, § 2, 37 Stat. 553, requiring a sworn statement of the names of editors, owners, stockholders, bondholders, etc., and that all paid matter be plainly marked "advertisement." *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

as four times a year," and that it must be "originated and published for the dissemination of information of a public character." If any issue of a paper has contained matter violative of the Espionage Act, the paper is no longer "regularly issued"; and likewise it has ceased to be a paper "published for the dissemination of information of a public character."[1] The argument is obviously unsound. The requirement that the newspaper be "regularly issued" refers, not to the propriety of the reading matter, but to the fact that publication periodically at stated intervals must be intended and that the intention must be carried out. Similarly, the requirement that the paper be "published for the dissemination of information of a public character" refers not to the reliability of the information or the soundness of the opinions expressed therein, but to the general character of the publication. The Classification Act does not purport to deal with the effect of, or the punishment for, crimes committed through a publication. It simply provides rates and classifies the material which may be sent at the respective rates. The act says what shall

[1] In a letter to Senator Bankhead August 22, 1917, Cong. Rec. pp. 6851–6857, submitted at the argument, the Postmaster General said:

"For many (?) years this Department has held publications not to be 'regularly issued' in contemplation of law when any issue contained non-mailable matter; and when the second-class privilege has been withdrawn under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on both the grounds stated."

In his report for the year ending June 30, 1918, the Postmaster General says, p. 46:

"In the administration of the law governing second-class matter it was again found necessary to revoke the second-class mail privilege of some publications for the reason that their contents consisted more or less of matter which was non-mailable under the Espionage and other laws, and which, therefore, removed them from the class of publications entitled to that privilege."

The statement is repeated in the Postmaster General's report for the year ending June 30, 1919, p. 25.

constitute a newspaper. Undoubtedly the Postmaster General has latitude of judgment in deciding whether a publication meets the definition of a newspaper laid down by the law, but the courts have jurisdiction to decide whether the reasons which an administrative officer gives for his actions agree with the requirements of the statute under which he purports to act. *Gegiow* v. *Uhl*, 239 U. S. 3; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. The fact that material appearing in a newspaper is unmailable under wholly different provisions of law can have no effect on whether or not the publication is a newspaper. Although it violates the law, it remains a newspaper. If it is a bad newspaper the act which makes it illegal and not the Classification Act provides the punishment.

There is, also, presented in brief and argument, a much broader claim in support of the action of the Postmaster General. It is insisted that a citizen uses the mail at second-class rates not as of right—but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered; and may not complain if it is denied to him. The service is called the second-class privilege. The certificate evidencing such freedom is spoken of as a permit. But, in fact, the right to the lawful postal rates is a right independent of the discretion of the Postmaster General. The right and conditions of its existence are defined and rest wholly upon mandatory legislation of Congress. It is the duty of the Postmaster General to determine whether the conditions prescribed for any rate exist. This determination in the case of the second-class rate may involve more subjects of enquiry, some of them, perhaps, of greater difficulty, than in cases of other rates. But the function of the Postmaster General is the

same in all cases. In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office.[1] And it is not a function which either involves or permits the exercise of discretionary power. The so-called permit is mere formal notice of his judgment, but indispensable to the publisher because without it the local postmaster will not transmit the publication at second-class rates. The same sort of permit is necessary for the same bulk service at first, third or fourth-class rates.[2] There is nothing, in short, about the second-class rate which furnishes the slightest basis in law for differentiating it from the other rates so far as the discretion of the Postmaster General to grant or withhold it is concerned.

Third. Such is the legislation of Congress. It clearly appears that there was no express grant of power to the Postmaster General to deny second-class mail rates to future issues of a newspaper because in his opinion it had systematically violated the Espionage Act in the past; and it seems equally clear that there is no basis for the conten-

[1] The orders of the Postmaster General excluding periodicals from second-class mail, sustained in *Houghton* v. *Payne*, 194 U. S. 88; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, and *Smith* v. *Hitchcock*, 226 U. S. 53; as well as the fraud orders sustained in *Public Clearing House* v. *Coyne*, 194 U. S. 497, and that with which the court refused to interfere by certiorari in *Degge* v. *Hitchcock*, 229 U. S. 162, involved merely decisions of this nature. In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, his fraud order was set aside because wholly unwarranted by the facts.

[2] Under recent legislation a "permit" may be issued for either first, third or fourth-class mail. Under Act of April 28, 1904, c. 1759, § 2, 33 Stat. 429, 440, as amended by Act of May 18, 1916, c. 126, § 13, 39 Stat. 159, 162, and Act of April 24, 1920, c. 161, 41 Stat. 574, identical articles may be deposited in large quantities without stamps affixed and sent at first, third or fourth-class rates, according to their nature, by paying the postage in advance in cash in a lump sum.

tion that such power is to be implied. In respect to newspapers mailed by a publisher at second-class rates there is clearly no occasion to imply this drastic power.[1] For a publisher must deposit with the local postmaster, before the first mailing of every issue, a copy of the publication which is now examined for matter subject to a higher rate and in order to determine the portion devoted to advertising. Act of March 3, 1879, c. 180, § 12, 20 Stat. 359; Act of October 3, 1917, c. 63, § 1101, 40 Stat. 327. If there is illegal material in the newspaper, here is ample opportunity to discover it and remove the paper from the mail. Indeed, of the four classes of mail, it is the second alone which affords to the postal official full opportunity of ascertaining, before deposit in the mail, whether that which it is proposed to transmit is mailable matter. But even if the statutes were less clear in this respect than they seem to me, I should be led to adopt that construction because of the familiar rule that "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." *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. For adoption of the construction urged by the Postmaster General would raise not only a grave question, but a "succession of constitutional doubts" as suggested in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422. It would in practice seriously abridge the free-

[1] In the one case where drastic preventive measures were considered necessary—in the case of the foreign language press—Congress granted discretionary power to the Postmaster General specifically and in plain terms. By Act of October 6, 1917, c. 106, § 19, 40 Stat. 425 (The Trading With The Enemy Act), it was provided that, until the end of the war, foreign language papers should be nonmailable unless a translation should have been previously filed with the local postmaster, but that the Postmaster General might at his discretion grant a permit to mail without such translation. This act applied to publications sent by any class of the mails.

dom of the press. Would it not also violate the First Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the Fifth Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate Article III of the Constitution? It would in practice subject publishers to severe punishment for an infamous crime without trial by jury. Would it not also violate the Sixth Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the Eighth Amendment? If the construction urged by the Postmaster General is rejected, these questions need not be answered; but it seems appropriate to indicate why the doubts raised by them are grave.

(a) The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails. *In re Rapier*, 143 U. S. 110. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. As stated in *Ex parte Jackson*, 96 U. S. 727, 732: "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." In other words, the postal power, like all its other powers, is subject to the limitations of the Bill of Rights. *Burton* v. *United States*, 202 U. S. 344, 371. Compare *Adair* v. *United States*, 208 U. S. 161. Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitu-

tional. This court also stated in *Ex parte Jackson*, that "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri*, 4 Wall. 277, 325. The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.[1]

How dangerous to liberty of the press would be the

[1] See "Freedom of Speech" by Zechariah Chafee, Jr., pp. 105–109, 233–234; also p. 199: "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." It has been uniformly held that a statute prescribing similar penalties for failure to observe its provisions or the order of a public service commission, although made after full hearing, is a deterrent so potent as to amount to a denial of the right to a judicial review, and operate as a taking of property without due process of law in violation of the Fourteenth Amendment. *Ex parte Young*, 209 U. S. 123, 147; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 349; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337.

holding that the second-class mail service is merely a privilege, which Congress may deny to those whose views it deems to be against public policy is shown by the following contention made in 1912 by the Solicitor General in the *Lewis Case* (see Brief, pp. 46–47):

"A possible abuse of power is no argument against its existence, but we may as well observe that a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal as having no relation to the thing carried in the mails *unless the views are expressed in the paper;* but *if such views are expressed in the paper* Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff if a majority of Congress thought such views against public policy." (Italics in the original.) [1]

(b) The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. *Hoover* v. *McChesney,* 81 Fed. Rep. 472; *Payne* v. *National Railway Publishing Co.,* 20 App. D. C. 581; 192 U. S. 602. It is of the same nature as, indeed, it is a part of, the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations. *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1; *Adams* v. *Tanner,* 244 U. S. 590; *Allgeyer* v. *Louisiana,* 165 U. S. 578. A law by which certain publishers were unreasonably or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it

[1] It was, perhaps, in reference to this contention that the court said in closing its opinion in that case (p. 316): "We do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated."

would likewise deny them equal protection of the laws. Compare *Second Employers' Liability Cases*, 223 U. S. 1, 52–53. The court might hold that a statute which conferred upon the Postmaster General the power to do this, because of supposed past infractions of law, was unreasonable and arbitrary; particularly in respect to second-class mail which affords ample opportunity for preventing the transmission of unmailable matter; and hence obnoxious to the Fifth Amendment.

The contention that, because the rates are non-compensatory, use of the second-class mail is not a right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation.[1]

(c) The order revoking the entry of The Milwaukee Leader to second-class mail was clearly a punitive, not a preventive measure; as all classes of mail except the second were, as the Postmaster General states, left open to it provided it had sufficient financial resources. Of

[1] This is true, although the deficit is covered directly, in large part, by profits on first-class mail. The net cost of this service to the Government was, before the World War, equal to one-tenth of its expenditures for all other than postal purposes. Compare *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 304, with 34 Statistical Abstract of the United States (1911), p. 656. The justification for this non-compensatory service lies in the belief that education in its broad sense—intellectual activity fostered through the dissemination of information and of ideas—is essential to the life of a free, self-governing and striving people. This non-compensatory service is comparable to many rendered by the Government, *e. g.*, to the facilitation of communication and commerce by port, canal, passport or consular services, for all of which only small charges, or none, are made.

That a Government furnishing public service must be judged by ordinary standards of public callings, see Chafee on Freedom of Speech, p. 109, citing H. J. Laski in 31 Harvard Law Review, 186, and Laski's Authority in the Modern State, p. 378.

the three left available, the third class, being for "miscellaneous printed matter," was an appropriate one for distributing newspapers and was the cheapest. But the additional cost to the publisher involved in distributing daily 9,000 copies by the third-class mail would be a very serious one. The actual and intended effect of the order was merely to impose a very heavy fine, possibly $150 a day, for supposed transgression in the past. But the trial and punishment of crimes is a function which the Constitution, Article III, § 2, cl. 3, entrusts to the judiciary.[1] I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime. Possibly the court would hold that Congress could not, in view of Article III of the Constitution, confer upon the Postmaster General as a mere incident in the administration of his department, authority to issue an order which could operate only as a punishment. See *Wong Wing* v. *United States*, 163 U. S. 228, 235–237.

(d) The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed and that he shall be confronted with the witnesses against him. It is only in the case of petty offences that the jury may be dispensed with. *Schick* v. *United States*, 195 U. S. 65, 68. What is in effect a very heavy fine has been imposed by the Postmaster General. It has been imposed because he finds that the publisher has committed the crime of violating the Espionage Act. And that finding is based in part upon "representations and complaints from sundry good and loyal citizens"

[1] Compare *Harbor Commissioners* v. *Redwood Co.*, 88 Cal. 491; *Cleveland, etc., Ry. Co.* v. *People*, 212 Ill. 638; *Langenberg* v. *Decker*, 131 Ind. 471; *In re Sims*, 54 Kan. 1.

with whom the publisher was not confronted. It may be that the court would hold, in view of Article Sixth in our Bill of Rights, that Congress is without power to confer upon the Postmaster General, or even upon a court, except upon the verdict of a jury and upon confronting the accused with the witnesses against him, authority to inflict indirectly such a substantial punishment as this. See *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343.

(e) The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount.[1] Every fine prescribed by Congress is limited in amount. Statutes frequently declare that each day's continuation of an offence shall constitute a new crime. But here a fine imposed for a past offence is made to grow indefinitely each day—perhaps throughout the life of the publication. Already, having grown at the rate of say $150 a day, it may aggregate, if the circulation has been maintained, about $180,000 for the three years and four months since the order was entered; and its growth continues. It was assumed in *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 111, that an excessive fine, even if definite, would violate the Eighth Amendment. Possibly the court, applying the Eighth Amendment, might again, as in *Weems* v. *United States*, 217 U. S. 349, 381, make clear the "difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

The suggestion is made that if a new application for entry to second-class mail had been made the publishers might have been granted a certificate. It is no bar to proceedings to set aside an illegal sentence, that an ap-

[1] Compare *Morris* v. *State*, 1 Blackf. (Ind.) 37, 38; *State* v. *Bennett*, 4 Dev. & B. (N. Car.) 43, 50; *Easterling* v. *State*, 35 Miss. 210.

plication to the Executive for clemency might have resulted in a pardon.

In conclusion I say again—because it cannot be stressed too strongly—that the power here claimed is not a war power. There is no question of its necessity to protect the country from insidious domestic foes. To that end Congress conferred upon the Postmaster General the enormous power contained in the Espionage Act of entirely excluding from the mails any letter, picture or publication which contained matter violating the broad terms of that act. But it did not confer—and the Postmaster General concedes that it did not confer—the vague and absolute authority practically to deny circulation to any publication which in his opinion is likely to violate in the future any postal law. The grant of that power is construed into a postal rate statute passed forty years ago which has never before been suspected of containing such implications. I cannot believe that in establishing postal classifications in 1879 Congress intended to confer upon the Postmaster General authority to issue the order here complained of. If, under the Constitution, administrative officers may, as a mere incident of the peace time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our Bill of Rights and in every extension of governmental functions lurks a new danger to civil liberty.

MR. JUSTICE HOLMES, dissenting.

I have had the advantage of reading the judgment of my brother Brandeis in this case and I agree in substance with his view. At first it seemed to me that if a publisher should announce in terms that he proposed to print treason and should demand a second-class rate it must be that the Postmaster General would have authority

to refuse it. But reflection has convinced me that I was wrong. The question of the rate has nothing to do with the question whether the matter is mailable, and I am satisfied that the Postmaster cannot determine in advance that a certain newspaper is going to be non-mailable and on that ground deny to it not the use of the mails but the rate of postage that the statute says shall be charged.

Of course the Postmaster may deny or revoke the second-class rate to a publication that does not comply with the conditions attached to it by statute, but as my brother Brandeis has pointed out, the conditions attached to the second-class rate by the statute cannot be made to justify the Postmaster's action except by a quibble. On the other hand the regulation of the right to use the mails by the Espionage Act has no peculiarities as a war measure but is similar to that in earlier cases, such as obscene documents. Papers that violate the act are declared non-mailable and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the papers when received and to return them to the senders. Act of June 15, 1917, c. 30, Title XII, 40 Stat. 217, 230. Act of May 16, 1918, c. 75, 40 Stat. 553, 554. He could not issue a general order that a certain newspaper should not be carried because he thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretence that it has done so. Therefore I do not consider the limits of its constitutional power.

To refuse the second-class rate to a newspaper is to make its circulation impossible and has all the effect of

the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the carriage of unlawful matter of the present kind are to stop and to return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe.

PAYNE, SECRETARY OF THE INTERIOR, ET AL. *v.* UNITED STATES EX REL. NEWTON.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 123. Argued December 16, 1920.—Decided March 14, 1921.

1. After the lapse of two years from the date of the issuance of a receiver's receipt upon a final entry under the homestead law, if no contest or protest against the validity of the entry be then pending, the Land Department is required, by § 7 of the Act of March 3, 1891, to issue a patent for the land. P. 442. *Lane* v. *Hoglund*, 244 U. S. 174.
2. The purpose of this provision is to give the entryman, after the time limited, the advantage of the patent and legal title and thus transfer any later controversy over the validity of the entry from the department to the courts. P. 444.
3. The duty to issue the patent is not suspended by the initiation after the two years have elapsed of proceedings in the department to

cancel the entry and in the District Court to cancel the final certificate and receipt, upon the ground of fraud. P. 444.
48 App. D. C. 547, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Garnett, with whom *Mr. Assistant Attorney General Nebeker* and *Mr. H. L. Underwood,* Special Assistant to the Attorney General, were on the briefs, for plaintiffs in error:

A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry. *Knight* v. *United States Land Association,* 142 U. S. 161, 178; *Turner* v. *Fisher,* 222 U. S. 204; *Power* v. *Rose,* 219 Illinois, 46, 58, 59.

To require the Government to wait until patent issued before bringing suit to vindicate its rights might result in serious embarrassment. It might, for instance, be urged in defense of such a suit that the Government passed title to the land when it knew of the fraud as fully and completely as it did when it brought its suit. Again, the right of a transferee might intervene to the prejudice of the Government's right to recover the land. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 312.

The relator being guilty of fraud, is not entitled to relief by mandamus. High, Extraordinary Legal Remedies, 3d ed., § 26; *Duncan Townsite Co.* v. *Lane, supra,* 311, 312.

The proviso to § 7 of the Act of March 3, 1891, does not bar action by the Secretary of the Interior in cases of fraud. Distinguishing *Lane* v. *Hoglund,* 244 U. S. 174.

The solicitude of Congress in the enactment of the legislation was for the *bona fide* claimant. To interpret it otherwise would be to impute to Congress a purpose to condone and reward fraud.

A further indication that the proviso was not to apply when fraud was shown is in the language of the preceding portion of § 7, providing for issuance of patent only where the rights of a purchaser without fraud have intervened. Can it be fairly or reasonably asserted that after so protecting the Government against fraud Congress intended in the very next part of the section to provide for issuance of patents, not for the benefit of an innocent transferee but in aid and for the benefit of those who by fraud obtained final receipts and certificates upon their entries?

Summarized, the section provides, in the part just referred to, for the protection of *bona fide* purchasers; in the proviso, for the protection of *bona fide* entrymen. Neither fraudulent purchasers nor fraudulent entrymen are entitled to the benefits of the law.

Mr. F. W. Clements, with whom *Mr. Alexander Britton*, was on the brief, for defendant in error.

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

This was a petition to the Supreme Court of the District of Columbia for a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to pass a homestead entry to patent. A demurrer to the answer was sustained, the defendants elected to stand on the answer, and a judgment awarding the writ was entered. The Court of Appeals affirmed the judgment, 48 App. D. C. 547, and the defendants prosecute this writ of error under § 250, cl. 6, of the Judicial Code.

The important statute, the construction of which is drawn in question by the defendants, is a provision in § 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, which declares:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

The facts which stand admitted can be shortly stated. Allen L. Newton, the relator, made a preliminary homestead entry at the local land office of a quarter section of land. At that time the land was withdrawn for forest purposes, but with the qualification that prior homestead settlers who continued in good faith to maintain their claims should be permitted to carry them to entry and patent. Newton claimed to be a prior settler and within the qualification. In due course, after publication of the regular notice, he submitted commutation proofs under the homestead law and paid the purchase price and the legal fees. The local land officers found the proofs satisfactory, permitted him to make final entry and issued thereon the usual receiver's receipt. That was on November 21, 1904, and there was no protest, contest or other proceeding against the entry within two years, nor until November 27, 1908. On the latter date the Commissioner of the General Land Office ordered a hearing upon a charge that Newton had not complied with the law in point of residence and cultivation; and on March 23, 1912, the Secretary of the Interior held in that proceeding that the charge was sustained and ordered the entry canceled. On May 14, 1918, the Secretary rescinded that order and directed that the entry be passed to patent under the statute before quoted. The following month the Secretary recalled his last action and caused a suit to be brought in the District Court of the district wherein the land is situate to cancel the receiver's receipt and quiet the title

in the United States. The bill in that suit charged that the entry was fraudulently procured in that the proofs submitted by Newton in respect of his settlement, residence and cultivation were false; and that charge is repeated in the answer in the present case. Further proceedings in the suit in the District Court have been suspended, it is said, to await the ultimate decision on this petition.

Both courts below held that, as the final entry was not questioned by any protest or contest in the land department within two years after the issue of the receiver's receipt, the statute—the provision in § 7—terminated the authority of that department to entertain any proceeding for the cancelation of the entry and cast upon the Secretary and the Commissioner a plain and unqualified duty to pass the entry to patent. Whether that ruling was right or otherwise is the matter we are to consider.

The words of the statute are direct and make it very plain that if at the expiration of two years from the date of the receiver's receipt on final entry there is "no pending contest or protest" against the entry its validity no longer may be called in question in the land department—that is to say, "the entryman shall be entitled to a patent . . . and the same shall be issued to him." The purpose to fix his right and to command its recognition is obvious. This court so held in *Lane* v. *Hoglund*, 244 U. S. 174, where a writ of mandamus directing the issue of a patent was awarded. In that case, as in this, there was no contest or protest within the designated period, and in a proceeding subsequently initiated the Secretary held that the entryman had not complied with the law in point of residence and cultivation—in other words, that the proofs by which he procured the entry were false—and upon that ground the cancelation of the entry was directed. Besides, the entry there bore the same relation to a forest reserve that the present entry bears. Thus in all that is material the

two cases are alike. In the opinion in that case it was pointed out that the practice of the land department prior to the statute had been to entertain and act upon belated suggestions of fraud and noncompliance with law, that this had resulted in a practical blockade in the issue of patents and that the purpose of the statute was to rectify that situation and prevent its recurrence. The court then observed, p. 181, "In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course."

In the main the land department, as its regulations and decisions show, has construed and applied the statute as taking from the land officers all power to entertain proceedings for the cancelation of final entries of the classes specified, save where the proceeding is begun within the two-year period,—and this whether it is initiated by a government officer or by a private individual, and whether it is based upon a charge of fraud or upon some other ground. To illustrate: In the original instructions of May 8, 1891, 12 L. D. 450, the department took the position that it no longer could cancel such an entry or withhold the patent "on the ground of fraud, a failure to comply with the law, or a prior claim," unless a proceeding for the purpose was initiated within the period prescribed. In the case of *Jacob A. Harris*, 42 L. D. 611, decided December 13, 1913, the Secretary of the Interior adhered to that position as grounded upon a "sound construction of the law," overruled a decision to the contrary made two years before and rejected a protest presented after the allotted time which charged that the entryman, contrary to the statements in his proofs, had not complied with the law in the matter of settlement, residence and cultivation.

And in instructions issued April 25, 1914, 43 L. D. 294, the Secretary stated that the lapse of two years after the issue of the receiver's receipt "will bar a contest or protest based upon any charge whatsoever," save where the proceeding is sustained by some special statutory provision.

The defendants now call that construction in question. But we perceive no reason for rejecting or disturbing it. On the contrary, we think it is in accord with the natural import of the words of the statute and gives effect to the evident purpose of Congress. That purpose is to require that the right to a patent which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay,—and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. See *Brown* v. *Hitchcock*, 173 U. S. 473, 477. Of course, the purpose is not merely to enable the officers to issue the patent—for which they have other express authority—but to command them to issue it in the event stated,—the words of the statute being "the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

It is urged that the pendency in the District Court of the suit before mentioned affords a sufficient justification for withholding the patent. The courts below held otherwise, and rightly so, as we think. The statute contemplates that in the event stated the patent shall not longer be withheld, but shall be issued promptly to the end that the entryman shall have the advantages and protection which go with it. In other words, it is intended that he shall be clothed with the legal title instead of an equitable title only, shall have a patent instead of a receiver's receipt, and

shall have the benefit of the presumptions which are available to other patentees when their rights are called in question. But for this the statute would be without any real purpose or effect.

Judgment affirmed.

QUONG HAM WAH COMPANY *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 638. Argued March 9, 1921.—Decided March 21, 1921.

1. This court is without authority to review and revise the construction affixed upon a state statute as to a state matter by the court of last resort of the State. P. 448.
2. Where the state court, construing a state statute granting a privilege to citizens of the State, decided that, taken with Art. IV, § 2, of the Constitution, it must be applied as granting the same privilege to citizens of other States as well, *held*, that insistence in this court that the statute violated that provision of the Constitution by confining the privilege to citizens of the State, was frivolous and would not support a writ of error to review the judgment. P. 449.

Writ of error to review 192 Pac. Rep. 1021, dismissed.

THIS was a writ of error to review a judgment of the Supreme Court of California affirming an award made by the State Industrial Accident Commission under a Workmen's Compensation Law.

Mr. Warren Gregory, with whom *Mr. Allen L. Chickering* and *Mr. Delger Trowbridge* were on the brief, for plaintiff in error:

The judgment of the court below that plaintiff in error, although a resident of California, could nevertheless

attack the validity of the statute, is clearly correct. *Buchanan* v. *Warley*, 245 U. S. 60; *Heim* v. *McCall*, 239 U. S. 175; *Crane* v. *New York*, 239 U. S. 195; *New York Life Ins. Co.* v. *Hardison*, 199 Massachusetts, 190.

If the statute gives a right to a resident of California which is not given to a non-resident of that State, then it is clearly violative of § 2 of Art. IV of the Constitution and also of § 1 of the Fourteenth Amendment. *Ward* v. *Maryland*, 12 Wall. 418; *Cole* v. *Cunningham*, 133 U. S. 107. Distinguishing *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142.

Section 58 of the California Workmen's Compensation Act does not cover the claim of a non-resident of the State, because (a) the language of the act plainly limits it to injuries suffered by a resident of the State, and (b) the entire act has unmistakable evidence that it was never intended by the legislature that the operation of the law should be extended to non-residents.

Although the provisions of the Constitution may, in certain cases, extend the privileges and immunities of the citizens of a particular State to the citizens of the several States, nevertheless such principle has no application in the instant case, because there is thereby extended a burden as well as a privilege or immunity.

A discrimination between residents and non-residents violates § 2 of Art. IV of the Constitution with the same effect as if the discrimination were between citizens of the several States. *Blake* v. *McClung*, 172 U. S. 239; *Ward* v. *Maryland*, 12 Wall. 418; *La Tourette* v. *McMaster*, 248 U. S. 465.

Mr. Warren H. Pillsbury for defendants in error.

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

The Quong Ham Wah Company is engaged in the business of supplying to canneries in California and else-

where the labor required by them to carry on their canning operations. The Company in 1918 hired in the city of San Francisco one Owe Ming, a resident of California, under an agreement that he was to work as its employee at the cannery of the Alaska Packers Association at Cook's Inlet, Alaska, during the canning season, and that upon his return to San Francisco he would be paid off by the Quong Ham Wah Company and his employment terminated.

While working at the cannery Owe Ming sustained an injury resulting in a permanent disability, for which on returning to San Francisco he petitioned the Industrial Accident Commission of California for the allowance of compensation under the Workmen's Compensation Act, § 58 of which provides:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The Alaska Packers Association was joined with the Quong Ham Wah Company as defendant in the proceedings before the Commission, which culminated in a joint and several award against the said defendants. Thereafter the Quong Ham Wah Company filed with the Commission a petition for rehearing, asserting among other things, that the Commission was without jurisdiction to award compensation for injuries occurring outside the territorial limits of the State of California, except as provided in § 58 of the Compensation Act, and that that section was void as repugnant to Article IV, § 2, of the Constitution of the United States, because it granted to citizens of California the privilege of recovering for injuries sustained outside the State in the course of employments

contracted for within the State, while at the same time denying that privilege to citizens of other States. The rehearing was refused by the Commission.

The Company thereupon applied to the Supreme Court for a writ of certiorari, which was allowed, and that court, concluding that § 58 discriminated against non-residents as alleged and was consequently repugnant to the Constitution of the United States and void, decided that the Commission was without jurisdiction and annulled its award. Upon a rehearing, however, this view was retracted and the court concluded that the effect of the constitutional provision relied upon was, not to render void the provisions of § 58 for discrimination against non-residents, but to lead to or cause a construction of that section which would include citizens of other States and therefore avoid all question as to the discrimination relied upon. The court consequently held that "the statute itself is valid, and may be made to apply uniformly to citizens of California and the citizens of the other states," and, giving effect to this interpretation, affirmed the action of the Commission.

To reverse the judgment so rendered this writ of error is prosecuted. All the assignments and contentions made rest in their last analysis upon the assumption that, despite the construction of the statute made by the court below, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. *Commercial Bank* v. *Buckingham*, 5 How. 317, 342; *Johnson* v. *New York Life Insurance Co.*, 187 U. S. 491, 496; *Ross* v. *Oregon*, 227 U. S. 150, 162; *Ireland* v. *Woods*, 246 U. S. 323, 330; *Stadelman* v. *Miner*, 246 U. S. 544; *Erie R. R. Co.* v. *Hamilton*, 248 U. S. 369, 371–372. It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based

is so wanting in foundation as to be frivolous and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Sugarman* v. *United States*, 249 U. S. 182, 184; *Berkman* v. *United States*, 250 U. S. 114, 118; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193.

True it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the federal question relied upon.

Dismissed for want of jurisdiction.

EX PARTE RIDDLE, PETITIONER.

ON PETITION FOR WRIT OF MANDAMUS.

No. 27, Original. Argued February 28, March 1, 1921.—Decided March 21, 1921.

1. Mandamus does not lie where there was an adequate remedy by writ of error. P. 451.
2. A defendant, convicted of a felony and sentenced in the District Court, moved during the term to have the record corrected to show that, by agreement with the district attorney, he was tried by eleven jurors, and to set aside the judgment for that reason, but the court held the record sufficient, rejected evidence offered to the contrary, and denied both motions. *Held*, that the decisions could have been reviewed upon a bill of exceptions by writ of error. *Id.*

Rule discharged; petition denied.

PETITION for a mandamus to require a district judge to correct the record in a criminal case.

The facts are stated in the opinion.

Mr. John London and *Mr. Benjamin Carter* for petitioner.

The Solicitor General and *Mr. Erle Pettus*, with whom *Mr. W. C. Herron* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner was indicted for a violation of § 215 of the Criminal Code of the United States by a use of the mails in furtherance of a scheme to defraud. This is a felony, § 335, and therefore, we assume, must be tried by a jury of twelve. The petitioner was tried, convicted and sentenced, the record stating that "to try this cause come a jury of good and lawful men duly impaneled, sworn and

charged a true verdict to render according to the law and the evidence." During the term the petitioner filed a motion setting forth that as the result of an agreement between himself and the District Attorney the case was tried before a jury of eleven, and asking to have the record corrected to show the fact. There was also another motion to set aside the judgment on this ground. The record recites that after hearing the evidence and argument the Court being of opinion that the record is as it should be, and does not need amendment, denies the motion, and similarly denies the motion to set aside the judgment. The record discloses exceptions to both orders but sets forth no grounds. No exception to the jury seems to have been taken nor does the fact alleged or the exclusion of any evidence competent to prove it appear of record in any form.

The petitioner now comes here asking for a mandamus to correct the judge's conclusion and setting forth evidence offered in support of his motion that was rejected and that he says should have been received. He might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof were material, and then have brought a writ of error. *Nalle* v. *Oyster*, 230 U. S. 165, 177. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414. In this case the facts were more or less clearly admitted at the argument but the record does not establish them and the extent of agreement or dispute with regard to them does not change the remedy to be sought.

Rule to show cause discharged.
Writ denied.

HOLLIS ET AL. *v.* KUTZ ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

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

No. 397. Argued March 2, 1921.—Decided March 21, 1921.

1. Under the act establishing the Public Utilities Commission of the District of Columbia, a person claiming that an order of the commission raising the rates of a gas company infringes his constitutional rights need not make complaint or appear before the commission before bringing suit to have the order declared void. P. 454.
2. An order of the commission, raising the rates chargeable by a gas company to private consumers in the District of Columbia without changing a lower and unremunerative rate fixed by act of Congress for gas furnished the Government and the District, *held* not to involve any unconstitutional discrimination against private consumers, or taking of their property without due process of law, since the United States may fix any rate, for itself and for the District, as a condition to the gas company's establishment in the District, and private consumers are not compelled to purchase gas. P. 454.

49 App. D. C. 301; 265 Fed. Rep. 451, affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District dismissing a bill brought by the present appellants for the purpose of setting aside as unconstitutional certain orders of the Public Utilities Commission permitting the appellee gas company to increase its rates to private consumers while leaving them unchanged as to the Government and the District.

Mr. Roscoe F. Walter for appellants.

Mr. F. H. Stephens, with whom *Mr. Conrad H. Syme* was on the brief, for Public Utilities Commission.

Mr. Benjamin S. Minor, with whom *Mr. H. Prescott Gatley* and *Mr. Hugh B. Rowland* were on the brief, for Washington Gas Light Company, appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by private consumers of gas to have two orders of the Public Utilities Commission that increase the rate for gas to private consumers declared void. The first order, Number 254, March 15, 1918, raised the rate from 75 cents per thousand feet to 90 cents. The second, No. 314, March 15, 1919, raised it to not exceeding 95 cents; the orders being made under the authority of the Act of March 4, 1913, c. 150, § 8, 37 Stat. 938, 974, *et seq.*, establishing the Public Utilities Commission of the District of Columbia and fixing its powers. The bill and the appeal to this Court are said to be based upon Par. 64, of § 8, 37 Stat. 988. It is alleged that the orders violate the plaintiffs' constitutional rights because the rate to be charged to the United States and to the District remains the statutory rate of 70 cents, and to certain other takers still less, and that if the United States and District had paid 90 cents for the year 1918 the Gas Company would have received a return of about six per cent. It is said that the difference is an unlawful discrimination and that the plaintiffs are required to make up the loss incurred by furnishing the gas to the Government and the District at less than cost. The bill was dismissed by the Supreme Court for want of equity and because not filed within one hundred and twenty days after the entry of the order of March 15, 1918, as required by § 8, Par. 65. The Court of Appeals affirmed the decree on the different ground that

a formal complaint and hearing before the Commission were a condition of the right to sue in the courts. The provision in Par. 67 for the transmission of any new evidence taken in the suit to the Commission for its further consideration, and other details, were thought to indicate that the suit was in the nature of an appeal.

We are unable to agree with the opinion of the Court of Appeals. Assuming that the bill is based upon the statute the language of Par. 64 is that any person interested and dissatisfied with any order fixing any rate may commence a proceeding in equity. We do not perceive any advantage in requiring a party to file a complaint asking the Commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. On the other hand we see no requirement that the plaintiffs in equity should have appeared in the original hearing upon the rate. They are parties to the order equally whether they saw fit to argue the case to the Commission or not, and when they stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into Court. This suit is not for a revision of details but for a decree that the orders are void as matter of law. That by reason of their pecuniary interest the plaintiffs are persons interested within the statute, may be assumed for the purposes of decision. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49. S. C. *Peavey & Co.* v. *Union Pacific R. R. Co.*, 176 Fed. Rep. 409, 416, 417. See *Detroit & Mackinac Ry. Co.* v. *Michigan R. R. Commission*, 235 U. S. 402.

On the merits however there is no doubt that the decree was right. We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished to the public. But the notion that the Government cannot make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the District shall be

satisfied at any price that it may fix strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands. We do not consider whether the Commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the Government and they have no other ground upon which to found their supposed right.

Decree affirmed.

LANG, ADMINISTRATRIX OF LANG, *v.* NEW YORK CENTRAL RAILROAD COMPANY.

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

No. 290. Argued March 1, 1921.—Decided March 28, 1921.

1. Failure of a railroad to equip a car with automatic couplers as required by the Safety Appliance Act will not render it liable to an employee for an injury of which the delinquency was not the proximate cause. P. 458.
2. Where a brakeman, whose duty and purpose were to stop a string of switched cars before they reached a car standing on a siding awaiting unloading, was injured in a collision with it, having failed to stop the moving cars in time, *held*, that the fact that the standing car lacked a draw bar and coupler on the end where the impact was did not render the railroad liable for the injury, even if their presence would have prevented it, since the purpose of the requirement of automatic couplers is to avoid risks in coupling and not to provide a place of safety between colliding cars. P. 459.

227 N. Y. 507, affirmed.

THE case is stated in the opinion.

Mr. Hamilton Ward, with whom *Mr. Julius A. Schrieber* and *Mr. Irving W. Cole* were on the brief, for petitioner.

Mr. Maurice C. Spratt for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages laid in the sum of $50,000 for injuries sustained by petitioner's intestate, Oscar G. Lang, while assisting in switching cars at Silver Creek, N. Y. The injuries resulted in death. The Safety Appliance Act is invoked as the law of recovery.

There was a verdict for $18,000 upon which judgment was entered. It and the order denying a new trial were affirmed by the Appellate Division, March 5, 1919, by a divided court.

The Court of Appeals reversed the judgments and directed the complaint to be dismissed, to review which action this certiorari is directed.

In general description the court said: "In the case before us the defendant [respondent] was engaged in interstate commerce. A car without drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car."

There is no dispute about the facts; there is dispute about the conclusions from them. We may quote, therefore, the statement of the trial court, passing upon the motion for new trial, as sufficient in its representation of the case. It is as follows: "The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, New York. On the same track was also standing another car destined for Farnham, the

next station east. At Silver Creek this wayfreight had orders to leave a couple of cars and to take on the car going to Farnham. The car loaded with iron above referred to was defective. The draw bar, the draft timber and the coupling apparatus on the westerly end of this car were gone. This car had been on the siding at Silver Creek several days loaded with iron consigned to a firm at Silver Creek, waiting to be unloaded. Its condition was known to the crew of the wayfreight generally and to the plaintiff's intestate prior to the accident. In fact its crippled condition was the subject of conversations between him and the train conductor only shortly before the accident happened. In getting out the car for Farnham the engine went onto the siding from the westerly end, pulled out a string of six cars including the Farnham car, then shunted the Farnham car onto an adjoining track, placed two of the other cars they had hauled out onto a third track, and then kicked the other three cars back onto the track where the crippled car stood. Plaintiff's intestate was on one of these three cars for the purpose of setting the brakes and of so placing them on this siding as not to come into contact with the crippled car. He evidently was at the brake on the easterly end of the easterly one of the three cars moving toward the crippled car. His foot was resting on the small platform at the end of the car just below the brake wheel. For some reason he did not stop the three cars moving on this track before the cars came into contact with the crippled car. The cars collided, and owing to the absence of the coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars and he was so injured that he died from the injuries so received. It evidently was not the intention of any of the crew to disturb, couple onto, or move the crippled car."

The statement that "owing to the absence of the coupler attachment and bumpers on the crippled car intestate's

leg was caught between the ends of the two cars" is disputed as a consequence or an element of decision independently of what Lang was to do and did—indeed it is the dispute in the case. Based on it, however, and the facts recited, the contention of petitioner is that they demonstrate a violation of the Safety Appliance Act and justify the judgment of the trial court and its affirmance by the Appellate Division. For this *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617, is cited.

The opposing contention of respondent is that "The proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car. The absence of the coupler and draw bar was not the proximate cause of the injury, nor was it a concurring cause." To support the contention *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243, is adduced.

The Court of Appeals considered the *Conarty Case* controlling. This petitioner contests, and opposes to it the *Layton Case, supra*, and contends that the court failed to give significance and effect to the fact that the car in the *Conarty Case* was out of use and that while out of use the car upon which Conarty was riding collided with it; whereas in the case at bar, it is insisted that the defective car was in use by defendant and was required to be used by the intestate. The trial court made this distinction and expressed the view that the defective car in the case at bar "must be deemed to have been in use within the meaning of the statute." The distinction as we shall presently see is not justified. It is insisted upon, however, and to what is considered its determination is added a citation from the *Layton Case* declaring that the Safety Appliance Act makes "it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not" equipped as there provided. And further, "By this legislation the qualified duty of the common law is expanded

into an absolute duty with respect to car couplers" and by an omission of the duty the carrier incurs "a liability to make compensation to any employee who" is "injured because of it." But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares. Its concluding words are, expressing the condition of liability, "that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." The plaintiff recovered because the case came, it was said, within that interpretation of the statute.

We need not comment further upon the case nor consider the cases which it cites. There is no doubt of the duty of a carrier under the statute and its imperative requirement or of the consequences of its omission. But the inquiry necessarily occurs, to what situation and when, and to what employees, do they apply?

The Court of Appeals was of the view that it was the declaration of the *Conarty Case* that § 2 [1] of the Safety Appliance Act "was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not intended to provide a place of safety between colliding cars," and that "the absence of a coupler and drawbar was not a breach of duty toward a servant in that situation." It further decided that Lang was in "that situation" and he "was not one of the persons for whose benefit the Safety Appliance Act was passed."

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[1] § 2 of the Safety Appliance Act is as follows: "On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier [one engaged in interstate commerce] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531.

Two questions are hence presented for solution. (1) Was the Court of Appeals' estimate of the *Conarty Case* correct? (2) Was it properly applied to Lang's situation?

(1) The court's conclusion that the requirement of the Safety Appliance Act "was intended to provide against the risk of coupling" cars, is the explicit declaration of the *Conarty Case*. There, after considering the act and the cases in exposition of it, we said, nothing in its provisions "gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.'"

The case was concerned with a collision between a switch engine and a defective freight car resulting in injuries from which death ensued. The freight car was about to be placed on (we quote from the opinion) "an isolated track for repair and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued." The deceased was on the switch engine and was on his way "to do some switching at a point some distance beyond the car" and was "not intending and did not attempt, to couple it to the engine or to handle it in any way. Its movement was in the hands of others."

(2) That case, therefore, declares the same principle of decision as the Court of Appeals declared in this, and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car. In that case the movement of the colliding car was at night, and it may be inferred that there was no knowledge of the situation of the defective car. In

this case the movement of the colliding car was in the day time and the situation of the defective car was not only known and visible, but its defect was known by Lang. He, therefore, knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. "It evidently was not," the trial court said, "the intention of any of the crew [of the colliding car] to disturb, couple onto, or move the crippled car." It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it "so as not to come into contact with the crippled car," to quote again from the trial court. That duty he failed to perform, and, if it may be said that, notwithstanding, he would not have been injured if the car collided with had been equipped with draw bar and coupler, we answer, as the Court of Appeals answered, still "the collision was not the proximate result of" the defect. Or, in other words, and as expressed in effect in the *Conarty Case*, that the collision under the evidence cannot be attributed to a violation of the provisions of the law "but only that had they been complied with it [the collision] would not have resulted in the injury to the deceased."

Judgment affirmed.

MR. JUSTICE CLARKE, with whom concurred MR. JUSTICE DAY, dissenting.

Because I think that the court's decision of this case will result in seriously confusing the law applicable to the Safety Appliance Acts of Congress, I shall state, as briefly as I may, my reasons for dissenting from it.

When Lang, a brakeman in the employ of the New York Central Railroad Company, received his fatal injuries the Safety Appliance Acts of Congress declared it to be "unlawful" for an interstate carrier by rail to "use on its line" any car not equipped with automatic couplers, and also

provided that any employee injured by any car not so equipped should not be held to have assumed the risk of injury thereby occasioned by continuing to work after the unlawful use of such a car had been brought to his knowledge (27 Stat. 531, §§ 2 and 8; 32 Stat. 943, § 1).

At that time also the Federal Employers' Liability Act provided that in any action brought under the act no employee should be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of its employees contributed to the injury or death of such employee. (35 Stat. 65, §§ 3 and 4.)

It is obvious that these statutes take out of this case all question as to assumption of risk by, and contributory negligence of, the deceased brakeman.

Since the decision in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295, this court has consistently held that in enacting the Safety Appliance Acts: "*The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

Chicago, Burlington & Quincy Ry. Co. v. *United States*, 220 U. S. 559. Here the court declares that the Safety Appliance Act imposes "An absolute duty on the carrier and the penalty cannot be escaped by exercise of reasonable care."

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U. S. 33. Here the court said: "Disregard of the Safety Appliance Act is a wrongful act; and, where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover the damages from the party in default is implied."

Louisville & Nashville R. R. Co. v. *Layton*, 243 U. S. 617, 621. Here the foregoing cases are cited, and the court declares: "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that *the liability* in damages to employees for failure to comply with the law *springs from its being made unlawful to use cars not equipped as required*,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. *This effect can be given to the acts* and their wise and humane purpose can be accomplished *only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.*"

Minneapolis & St. Louis R. R. Co. v. *Gotschall*, 244 U. S. 66. Here a brakeman, going over the tops of cars when a train was in motion, was thrown under the wheels by a sudden jerk caused by the setting of brakes when defective couplers parted, and the company was held liable "in view of the positive duty imposed by the statute . . . to furnish safe appliances for the coupling of cars."

Regarding the case at bar as ruled by the decisions we have cited, especially by *Louisville & Nashville R. R. Co.* v. *Layton*, *supra*, the trial court held the railroad company liable and sent the case to the jury for the assessment of damages only. The Appellate Division affirmed the judgment but the Court of Appeals reversed it solely upon the authority of *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243.

It is plain that the principle of the cases quoted from is that carriers should be held liable to employees in damages whenever failure to obey the Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of their duty.

With these statutes and decisions in mind, we come to the consideration of the facts in this case.

Lang, a brakeman, was a member of the crew of a local freight train, running from Erie, Pennsylvania, easterly to Buffalo, New York. When the train reached Silver Creek, an intermediate station, the conductor was directed to pick up a car then on the "house track," and to take it in his train to Farnham, New York. We shall refer to this car as the "Farnham car."

For more than two weeks prior to the accident to Lang, there had been in the Silver Creek yard a box car loaded with steel, from one end of which, for three or four days before the accident certainly, (how much longer does not appear), the entire coupler and draw bar had been missing. This car had been held for unloading, which had been commenced before but was completed on the day of the accident. It had been necessary during this time to switch the car about the yard, and the crew of which Lang was a member had shifted it at least once on the day before the accident.

When the conductor went to look for the Farnham car he found it standing on the "house track" with five other cars to the west of it and four cars to the east of it, the car next it on the east being the defective car, with the draw head missing from its west end (the end next the Farnham car). Thus this "house track," with capacity for twelve cars, had ten standing upon it, of which the defective car was one—necessarily they must have been very close together.

The conductor saw that it was impossible to switch out the Farnham car from the east end of the "house track"

without moving the defective car, and thereupon he ordered his engine to go through the switch at the west end of the "house track," to couple to the six cars standing to the west of the defective car, and then to back out and switch the Farnham car (which would be the most easterly one of the string) onto another track where it could be picked up later. This being done, the two cars farthest from the engine were shunted onto a third track, thus leaving but three cars attached to the engine. The plan then was to "kick" these three cars back onto the "house track" and to stop them when near to the defective car but before they came in contact with it. It was while attempting to accomplish this purpose that the accident occurred.

The movement which resulted in the accident is described by the conductor, who was standing at the switch at the west end of the "house track," as follows:

The engine kicked the three remaining cars onto the "house track" and after they were started Lang, who was standing near the conductor, got on the head car, "the one nearest to the cripple," for the purpose of stopping them. When he got upon this box car, it was about four car lengths from the defective end of the defective car, and the track was slightly down grade toward it. His purpose was to get to the brake at the head end of the head car so as to stop the three before they touched the defective car, but, either because the cars had been started too rapidly by the engine, or because the brake did not work well, or because the track was down grade, or because the time or distance was too short, he did not get the cars stopped in time to prevent them from colliding with the defective car. At the moment of the impact, Lang, who was in the act of setting the brakes, had one foot on the brake step attached to the end of the head car, and, because the draw head was missing from the defective car, the ends of the two cars came together, so crushing his leg between them that he died

within a few days thereafter. Thus did Lang, who was as much without fault in fact as the statutes cited rendered him without fault in law, come to his death.

It is the uncontradicted evidence that if the bad order car had been equipped with such a coupler as the law required the ends of the two cars could not have come nearer together than thirty inches and the accident, of course, could not have occurred.

It seems to be the theory of the opinion of the court that, because the conductor realized the danger there was in the defective car and aimed to avoid moving it, therefore it was not "in use" by the company within the meaning of the Safety Appliance Acts.

But a car in such dangerously defective condition as this one was, which for convenience in unloading was kept for days, perhaps for weeks, in a yard so crowded that it was necessary to move it from time to time in the ordinary yard switching, cannot reasonably be said to have been "out of use" during that time. To allow such a car to be placed upon an unloading track, so short and crowded that a slight excess of speed in moving other cars, or a slight defect in the brakes or a moment of delay in applying them, might result, as it did in this case, in the injury or death of employees, cannot reasonably be said to be keeping such a car "out of use." As a matter of fact, the defective car was actually in use in a most real and familiar way on the very day of the accident, for, on that day, the unloading of it, which had been commenced before, was completed while it was on the "house track" on which the accident occurred.

The *Layton Case, supra*, coming after the *Conarty Case*, decided (all the members of this court as now constituted concurring) that: "Carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty;" and the *Gotschall Case*, 244 U. S. 66,

clearly proceeded upon the same principle. Neither of the men injured in the *Layton* or *Gotschall Cases* was engaged in coupling or uncoupling cars when the accident occurred, but each was injured because of defective coupling appliances when he was going over the cars of his train in the discharge of his duty. Here Lang was injured, when in the discharge of his duty, because a defective car had been placed upon a much used track in a busy yard in such a position that it was impossible for him, in the exercise of due care, to prevent the cars he was seeking to control from coming in contact with it.

It would be difficult to conceive of a case in which the negligence of the master could be a more immediate and proximate cause of injury to a servant than it was in this case.

Having regard to the extent to which this case must be accepted by other courts as a rule of decision, it would seem that the orderly and intelligible administration of justice required that the principle of the *Layton* and *Gotschall Cases* should be disavowed or overruled, for that principle is so plainly in conflict with the opinion in this case that courts and advising counsel will otherwise be left without any rule to guide them in the disposition of the many similar cases constantly pressing for disposition.

For the reasons thus stated I think the judgment of the Court of Appeals entered by the Supreme Court of New York should be reversed and the original judgment of the Supreme Court affirmed.

FRIEDMAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 221. Argued March 17, 1921.—Decided March 28, 1921.

Section 2347 of the Revised Statutes, in providing that public coal lands may be entered upon payment of "not less than " ten dollars per acre and "not less than " twenty dollars per acre, according to their distance from a completed railroad, sets up those prices as *minima* and by implication empowers the Secretary of the Interior to charge higher prices proportionate to the value of tracts sold. P. 469.

54 Ct. Clms. 225, affirmed.

THE case is stated in the opinion.

Mr. Charles A. Keigwin, with whom *Mr. William R. Andrews* was on the brief, for appellant.

The Solicitor General, with whom *Mr. W. Marvin Smith* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action to recover the sum of $3,600, excessive payment exacted by the Secretary of the Interior for 120 acres of coal land, which plaintiff (we so designate him in this opinion) was entitled to enter and did enter under § 2347 of the Revised Statutes.

The Court of Claims dismissed the petition and from its judgment this appeal is prosecuted.

The right of plaintiff to enter the land is not disputed. The dispute is as to the price prescribed by § 2347. Its provision is that payment shall be made of not less than $10 per acre if the lands selected be more than 15 miles

from a completed railroad, and not less than $20 per acre if they be within 15 miles of the railroad.

The entry of plaintiff was within 15 miles of the railroad and the Secretary required the payment of $50 per acre. The requirement is attacked as beyond the power of the Secretary, it being in excess of the statutory price which, it is contended, is $20 per acre; and to sustain the attack there is adduced the prior practice of the Interior Department and cases whose analogy, it is contended, demonstrate that the words "not *less* than twenty dollars per acre" mean not *more* than twenty dollars per acre. The answer to the contention would seem necessarily to be that "less" and "more" are words of contrast—indeed of opposition, and cannot be confounded. It is easy to see that if their difference should be disregarded in dealing with the things of the world, sensible or insensible, the resulting confusion would be hard to describe.

Plaintiff makes the words even more facile to management than in the above contention and makes them exclude all freedom of judgment and choice of price which they seem not only to imply but to require, in the administration of § 2347. In support of the liberty of identifying or confusing different things plaintiff invokes the practice of the Interior Department from 1873 to 1907, and urges that Congress by silence gave sanction and approval to the practice.

The inference deduced from the practice and the asserted sanction we cannot accept. The practice was but the exercise of administration by the Department upon the then circumstances, deemed proper and adequate then and accepted as such by Congress.

In 1907 there was a change of conditions and they dictated a change in administration and, in aid of a judgment of values and its exercise under the direction of § 2347, coal lands were subjected to classification and appraisement, a procedure not arbitrary but safe and sensible, establish-

ing a proportional relation between the payment made and the value of the lands received. And this is consonant with the statute; indeed, is its direction, if its words be considered. There has been no protesting objection from Congress, and the Executive and Legislative Departments have been in accord for fourteen years. The present practice of the Interior Department therefore has the same confirmation that plaintiff asserts for its prior practice.

Plaintiff, however, contends that § 2347 is the successor of prior legislation and that by such legislation, and decisions under it, the words "not less than" of that section have been made the equivalent "of the minimum and minimum price" of prior legislation and that $20 per acre is the "sole price fixed by law" for lands within fifteen miles of a completed railroad.

The legislation referred to is an Act of July 1, 1864, c. 205, 13 Stat. 343; an Act of March 3, 1865, c. 107, 13 Stat. 529; and an Act of March 3, 1873, c. 279, 17 Stat. 607; the latter statute becoming § 2347 and other sections.

The first act provided for the sale of coal lands at public auction "at a minimum price of twenty dollars per acre"; and that "any lands not thus disposed of" should "thereafter be liable to private entry at said minimum." The second act provided that coal land could be entered by a citizen actually engaged in mining upon it "at the minimum price of twenty dollars per acre, fixed in the coal and town property act of" July 1, 1864. The third act omits provision for offering coal lands at auction and subjects them to private entry at not less than $10 or $20 an acre, according to distance from a completed railroad. This provision became § 2347.

These acts were the successors of one another in general policy but not in details. In the latter they differed in provision and progressed to the explicit declarations of § 2347 and their inevitable meaning. And there is nothing to the contrary in *Colorado Coal & Iron Co.* v. *United*

States, 123 U. S. 307, 325. The case, indeed, was concerned with other provisions than those involved here.

We need not go beyond this general exposition. It would extend this opinion to a repellent length to trace and comment upon the details and refinements of plaintiff's reasoning, and upon the analogies he urges of the price of lands under the preëmption and other laws.

We are not impressed with the contention that if the price of $20 an acre is not the fixed and ultimate price there is no test of price and that the Secretary of the Interior "may charge what price he chooses . . . no law putting any restraint upon his action," and that the "sale of coal lands may be stopped altogether if, for any reason, the Secretary considers that to be judicious or desirable." This is tantamount to saying that the Secretary may abuse his trust and the power conferred upon him to execute it. There is no argument against conferring power or denying power in the assertion that it may be abused. The world acts and must act upon a different consideration. Government would otherwise be impossible. Besides, there is no contention that there is an arbitrary abuse of power in the present case, and when such abuse shall occur a remedy may be of concern and no doubt will be found.

Judgment affirmed.

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

UNITED STATES *v.* CORONADO BEACH COMPANY.

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

Nos. 524, 525. Argued March 1, 2, 1921.—Decided March 28, 1921.

1. The fifth section of the Mexican Colonization Law of August 18, 1824, which declares the right of the federal government, for the defense or security of the nation, to make use of lands for the purpose of constructing warehouses, arsenals and other public edifices, cannot be construed as reserving a power of expropriation without compensation over land granted under the act to a Mexican citizen. P. 485. *Arguello* v. *United States*, 18 How. 539.
2. The title to tide and submerged lands acquired by the State of California upon her creation was subject to prior Mexican grants, and subject to the jurisdiction of the District Court, under the Private Land Claims Act of March 3, 1851, to determine whether such lands, in any case before it, had been granted by the prior sovereignty. P. 487.
3. A decree of the District Court construing the boundary calls of a grant as including tide and overflowed lands adjacent to the granted upland, and confirming it accordingly, was a valid exercise of the court's jurisdiction, even if the construction was erroneous, and is not subject to collateral attack upon the ground that the Mexican documents, correctly interpreted, confined the grant to the shore line. P. 487.
4. In a suit by the United States to condemn rights deraigned under a Mexican grant, confirmed, surveyed and patented under the Act of March 3, 1851, *supra*, in which the Government claimed that adjacent tide and overflowed lands, included in the survey and patent, were not in the original grant or the confirmatory decree, and did not pass, *held*, that the confirmation and patent were conclusive, and that the Mexican map of the boundaries, which, with the other documents of the grant, was referred to in the decree of the District Court as defining it, was irrelevant. Pp. 487, 488.
5. *Held*, further, that the patent could not be collaterally impeached by showing from the field notes that the line including the tide and

submerged lands was not surveyed; and that, considered as a direct attack, the suit was barred by the limitation Act of March 3, 1891. P. 488.

6. An expert witness to value in a condemnation case used maps and drawings to illustrate his conception of the possible uses of the land. *Held*, that if the plan so portrayed was remote and speculative, the objection went to the weight of his testimony and not to such use of the maps and drawings. P. 488.

7. Under the Act of July 27, 1917, c. 42, 40 Stat. 247, providing for the taking of the "whole of North Island " and for "the determination and appraisement of any rights private parties may have in said island," and under the bill in this case following the act, the Government took not merely the upland but the adjacent tide and overflowed lands as well. P. 489.

274 Fed. Rep. 230, affirmed.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Garnett, with whom *Mr. Charles S. Lawrence* was on the briefs, for the United States:

The Mexican Colonization Law of August 18, 1824, by its 5th article, expressly reserved to the federal government the right to make use of any portion of lands within ten leagues of the sea coast, for the purpose of national defense. See Hall's Mexican Laws, §§ 488–502. This applies to all of the national lands to be distributed under this law, and not only to lands to be colonized by foreigners. *Arguello* v. *United States*, 18 How. 539, did not involve this question of the significance of the 5th article.

No good reason can be perceived why the general government should not reserve the right to use lands donated to its citizens equally with those donated to foreigners who colonize them, for the purposes of national security or defense if the emergency should arise. Indeed, when it is considered that the citizens could be granted lands by the act of the governor of the territory alone on the national boundaries or on the sea coast, and without

any supervision by the central government, there is more reason for applying the provisions of the 5th article to the lands of citizens than to those donated to foreigners for colonization purposes, the latter being forbidden to settle within twenty leagues of the national boundaries or ten leagues of the sea coast without the approval of the supreme general executive power. The practical interpretation of the section sustains this view. Law of April 6, 1830 (Hall's Mexican Laws, p. 108); Act of the State of Coahuila and Texas, March 25, 1825 (Hall, p. 133); Report of Captain H. W. Halleck, Secretary of State of the Territory of California, March 1, 1849; Rockwell's Spanish and Mexican Law, p. 431 *et seq.*; Jones' Rep., Sen. Doc. No. 18, 31st Cong. 2nd sess., p. 27; *Pueblo of Monterey*, 6 L. D. 179, 182; *Eldridge* v. *Trezevant*, 160 U. S. 452, 463; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217.

The United States succeeded to this right, and has not since been divested of it, as to the land here in controversy, either by the confirmation of the grant, *Brown* v. *Brackett*, 21 Wall. 387; *Henshaw* v. *Bissell*, 18 Wall. 255, 264; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344; *Los Angeles Milling Co.* v. *Los Angeles*, *supra*, 227; or by laches; or by force of the act limiting the time within which suits may be brought to vacate patents.

These tide and submerged lands belong to the State of California as a part of its sovereignty.

The sea and its shores are treated by the Spanish and Mexican laws as *bienes communes*, incapable of private ownership. Moreau & Carleton's Partidas, ed. 1820, vol. 1, tit. 28, pp. 334–7; White's New Recopilacion, ed. 1839, vol. 1, p. 46; vol. 1, Book 2, p. 70; Hall's Mexican Laws, ed. 1885, c. IV, §§ 1463–1471, pp. 446–9.

While it may be that the crown or the congress of Mexico could for the common benefit limit the general rule of the civil law and grant the sea shore for appropriate purposes, *Jover* v. *Insular Government*, 221 U. S. 623, 629, this grant

was under the law of August 18, 1824, for the colonization of territories of the republic (Hall, p. 147); Regulations of November 21, 1828, *ib.*, p. 149.

Under these there is no presumption to any power in the territorial governor of California to grant lands below ordinary high-water mark. The court must look to these laws both for the power to grant and for the mode and manner of its exercise. *Whitney* v. *United States*, 181 U. S. 104, 113; *United States* v. *Cambuston*, 20 How. 59, 63.

The Mexican patent not only does not contain an express grant of the tide lands or submerged lands, but provides that any inclosures of the land granted shall not prejudice any crossings, roads and servitudes which existed under the Mexican laws.

This would seem to be an express recognition that these lands on navigable waters were subject to the servitudes usual in such grants under Mexican laws (see Hall's Mexican Laws, § 1468, p. 448; Moreau & Carleton's Partidas, ed. 1820, vol. 1, tit. 28, law 6), and negatives any express grant of title below ordinary high-water mark.

Carrillo's petition described the boundary as on the "west by the bay and ship anchorage." The order of the governor directing the issue of patent gives the boundary as "the land known or named 'Isla' or peninsula, in the port of San Diego towards the part of—of the anchorage." The Mexican patent describes the boundary as "west by the bay or anchorage for ships, as explained by the map which goes with the espediente."

The petition to the land commissioners shows that the land had not been surveyed by the surveyor general (which was only necessary in order that patent might issue on confirmed claims under § 13 of the Act of March 3, 1851, 9 Stat. 631), because "such survey from the nature of the case being unnecessary, the boundaries being natural and not to be mistaken."

The map filed with the espediente, as set out in the

Mexican patent, is not in the record in this case and seems not to have been produced at the trial. A certified copy thereof from the Land Office is here exhibited, and a copy will also be found in the records of this court in the case of *United States* v. *Simmons*, No. 224, at the December term, 1863. From this map, which the Mexican regulations of 1828 required an applicant for a donation of vacant land to file, it is evident that the shore line on the west is meandered and none of the bay is included, which makes clear that the boundary given in the Mexican patent and in the petition therefor as the "bay or anchorage for ships," or "bay and ship anchorage," is but a description of the navigable body of water which forms the west boundary of the donation. Billings and others who petitioned the land commissioners for a confirmation fully recognized this when they asserted that the boundaries were natural and not to be mistaken, and a survey of the land, in order to segregate it from other land, was unnecessary.

That a Mexican grant bounded by the bay on navigable waters adjacent does not extend over the submerged lands or tide lands below ordinary high-water mark is too well settled for argument. *Shively* v. *Bowlby*, 152 U. S. 1, 29.

When California became a part of the territory of the United States, unless there had been previous to that time an express grant by the Mexican government of lands below ordinary high-water mark, (*Shively* v. *Bowlby*, *supra*, pp. 13, 47,) such lands were held in trust by the United States for the benefit of the future State. *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65, 66; *Shively* v. *Bowlby*, *supra*; *Knight* v. *United States Land Association*, 142 U. S. 183.

While California was a territory of the United States, although Congress had power to grant for appropriate purposes titles or rights in soil below ordinary high-water mark of tide waters, it has never done so by general laws and has

adopted the policy of leaving the disposition of sovereign rights in navigable waters in the soil under them, to the control of the States when admitted to the Union. *Shively* v. *Bowlby, supra,* pp. 47, 58.

It is settled, moreover, that when California was admitted to the Union September 9, 1850, she acquired absolute property and dominion over the soils under tide water within her jurisdiction. *Shively* v. *Bowlby, supra; Knight* v. *United States Land Association, supra,* p. 183, and cases there cited.

While, therefore, Congress might have expressly granted or confirmed an imperfect Spanish grant of tide lands below ordinary high-water mark while California was a Territory, it had no such power after California became a State. *Goodtitle* v. *Kibbe,* 9 How. 470, 478; *Packer* v. *Bird,* 137 U. S. 661.

In the decree of the District Court confirming the grant, it is adjudged that the title of the claimants "to the lands claimed by them, as set forth and described in their petition . . . is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed," and the boundary of the land in question is given "and west by the anchorage for ships according to the documents of title and map to which reference is had." No claim was specifically made in the petition for the extension of the grant to lands below high-water mark. On the contrary, the petition alleges that the boundaries of the land were natural, and not to be mistaken, and that a survey thereof is unnecessary.

The question whether the grant embraced lands below high-water mark, therefore, was never presented to the court, and no right to them was ever in the minds of the claimants at the time their petition was rejected by the land commissioners nor at the time it was confirmed by the court. It follows that translation of title to these tide lands can not be based upon this decree because the claim

confirmed in terms does not embrace them. *Packer* v. *Bird*, 137 U. S. 661, 672.

The decree of confirmation is limited to the extent of the claim made and covered and protected nothing beyond. *Brown* v. *Brackett*, 21 Wall. 387. It merely established the validity of the claim as it then existed, it did not change the character of the grant. *Henshaw* v. *Bissell*, 18 Wall. 255, 264.

Even if it purported to cover the submerged lands fronting the uplands covered by the Mexican grant, the special tribunal created by the Act of March 3, 1851, 9 Stat. 631, had no jurisdiction to determine the validity of claims to submerged lands. It is true authority was conferred on this tribunal to determine the acreage of quantity grants and the boundary of definite claims. *United States* v. *Fossatt*, 21 How. 445, 449. But this authority was limited to lands which, in case claims thereto were rejected by the Commission or were not presented within two years from the passage of the act, would then be "deemed, held and considered as a part of the public domain of the United States." This is made apparent when we consider § 13 of the act.

The words "public domain" used here mean "public lands" which are subject to sale and disposition under the general land laws. *Newhall* v. *Sanger*, 92 U. S. 761; *Barker* v. *Harvey*, 181 U. S. 481, 490; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284.

The object of the creation of the special tribunal to settle private grants in California was to segregate them from the "public domain," and thus open up a vast area of that domain in California to settlement under the homestead and preëmption laws. *Botiller* v. *Dominguez*, 130 U. S. 238, 249. There was no presumption in favor of the jurisdiction of this special tribunal, and we must look to the act creating it to determine its jurisdiction and to ascertain whether the power sought to be exercised is lawful.

United States v. *Santa Fe*, 165 U. S. 675, 714. This being true, the jurisdiction of this tribunal to extinguish the sovereign rights of California in its presumptive title to all its submerged lands must clearly appear. The California Enabling Act of September 9, 1850, c. 50, 9 Stat. 452, 453, provides specifically that "all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States."

There is no reported case, so far as we have been able to discover, where the land commissioners of California passed upon the claim of a private grantee to full ownership and control of lands below ordinary high-water mark.

The field notes of the survey were not introduced. A certified copy is here produced. These field notes form part of the survey and are to be considered with the plat to which they relate. *Heath* v. *Wallace*, 138 U. S. 573, 583.

There is nothing in the Mexican patent, the petition for confirmation, the decree of confirmation, or the terms of the patent from the United States, to disclose that any lands covered by water were included or intended to be included in the grant, but by examining the plat of survey it is observed that the surveyor general has run, on the western boundary, two lines, one meandering ordinary high-water mark on the shore, and expressly noted as such on the plat, and the other out to the deep channel used by ships in entering and leaving the harbor, and at one point beyond the center of the bay of San Diego.

Examination of the field notes shows that only one of these lines was actually run upon the ground, to wit, that marking the line of ordinary high-water mark; that the surveyor erroneously assumed the description of the west boundary in the decree required him to project the lines to the deep channel used by ships as shown by some map of the Coast Survey. Projecting these was a mere paper survey and not an actual survey on the ground.

Returns by a surveyor general embracing the descriptions of a survey of land are prima facie evidence, and plats and certificates, on account of the official character of the surveyor general, have accorded to them the force and effect of a deposition, *United States* v. *Hanson*, 16 Pet. 200, 201, but "it is not the mere assertion of a surveyor that he had surveyed land that makes it so," *Winter* v. *United States*, 30 Fed. Cas. 350, 365, and the admission of the survey in evidence does not admit its validity. *United States* v. *Breward*, 16 Pet. 143, 146.

The legal effect of a survey must be determined not by what the surveyor said but by what he did. An actual survey on the ground was essential to the validity of the grant. *Ellicott* v. *Pearl*, 10 Pet. 411, 441; *Muse* v. *Arlington Hotel Co.*, 68 Fed. Rep. 637; *United States* v. *Lawton*, 5 How. 10, 27; *Scull* v. *United States*, 98 U. S. 410, 419.

Furthermore a computation of the elements by which the surveyor established these conjectural lines discloses that these lines fail to close by a distance of approximately 465 feet. This inaccurate paper survey can not be held to enlarge the terms of the decree and patent so as to embrace lands which are not those specified in the decree and patent as an island or peninsula. The submerged lands and the high lands are naturally and legally separate and distinct, were each separately surveyed by the surveyor general, and are separately shown on the plat of survey annexed to the record. The decree of confirmation confirmed the title to the island or peninsula as shown on the original map filed with the espediente, which embraced only the high land. The patent quotes the language of this decree in describing the land according to this map. The descriptive language of the patent referring to the subsequent survey is "the tract of land embraced and described in the foregoing survey." As pointed out, this survey described two tracts, one, land in its ordinary sense of visible high land,

the other, invisible land, the soil under the sea. To construe the patent as describing this invisible soil under the sea is to give undue weight to an act of the surveyor wholly outside his official duty and to one expression in the instrument at the expense of the rest of it, and to convict the patent of glaring inconsistencies and of a clear departure from the terms of the decree of confirmation which it was to effectuate.

The reasonable construction of the patent, in the light of the original map and the decree of confirmation, as well as from the terms of the patent itself, is that the act of the surveyor general in separately platting on paper the soil under the sea was "not within the scope of his proper official functions," and that the island or peninsula, "the tract of land embraced and described in the foregoing survey," title to which passed by the patent, was the fast land as surveyed and monumented on the ground and as indicated on the plat. This construction harmonizes all parts of the patent, the Mexican grant, the decree, and the policy of Mexico and the United States not to grant to individuals the soil under the sea. It gives the grantee all the land actually surveyed.

It is respectfully urged, therefore, that the patent properly construed does not embrace these submerged lands. If, however, the patent can be construed as intending to embrace them, it is to this extent void and subject to collateral attack.

"Neither the treaty of Guadalupe Hidalgo nor patents under the Act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty." *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217, 227, 233; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

The right to collaterally assail the patent depends upon whether the Land Department had jurisdiction of these lands. Since the Department had neither by survey nor

patent the right to enlarge the grant, this, in turn, depends upon whether there was an express grant of these tide and submerged lands by the former government.

Upon the admission of California as a State, no express grant of such lands having been made by the former government, such lands were not part of the public domain, nor in any sense subject to the control of the Land Department or its power to determine any question of title thereto. *Iowa* v. *Rood*, 187 U. S. 87, 93.

Defendant's right, title or interest, if any, in the lands below high-water mark are in any view subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery.

Congress did not authorize by the Act of July 27, 1917, condemnation of the tide lands.

The United States was entitled to have the land above high-water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon.

Mr. P. F. Dunne, with whom *Mr. Read G. Dilworth* was on the briefs, for defendant in error and appellee:

The grant to Carrillo was not subject to the alleged easement of occupancy for military and naval purposes. It was not a grant to a foreign colonist or to an impresario, but to a Mexican citizen. *United States* v. *Cervantes*, 18 How. 553, 555. In *Arguello* v. *United States*, 18 How. 539, it was held that the first eight sections of the law of 1824 "apply wholly to colonists and foreigners."

The alleged easement of occupancy, under article 5 of the law of 1824, is attributable to the public lands, to the vacant lands of the nation; it is not related to lands upon which the State or Territory has already exercised its dispositive power, and which have passed, as a fact accomplished, into the vested right of private ownership. *United States* v. *Arredondo*, 6 Pet. 691, 733; *United States*

v. *Reading*, 18 How. 8; *United States* v. *Yorba*, 1 Wall. 412, 423; Hall's Mexican Law, p. 151; *Republic* v. *Thorn*, 3 Texas, 499, 505; *Palmer* v. *United States*, 1 Hoffman, 249, 269; Regulations of November 21, 1828; *United States* v. *Vallejo*, 1 Black, 541, 551, 552; *United States* v. *Workman*, 1 Wall. 745, 761; *Camou* v. *United States*, 171 U. S. 277; Mexican Law of April 6, 1830.

Indeed, if the easement of confiscation set up here could be strained out of article 5 of the laws of 1824, and imputed as a sovereign prerogative to the Mexican government, it would not be communicable, by treaty or otherwise, to a government of constitutional guarantees like ours. *Charles River Bridge Case*, 11 Pet. 641; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177, 178; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 235, 236; *Fremont* v. *United States*, 17 How. 564.

No easement of occupancy arose from the provision of the grant safeguarding "crossings, roads, and servitudes (*servidumbres*)." *Harvey* v. *Barker*, 126 California, 262; affd. 181 U. S. 481; *Eldridge* v. *Trezevant*, 160 U. S. 452.

Distinguishing: *Los Angeles* v. *Los Angeles Milling Co.*, 152 California, 645, *s. c.* 217 U. S. 217; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 342.

The decree of confirmation and the resulting patent ascertained and settled the title conclusively between the United States and defendant. Act of March 3, 1851; *Rodrigues* v. *United States*, 1 Wall. 582, 588; *United States* v. *Elder*, 177 U. S. 116; *United States* v. *Turner*, 11 How. 667; *Fremont* v. *United States*, 17 How. 542, 543, 556; *Botiller* v. *Dominguez*, 130 U. S. 252; *United States* v. *Fossatt*, 21 How. 445, 448; *United States* v. *Workman*, 1 Wall. 745; *Los Angeles Milling Co.* v. *Thompson*, 117 California, 594; *s. c.* 180 U. S. 72; *Harvey* v. *Barker*, 126 California, 262; *s. c.* 181 U. S. 481; *Phillips* v. *Mound City Association*, 124 U. S. 605.

The reservation of the alleged easement should have

been embodied in the decree and patent. *Harvey* v. *Barker*, 126 California, 262; *s. c.* 181 U. S. 481; *Los Angeles* v. *Los Angeles Milling Co.*, 152 California, 645, 649; *United States* v. *Osio*, 23 How. 273; *Mitchel* v. *United States*, 9 Pet. 711, 761; *Lynch* v. *Bernal*, 9 Wall. 315; *Grisar* v. *McDowall*, 6 Wall. 363; *United States* v. *Santa Fe*, 165 U. S. 675, 709.

In no event, under the Act of March 3, 1891, can the plaintiff go behind the patent.

The western boundary of "the whole of North Island" is precisely defined to include the tide land area, by the United States patent and the plat of survey accompanying the same and a part thereof. The State of California, as of its sovereign status, never had title to these particular tide lands, lying inside of the boundary line fixed by the United States survey which supervened upon the decree of confirmation and accompanied the patent. These particular tide lands, by elder and patented title, passed in fee simple absolute to the Mexican grantee, or his successors in interest, pursuant to the confirmation of the Mexican grant. *Jover* v. *Insular Government*, 221 U. S. 623, 629; *Beard* v. *Federy*, 3 Wall. 478; *United States* v. *Fossatt*, 21 How. 445, 448; *Los Angeles Milling Co.* v. *Thompson*, 117 California, 594; *s. c.* 180 U. S. 72; *Barker* v. *Harvey*, 181 U. S. 481; *Teschemacher* v. *Thompson*, 18 California, 11; *Goodtitle* v. *Kibbe*, 9 How. 470; *Knight* v. *United States Land Association*, 142 U. S. 161; *Shively* v. *Bowlby*, 152 U. S. 1; *Los Angeles* v. *Los Angeles Milling Co.*, 152 California, 645; *s. c.* 217 U. S. 217; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 342.

The public right of navigation and fishery, and the public regulation of the same, are not in question here.

The appraisement, under the Act of July 27, 1917, is of the whole of North Island, not some part; and the whole of North Island, for the purposes of the appraisement, is measured by "any rights private parties may have in the

said island over and beyond any rights thereto in the United States."

The survey was properly made, and in any event is conclusive in this proceeding. *Craig* v. *Radford*, 3 Wheat. 598; *United States* v. *San Jacinto Co.*, 125 U. S. 296, 301; *Knight* v. *United States Land Association*, 142 U. S. 190; *Cragin* v. *Powell*, 128 U. S. 699, 700; *Quinby* v. *Conlan*, 104 U. S. 425–427.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases arise out of a proceeding brought by the United States under the Act of July 27, 1917, c. 42, 40 Stat. 247, for the double purpose of ascertaining the rights of private parties in North Island in the harbor of San Diego, California, and of condemning the whole of said island for public purposes after the value of such rights has been fixed and paid into Court. The proceeding was begun by a bill in equity against the Coronado Beach Company. In its answer that Company alleged title to the whole island, and after a hearing obtained a decree in its favor, subject to the question of the rights of the United States brought up by the appeal in No. 525. The case then was transferred to the law side, the value of the plaintiff's island was assessed by a jury, and a judgment was entered that upon payment of $5,000,000 into Court within thirty days the United States might have a final order of condemnation. The writ of error in No. 524 presents the questions raised in this stage of the case.

The title of the Corondo Beach Company is derived from a Mexican grant of May 15, 1846, to one Carrillo, a Mexican citizen, the Company having succeeded to his rights. At this point it is necessary to mention only that Carrillo is given the right to enclose the land "without prejudice to the crossings, roads, and servitudes." The grant was under a law of August 18, 1824, by the fifth

section of which "If for the defence or security of the nation the federal government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress, or during its recess with that of the government council." Hall, Laws of Mexico, 148, § 492. The United States interprets this as a reservation of power against all persons, as one of the servitudes to which the Carrillo grant was subject, and as a sovereign right to which it succeeded when the land became territory of the United States. We cannot accept so broad an interpretation. We need not repeat the discussion in *Arguello* v. *United States*, 18 How. 539, wherein it was laid down that the first eight sections apply wholly to colonists and foreigners. The decision immediately concerned the fourth section of the law, but the ground for the construction given to it was that the others obviously were limited as stated and that there was no reason for giving to the fourth a greater scope. Moreover the second section states that "The objects of this law are those national lands which are neither private property nor belong to any corporation or town (pueblo), and can therefore be colonized." *United States* v. *Yorba*, 1 Wall. 412. It is hardly credible that section five should have been intended to reserve the right to displace private owners, and wholly incredible that it reserves the right to do so without compensation, especially when it is noticed that by the law of April 6, 1830, the value of lands taken for fortification, &c., is to be credited to the States. *Camou* v. *United States*, 171 U. S. 277, 284, 285. Hall, Laws of Mexico, 108, § 291.

The more serious questions arise on the writ of error and concern primarily the extent of the grant; the main dispute being whether the Company owns the tide lands in front of the upland of the island. Carrillo's petition states as its ground that he is in want of proper land for the breeding of

cattle and horses and asks the grant for a cattle farm of the island or peninsula in question, bounded substantially as in the subsequent grant, viz: on the north by the Estero of San Diego towards the town, east by the end of the rancho of Don Augustin Meliso, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. On April 20, 1852, Billings and others then holding the title petitioned the Commissioners to settle Private Land Claims, appointed under the Act of March 3, 1851, c. 41, 9 Stat. 631, to confirm to them this tract of land. The petition was rejected by the Board but on appeal the title was declared good and confirmed by the District Court of the United States. The decree stated the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships, according to the documents of title and map to which reference is had." This decree was filed on January 12, 1857; on May 7, 1867, after an appeal to this Court had been dismissed, there was a substitution of Peachy and Aspinwall as parties, and on June 11, 1869, a patent was issued reciting the decree, a return with a plat of a survey approved under § 13 of the Act of 1851, and giving and granting to them the land described in the survey. The Mexican map is not in the record and is not material since the plat accompanying the patent of the United States shows the line marking the "Anchorage for Ships," which includes the tide lands in dispute.

The jurisdiction of the decree and the validity of the patent so far as they cover the tide lands is denied by the United States, a special reason being found in the fact that California became a State in 1850 and thereby acquired a title to the submerged lands before the date of the decree. But the title of the State was subject to prior Mexican grants. The question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there was

jurisdiction to decide them as well if the decision was wrong as if it was right. The title of California was in abeyance until those issues were determined, as the decree related back to the date of the original grant. The petitioner asked a confirmation of the tract conveyed to Carrillo. The grant to Carrillo was bounded "west by the anchorage for ships" and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached. *Knight* v. *United States Land Association*, 142 U. S. 161. *San Francisco* v. *Le Roy*, 138 U. S. 656. *Beard* v. *Federy*, 3 Wall. 478. It was suggested that the bill might be regarded as a direct attack upon the patent; but this probably was an afterthought and in any event the attack would be too late. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1099. *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 450.

A subordinate objection is urged to the admission of maps or drawings showing the adaptability of the island to a great system of improvements possible if the Coronado Beach Company owned the submerged land. It is urged that such improvements were speculative, remote, and not shown to be commercially practicable. But the drawings were admitted only to illustrate the opinion of the witness as to value and were explained as meaning no more. If the reasons for his opinion were inadequate they detracted from the weight of his testimony but were not inadmissible on that account.

Finally it is contended that the Government took only the upland. But the Act of 1917 provides for the taking of "the whole of North Island" and for "the determination and appraisement of any rights private parties may have in said island," and the bill follows the act and prays that if the defendant company has any right to the tract or any part thereof the right "and the whole thereof" may be "appraised and condemned." We discover no error in the proceedings below.

Decree and judgment affirmed.

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

STATE OF WYOMING ET AL. *v.* UNITED STATES.

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

No. 257. Argued October 6, 7, 1920.—Decided March 28, 1921.

1. Lands "in place" granted to a State for the support of schools, and subsequently included within a reservation by the United States, are exchangeable for unappropriated, non-mineral public lands of equal acreage outside the reservation, under the Act of February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276, Rev. Stats. P. 493.
2. Although, under other general provisions (Rev. Stats., §§ 441, 453, 2478), the lieu lands are selected by the State under the direction of the Secretary of the Interior, this implies no discretion in him or in the Land Department to refuse approval of selections duly made, their function here being purely the judicial one of determining whether selections, with accompanying surrenders of base land, complied with the act of Congress and the Secretary's directions, under the conditions existing at the time when the selections were made and completed. P. 496.

3. When such a selection, with accompanying waiver or surrender, has been duly made and completed, in full conformity with the act and the directions of the Secretary, the equitable title to the tract selected passes to the State, the United States acquiring a like title to the base land; and the rights of the State cannot be affected by a subsequent attempt by the executive to reserve the tract selected, or a subsequent discovery that it contains mineral. P. 497. *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, and *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, explained.
4. It is a general rule that the question of the mineral or non-mineral character of land selected or entered shall be determined as of the time when the selector or entryman fully complied with all conditions precedent resting upon him. P. 500.
5. The exception to this rule found in the case of lands claimed under railroad aid grants, where the question of mineral character remains open until patent issues, is based upon the peculiar terms and subject-matter of the granting acts, their long administrative interpretation, and their restrictive construction in favor of the Government. P. 507.
6. Legislation of Congress designed to aid the common schools should be construed liberally rather than restrictively. P. 508.
7. The Act of June 25, 1910, c. 421, 36 Stat. 847, did not, and constitutionally could not, authorize executive withdrawal of land equitably vested in a State under a lieu selection. P. 509.

262 Fed. Rep. 675, reversed.

THE case is stated in the opinion.

Mr. John W. Lacey, with whom *Mr. William L. Walls*, Attorney General of the State of Wyoming, *Mr. D. A. Preston*, *Mr. H. S. Ridgely* and *Mr. Herbert V. Lacey* were on the briefs, for appellants.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for the United States:

Until approval by the Secretary of the Interior, no title, legal or equitable, vests in the State under a lieu or exchange selection application. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301; *State* v. *Hyde*, 88 Oregon, 1, 15, 16; *Wisconsin Central R. R. Co.* v. *Price County*, 133

U. S. 496, 511, 512; *Buena Vista Land Co.* v. *Honolulu Oil Co.*, 166 California, 71; *Roberts* v. *Gebhart*, 104 California, 67, 69–71; *Baker* v. *Jamison*, 54 Minnesota, 17, 27, 28.

In those cases where it is held that a selection vests title in the applicant, the word "selection" means approved selection. *Wisconsin Central R. R. Co.* v. *Price County*, *supra*, 514.

It is true the filing of a selection application operates to give the selector a preference right as against one tendering a filing thereafter, unless the latter is in support of a settlement or right initiated prior to the filing. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387, 388, 391, 392. But this principle applies to the relative rights of individual claimants, not to the right of the United States to retain title. *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142, 149.

We do not attempt to deny the well settled rule that, where one has done all that is required of him with respect to securing a tract of public land, he acquires rights against the Government and conditions arising after that time are not to be considered in determining his right to the land. But that rule is founded upon the theory that by such compliance with the law the applicant has acquired an equitable title to the land; that in equity the land is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456, 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

Obviously the rule has no application to a case in which the performance of some act by a public official is a condition precedent to the vesting of an equitable title.

It is well settled as to railroad indemnity lands that no title vests until the application to select is made and approved by the Secretary of the Interior. *Sioux City & St. Paul R. R. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 117 U. S. 406, 408; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

The withdrawal of the land as mineral, and the establishment of its mineral character prior to approval, barred acquisition thereof by the State. Act of June 25, 1910, c. 421, § 1, 36 Stat. 847; Administrative Ruling, 43 L. D. 293.

Such a filing as the one now under consideration is obviously unlike homestead or other claims upon which final proofs have been submitted and in which the claimants have done all that is necessary under the law to vest them with an equitable title.

It is well established, also, that mere settlement upon lands of the United States with a declared intention to obtain title thereto under the preëmption laws does not give a vested interest in the premises so as to deprive Congress of the power to divest it by grant to another. *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77; *Shepley* v. *Cowan*, 91 U. S. 330; *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, 577, 578; *Wagstaff* v. *Collins*, 97 Fed. Rep. 3, 8.

The doctrine of relation is inapplicable. *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334; *United States* v. *Morrison*, 240 U. S. 192, 212.

The selected land is mineral in character. If we consider that §§ 2275 and 2276, Rev. Stats., constitute a grant, it is clear that this land can not pass to the State, since mineral lands were excepted. The case would therefore fall within the rule of *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669; *United States* v. *Southern Pacific Co.*, 251 U. S. 1; *United States* v. *Sweet*, 245 U. S. 563.

If, however, the sections be construed as conferring merely a privilege of exchange, then the case would come under the rule that until equitable title passes, in this case until approval, the matter of the character of the land is open to determination. *Leonard* v. *Lennox*, 181 Fed. Rep. 760.

Again, even if the transaction is in the nature of a contract, created by the acceptance by the State of the invitation or privilege given by the United States, we assert that the State is bound by the terms offered, one of which was that only non-mineral land might be selected. Certainly the State could not expect that its own showing as to the character of the land was to be conclusive and to bar the right of the United States, through its proper officer, from inquiring into that matter. *Roughton* v. *Knight*, 219 U. S. 537, 547. Distinguishing, *Daniels* v. *Wagner*, 237 U. S. 547.

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

This is a suit by the United States to establish title in it to eighty acres of land and to the proceeds of oil taken therefrom. The District Court rendered a decree dismissing the bill on the merits, which the Circuit Court of Appeals reversed, 262 Fed. Rep. 675, and the defendants bring the case here.

One of the defendants, the State of Wyoming,[1] claims under a lieu selection, made in 1912, and the other defendants under a lease from the State, made in 1916. It is against the selection and the lease that the United States seeks to establish title.

By the Act of July 10, 1890, c. 664, § 4, 26 Stat. 222, Congress granted to the State for the support of common schools certain lands in place (sections 16 and 36 in each township), with exceptions not material here; and by the Act of February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276, Rev. Stats., the State was invited and entitled, in the event any of the designated lands in

[1] The State was not made a party at first, but afterwards at its own request was admitted as a defendant to enable it to defend the lieu selection.

place after passing under the school grant should be included within a public reservation, to waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the State. See *California* v. *Deseret Water, etc., Co.*, 243 U. S. 415; *Payne* v. *New Mexico, ante*, 367. Other laws of general application, §§ 441, 453, 2478, Rev. Stats., required that the selections be made under the direction of the Secretary of the Interior.

In 1897 a tract in place which had passed to the State under the school grant was included within a public reservation, called the Big Horn National Forest. On April 4, 1912, the State—through its Governor, Joseph M. Carey, and its Land Commissioner, S. G. Hopkins—filed in the proper local land office a selection list waiving its right to that tract and selecting in lieu thereof other land of the same area from public lands within the State and outside the forest reserve. The land so selected included the eighty acres now in controversy. At that time the State had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated, and neither known nor believed to be mineral. The list fully conformed to the directions on the subject issued by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was regularly posted and published, proof thereof was duly made and the State paid the publisher's charge. Thus, as the Circuit Court of Appeals said, "the State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government, and everything that was required either by statute or regulation of the Land Department" in selecting the lieu land instead of the relinquished tract.

No objection was called forth by the notice and in

regular course the local officers transmitted the list and other papers to the General Land Office with a certificate stating that no adverse filing, entry or claim to the selected land was shown by the records in their office and that the filing of the list was allowed and approved by them. The list remained in the General Land Office awaiting consideration by the Commissioner for upwards of three years. In the meantime, on May 6, 1914, two years after the selection, the selected land, with other lands aggregating more than 88,000 acres, was included in a temporary executive withdrawal as possible oil land under the Act of June 25, 1910, c. 421, 36 Stat. 847. On April 29, 1915, the Commissioner, coming to consider the selection, declined to approve it as made and called on the State either to accept a limited—surface right—certification of the selected land or to show that it still was not known or believed to be mineral. The State declined to accede to either alternative and insisted that its rights should be determined as of the time when the waiver and selection were made and that, applying that test, it became invested with the equitable title to the selected land two years prior to the temporary withdrawal and at a time when that land plainly was neither known nor believed to be mineral. The Commissioner thereupon ordered the selection canceled,—not because it was in any respect objectionable when made, but on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and subsequent oil discoveries in that vicinity. The State appealed to the Secretary of the Interior, and, on October 25, 1916, he affirmed the Commissioner's action.

In the meantime, on May 24, 1916, the State had given to the defendant Ridgely a lease permitting him to drill the selected land for oil, and the lease had been assigned to the defendant oil company. There was no oil discovery, nor any drilling, on the selected land up

to the time the lease was given; but thereafter the oil company began drilling and at large cost carried the same to discovery and successful production. This was four years after the selection.

The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, and still later was discovered to be mineral land, that is, to be valuable for oil. Or, putting it in another way, the question is whether it was admissible for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the State relinquished the tract in the forest reserve and selected the other in its stead.

In principle it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing. The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the State and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the State which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words,

their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. Of course the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price.

The conclusion which we deem plain in principle is fully sustained by prior adjudications. In *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, which presented the question of when under the public land laws a right to the land becomes vested, it was said, p. 431: "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." And again, p. 432: "It is a general rule, in respect to the sales of real estate,

that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership." In *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, a title obtained through preëmption cash entries was assailed on the ground that the land was shown by subsequent discoveries to be mineral; but the attack failed, the court saying, p. 328: "A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of sale. The question must be determined according to the facts in existence at the time of the sale." In *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, a title acquired through an application for a placer patent was sought to be annulled on the ground that subsequent mining disclosed that the land was lode land; but the title was sustained, the court observing, p. 683: "The subsequent discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time." Particularly in point is *Shaw* v. *Kellogg*, 170 U. S. 312, which related to what is called Baca Tract No. 4. Congress had accorded to the heirs of Luis Maria Baca the right to relinquish their claim to a large body of land in New Mexico and to select

instead "an equal quantity of vacant land, not mineral," in not exceeding five tracts in that Territory. As here, there was no provision for a patent. The original claim was relinquished and the lieu selection made conformably to directions given by the Land Department, the selected land being represented as vacant and not known to be mineral. Afterwards the selection of a part of Tract No. 4 was called in question on the ground that it was shown by subsequent discoveries to be mineral. This court sustained the selection and said, p. 332: "The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preëmption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral." In *Leonard* v. *Lennox*, 181 Fed. Rep. 760, a contention that an application for a non-mineral final entry, even if regularly presented and based on full compliance with the law, should be disallowed and rejected where the land subsequently is discovered to be mineral (coal) was

overruled by the Circuit Court of Appeals of the Eighth Circuit, the court saying, p. 764: "This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them." The last expression on this subject in this court is found in *Payne* v. *New Mexico*, *ante*, 367, where it was held in respect of a state lieu selection like the one in question here that the Commissioner and the Secretary in acting thereon are required to give effect to the conditions existing when it was made, that if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in conditions and that in this regard the statute under which the selection was made does not differ from other land laws offering a conveyance of the title to those who accept and fully comply with their terms.

The Land Department uniformly has ruled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey,—or at the date of the grant where the survey precedes it,—regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected

by a subsequent mineral discovery. *California* v. *Poley*, 4 Copp's L. O. 18; *Abraham L. Minor*, 9 L. D. 408; *Rice* v. *California*, 24 L. D. 14; *United States* v. *Morrison*, 240 U. S. 192, 207; *United States* v. *Sweet*, 245 U. S. 563, 572. And as respects cash entries and entries under the preemption, homestead, desert land and kindred laws the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb. *Harnish* v. *Wallace*, 13 L. D. 108; *Rea* v. *Stephenson*, 15 L. D. 37; *Reid* v. *Lavallee*, 26 L. D. 100, 102; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1, 17; *Diamond Coal & Coke Co.* v. *United States*, 233 U. S. 236, 240. And this rule has been applied by that department, although not uniformly, to selections made in lieu of relinquished lands in public reservations. Thus in *Kern Oil Co.* v. *Clarke*, 30 L. D. 550, where a lieu selection under the Act of June 4, 1897, c. 2, 30 Stat. 36, was under consideration, the Secretary of the Interior said, p. 556: "When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to

sale or other disposal, and no change in such conditions, subsequently occurring can impair or in any manner affect his rights." Again, p. 560: "These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received." And again, p. 564: "It would be strange indeed, if by the latter [1897] act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty."

That view was repeated and applied in many other departmental decisions dealing with lieu selections. But afterwards the Secretary, conceiving that the decisions of this court in *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, and *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, justified him in so doing, ruled that

no right attached under such a selection unless and until it was approved by him and therefore that, even though the selection was lawfully made, he possessed a discretion to reject it and give effect to an intervening change in conditions, as where a new claimant settled upon the land or sought to make entry of it while the selection was pending.

Under this changed ruling the Secretary rejected several selections lawfully made by one Daniels and awarded and patented the land to others. Daniels then brought suits against the patentees charging that by the selections he acquired the equitable title, that his selections were rejected and the patents issued through a misapprehension of the law, and therefore that the patentees took the legal title in trust for him. Ultimately the suits came to this court, and after a full review the changed ruling of the Secretary was disapproved and Daniels' contention sustained. *Daniels* v. *Wagner*, 237 U. S. 547. The substance of the decision was that as the selections were lawful when made "it was the plain duty" of the Secretary to approve them; that the contrary view found no justification in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co., supra;* and that the real authority and duty of the Secretary in dealing with such selections were pointed out in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387–388, where it was said: "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority therefore involved not only the power but implied the duty to determine the lawfulness of the selec-

tions as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

As the Circuit Court of Appeals in the present case, like the Secretary in the other, regarded the decisions in the *Wisconsin Central Case* and the *Cosmos Case* as showing that no right attaches under a lieu selection unless and until approved by the Secretary, it is well to point out just what was involved in those cases; for it then will be apparent that there was no purpose in either to go to the length suggested.

The *Wisconsin Central Case* was a suit to enjoin the collection of a tax levied on land which at the time was covered by a pending indemnity selection under a railroad land grant. The Commissioner of the General Land Office had reported that the company already had received indemnity lands largely in excess of the losses for which it was entitled to indemnity, and the company was disputing that report. Until that controversy was determined it could not be known whether the company was entitled to an approval of the selection. In that situation the United States had such an interest in the land as made it non-taxable. Whether the selection was valid or otherwise was primarily a question for the Secretary of the Interior to determine. Ultimately he held it valid, but not until after the tax was levied—indeed, after the suit was brought. The suit involved the validity of the tax, and nothing more. Its purpose was not to control the action of the Secretary by a writ of mandamus or injunction, nor to determine the title as between the United States and the company or between the company and a grantee of the United States. True, the court, after commenting on the difference between the granted lands in place and the indemnity lands as respects the mode of identification, very broadly stated that an indemnity selection to be effective required the approval of the Secretary; but it was not meant by this that the Secretary arbitrarily could

defeat the right of selection by withholding his approval, nor that if through a mistake of law he rejected a selection which was valid at the time it was made the company would be remediless. There was no occasion to consider those questions, nor could they properly be determined without the presence of parties not then before the court. And that the court did not intend its words to be taken so broadly is illustrated by the fact that it cited with approval the case of *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 733, wherein an indemnity selection lawfully made, but disapproved by the Secretary, was sustained against an adverse certification on the ground that "this erroneous decision of his" did not deprive the selector "of rights which became vested by its selection of those lands."

The *Cosmos Case* was a suit by a lieu land selector to establish his title as against others who were claiming under placer mining locations. The selection was not accompanied by proof that the land was not then occupied adversely, although that was required. Within the time prescribed by the regulations the mining claimants filed in the land office verified protests assailing the regularity and validity of the selection, setting up locations of the selected land made under the placer mining law prior to the selection and alleging that the lands "were not subject to selection" because "the same was mineral land and was included within" the mining locations. The protests were entertained and, with the selection, were pending when the suit was begun, which was shortly after the protests were filed. The suit was brought on the theory that by the selection the selector acquired "the full, complete and equitable title" to the selected land, notwithstanding he had not submitted any proof of non-occupancy, and that the protests were not such as could be entertained or investigated by the Land Department. That case and another (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316),

wherein a writ of mandamus was sought against the Secretary by another lieu land selector, were heard and disposed of as related cases, and the decision in one should be read in connection with that in the other. The full substance of the decision in the *Cosmos Case* is in the following excerpt from the opinion, 190 U. S. 315: "Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. *United States* v. *Schurz*, 102 U. S. 378, 395. The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or in the prayer for relief to consider that question. For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was properly sustained." There are general expressions in the opinion, which separated from the rest, might be taken as declaring that no right vests under a lieu selection unless the Secretary approves it; but that such a ruling was intended is refuted by the opinion as a whole, and particularly by the statements therein that the power of the Secretary is not to be exercised arbitrarily and that his "decision of any legal question would not, of course, be binding on the courts" should the question properly arise in future litigation. The general expressions were relied upon in *Daniels* v. *Wagner*, as interpretative of the decision and this court answered, "But we are of opinion that this

interpretation of the *Cosmos Case* cannot be justified." Besides, it was adjudged in the *Daniels Case* that a lieu selection which is lawful at the time it is made does invest the selector with equitable rights which he may enforce in an appropriate way where the Secretary through an error of law rejects the selection. And that ruling was reaffirmed and applied in *Payne* v. *Central Pacific Ry. Co.*, *ante*, 228; and *Payne* v. *New Mexico*, *ante*, 367.

The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or non-mineral—is to be determined is one which in principle and practice is confined to railroad land grants. From the beginning the Land Department, by reason of the terms of those grants and the restrictive interpretation to which they are subjected, uniformly has construed and treated them as requiring that the character of the land be determined as of the time when the patent issues. In 1890 Secretary Noble, in declining to disturb this construction and practice, pointed out the reasons which had led the Department to make a distinction in this regard between those grants and other land laws, and said: "This practice, having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned. It has, in effect, become a rule of property." *Central Pacific R. R. Co.* v. *Valentine*, 11 L. D. 238, 246. In 1893 the matter came before this court and the construction and practice of the Land Department were sustained. *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288. As the opinion in that case shows, the court recognized that the mineral land exception in other land laws simply operates to exclude from sale, etc., "land known at the time to be mineral," and was careful to explain that its decision related to "grants in aid of

railroads " and to "no other grants." The grounds on which the decision was put were, (a) that the railroad land grants, besides being confined in the granting clause to lands "not mineral," contain provisos declaring in words or effect "that all mineral lands be, and the same hereby are, excluded from the operation of this " grant; (b) that such grants, although expressly requiring that the question whether the lands are otherwise excepted be determined as of the time the map of definite location is filed, contain no such provision in respect of the exception of mineral land; (c) that it was well understood that many years would necessarily elapse between the filing of the map and the time when by construction of the road the grantee would be entitled to patents, and as the grants covered great areas, in one instance nearly equal to that of Ohio and New York, it hardly could have been intended to arrest mineral development in those areas in the meantime; (d) that such grants "must be strictly construed," and "if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor;" and (e) that the long prevailing construction and practice of the Land Department ought not to be disturbed. Plainly the decision in that case is without bearing here, save as it recognizes that rights under other land laws are to be tested by a different rule. And this is emphasized by the fact that in *Shaw* v. *Kellogg, supra,* where the selection of Baca Tract No. 4 was involved, the court distinguished the *Barden Case,* and applied the general rule before stated. And it is of further significance that this court has recognized that the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively. *Beecher* v. *Wetherby,* 95 U. S. 517, 526; *Johanson* v. *Washington,* 190 U. S. 179, 183.

Of the executive withdrawal of the land two years after

the lieu selection was lawfully made, it suffices to say, following the recent decision in *Payne* v. *Central Pacific Ry. Co., ante,* 228, that the Act of 1910, under which the withdrawal was made, is confined to "public lands," that by the selection this land had ceased to be public, and that the act could not be construed to embrace it without working an inadmissible interference with vested rights.

It results that the Secretary erred in matter of law in rejecting the selection and that the District Court rightly entered a decree for the defendants. See *Cornelius* v. *Kessel,* 128 U. S. 456, 461; *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 338. The decree of the Circuit Court of Appeals is accordingly

Reversed.

MERCHANTS' LOAN & TRUST COMPANY, TRUSTEE OF ESTATE OF RYERSON, *v.* SMIETANKA, FORMERLY UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

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

No. 608. Argued January 11, 12, 1921.—Decided March 28, 1921.

1. A provision in a will creating a trust that accretions of selling value shall be considered principal and not income, can not render them non-taxable under the income tax law. P. 516.
2. A trustee, invested by will with full dominion over an estate, in trust to pay the net income to the testator's widow for life, and afterwards to use it for the benefit of his children and to pay over their shares as they reached a certain age, sold certain corporate stock, part of the original assets, for a price greater than their cash

value on March 1, 1913. *Held*, (no earlier value being involved) that the gain after March 1, 1913, was taxable as income, for the year when the sale was made, to the trustee as a "taxable person," under the Income Tax Law of September 8, 1916, as amended by the Law of October 3, 1917. P. 516. *Cf. Goodrich* v. *Edwards*, *post*, 527; *Walsh* v. *Brewster*, *post*, 536.

3. Income, within the meaning of the Sixteenth Amendment, the Income Tax Acts of 1913, 1916, 1917, and the Corporation Tax Act of 1909, is a gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets. P. 517. *Eisner* v. *Macomber*, 252 U. S. 189, 207.
4. It includes the gain from capital realized by a single, isolated sale of property held as an investment, as well as profits realized by sales in a business of buying and selling such property. P. 520. *Gray* v. *Darlington*, 15 Wall. 63, and *Lynch* v. *Turrish*, 247 U. S. 221, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Albert M. Kales, with whom *Mr. Walter L. Fisher* was on the brief, for plaintiff in error:

Assuming that the Income Tax Act of 1916, as amended by the Act of 1917, attempted to tax as income the increase in value since March 1, 1913, or date of purchase subsequent to that time, of the stock and bonds in question upon the ascertainment of the increment of value by conversion or redemption, the act was in violation of the Constitution.

In accordance with the statement of this court in *Eisner* v. *Macomber*, 252 U. S. 189, 206, it is now settled that the mere increase in the value of capital assets, prior to any conversion or redemption, is not "income" within the meaning of the Sixteenth Amendment. *Gray* v. *Darlington*, 15 Wall. 63, 66; *Lynch* v. *Turrish*, 247 U. S. 221, 231.

The conversion by the trustee does not cause the increase in the value of capital assets to be "income," for the reason that the increase after the single isolated

event of conversion still remains capital just the same as it was before. The increase after conversion remained a mere "gain accruing to capital," or "a growth or increment of value in the investment." The change in form by the conversion does not make any change in substance. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185; *Eisner* v. *Macomber, supra; Gibbons* v. *Mahon*, 136 U. S. 549; *Smith* v. *Hooper*, 95 Maryland, 16, 26–31; *Stewart* v. *Phelps*, 71 App. Div. 91, 96; affd. 173 N. Y. 621; *In re Armitage*, [1893] 3 Ch. 337; *Bulkeley* v. *Worthington Society*, 78 Connecticut, 526, 532. In the case of an increase in the value of bonds, it is believed to be universally recognized that the increase in value, ascertained on conversion or redemption, primarily belongs to the capital of the trust estate as between life tenant and remainderman. *Re Graham's Estate*, 198 Pa. St. 216; *Matter of Gerry*, 103 N. Y. 445; *Devenney* v. *Devenney*, 74 Oh. St. 96; *Whittingham* v. *Scofield's Trustee*, 67 S. W. Rep. 846.

The conversion and redemption in the case at bar do not cause the increase in the value of capital assets of the trust estate to be income because the gain or increase has not been "derived," that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal. *Eisner* v. *Macomber, supra*, 207, 211, 214, 215.

In the case of a trustee who converts a capital asset which he has received by devise, there can be no profit or gain upon which to base any claim of income.

Even, however, where the legal and beneficial owner of capital assets sells them at a profit as a single isolated transaction (he not being in any sense in the business of buying and selling for profit) the gain is not income within the Sixteenth Amendment. *Eisner* v. *Macomber, supra; Gray* v. *Darlington, supra; Lynch* v. *Turrish, supra; Smith* v. *Hooper, supra;* Webster's New International Dictionary, tit. "Income," 4; Funk & Wagnall's New

Standard Dictionary, tit. "Income," 1; New English Dictionary, tit. "Income," 6; *Lynch* v. *Hornby*, 247 U. S. 339; *Peabody* v. *Eisner*, 247 U. S. 347; *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189; British Income Tax Act, 16 & 17 Vict. c. 34; *Tebrau (Johore) Rubber Syndicate* v. *Farmer*, 5 Inc. Tax Cas. 658; *The Hudson's Bay Co.* v. *Stevens*, 5 Inc. Tax Cas. 424; *The Assets Co.* v. *The Inland Revenue*, Cases in Court of Session, 4th series, vol. 24, p. 578; *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69, 72.

Gray v. *Darlington, supra*, and *Lynch* v. *Turrish, supra*, are decisive that the act does not apply to any increase in the value of capital assets ascertained by conversion as a single isolated event. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342; *Doyle* v. *Mitchell Brothers Co., supra; Hays* v. *Gauley Mountain Coal Co., supra; United States* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 247 U. S. 195.

The gains in the value of the capital assets of a legal and beneficial owner, ascertained by conversion as a single isolated event, are not taxable as income under § 2 (a) or (c).

The act in particular contains no provision for the taxation of any increase in value of the capital assets of a trust estate held for life tenant and remainderman ascertained on conversion as a single isolated event.

The Solicitor General for defendant in error:

Assuming that the act treats gains derived by an individual from the sale of property as taxable income, it clearly provides for a tax to be paid by a trustee under the facts of this case.

The act clearly treats as taxable income any gain which is derived from the sale of property; that is, the conversion of capital assets.

Gains derived from the conversion of capital assets constitute income which Congress may constitutionally

tax. *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 183, 185.

Ever since the passage of the Act of 1909, the administrative department of the Government has construed the word "income" as including profits derived from the conversion of capital assets. This construction was expressly approved by this court in 1918, and millions of dollars of taxes have been collected both under the Act of 1909 and the subsequent income tax laws on that basis. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185–188.

Gray v. *Darlington*, 15 Wall. 63, is not authority for the contention that profits derived from the sale of capital assets are not income. *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 191; *Lynch* v. *Turrish*, 247 U. S. 221, 227, 230; *Doyle* v. *Mitchell Brothers Co.*, *supra*; *United States* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 247 U. S. 195; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 334; *Lynch* v. *Hornby*, 247 U. S. 339.

The fact that under the laws of most of the States gains derived from the profitable sale of capital assets are, as between life tenant and remainderman, treated as principal and not as income, can not operate to prevent such gains being income when clearly included in the definition of income as adopted by an act of Congress.

Neither is there any constitutional difficulty because Congress has seen fit to tax all of such gains in the year in which they are received.

When capital assets are converted into cash, and the original capital is withdrawn from the proceeds, the income remains segregated and subject to separate use. *Eisner* v. *Macomber*, *supra*, 211, 213.

The gains received by a trustee under a will by the profitable sale of capital assets purchased by the testator in his lifetime, are measured in precisely the same way

they would have been measured if the latter had lived and made the sale himself.

The question as to whether there is income in the sale of property at a loss as compared with its cost prior to 1913, but at an advance over its value on March 1, 1913, is not now involved.

MR. JUSTICE CLARKE delivered the opinion of the court.

A writ of error brings this case here for review of a judgment of the District Court of the United States for the Northern District of Illinois, sustaining a demurrer to a declaration in assumpsit to recover an assessment of taxes for the year 1917, made under warrant of the Income Tax Act of Congress, approved September 8, 1916, c. 463, 39 Stat. 756, as amended by the Act approved October 3, 1917, c. 63, 40 Stat. 300. Payment was made under protest and the claim to recover is based upon the contention that the fund taxed was not "income" within the scope of the Sixteenth Amendment to the Constitution of the United States and that the effect given by the lower court to the act of Congress cited renders it unconstitutional and void. This is sufficient to sustain the writ of error. *Towne* v. *Eisner*, 245 U. S. 418.

Arthur Ryerson died in 1912, and the plaintiff in error is trustee under his will, of property the net income of which was directed to be paid to his widow during her life and after her death to be used for the benefit of his children, or their representatives, until each child should arrive at twenty-five years of age, when each should receive his or her share of the trust fund.

The trustee was given the fullest possible dominion over the trust estate. It was made the final judge as to what "net income" of the estate should be, and its determination in this respect was made binding upon all parties interested therein, "except that it is my will that stock

dividends and accretions of selling values shall be considered principal and not income."

The widow and four children were living in 1917.

Among the assets which came to the custody of the trustee were 9,522 shares of the capital stock of Joseph T. Ryerson & Son, a corporation. It is averred that the cash value of these shares, on March 1, 1913, was $561,798, and that they were sold for $1,280,996.64, on February 2, 1917. The Commissioner of Internal Revenue treated the difference between the value of the stock on March 1, 1913, and the amount for which it was sold on February 2, 1917, as income for the year 1917, and upon that amount assessed the tax which was paid. No question is made as to the amount of the tax if the collection of it was lawful.

The ground of the protest, and the argument for the plaintiff in error here, is that the sum charged as "income" represented appreciation in the value of the capital assets of the estate which was not "income" within the meaning of the Sixteenth Amendment and therefore could not, constitutionally, be taxed, without apportionment, as required by § 2, cl. 3, and by § 9, cl. 4, of Article I of the Constitution of the United States.

It is first argued that the increase in value of the stock could not be lawfully taxed under the act of Congress because it was not income to the widow, for she did not receive it in 1917, and never can receive it, that it was not income in that year to the children for they did not then, and may never, receive it, and that it was not income to the trustee, not only because the will creating the trust required that "stock dividends and accretions of selling values shall be considered principal and not income," but also because in the "common understanding" the term "income" does not comprehend such a gain or profit as we have here, which it is contended is really an accretion to capital and therefore not constitutionally taxable under *Eisner* v. *Macomber*, 252 U. S. 189.

The provision of the will may be disregarded. It was not within the power of the testator to render the fund non-taxable.

Assuming for the present that there was constitutional power to tax such a gain or profit as is here involved, are the terms of the statute comprehensive enough to include it?

Section 2 (a) of the Act of September 8, 1916 (39 Stat. 757; 40 Stat. 300, 307, § 212), applicable to the case, defines the income of "a taxable person" as including "gains, profits and income derived from . . . sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, . . . or gains or profits and income derived from any source whatever."

Plainly the gain we are considering was derived from the sale of personal property, and, very certainly the comprehensive last clause "gains or profits and income derived from any source whatever," must also include it, if the trustee was a "taxable person" within the meaning of the act when the assessment was made.

That the trustee was such a "taxable person" is clear from § 1204 (1) (c) of the Act of October 3, 1917, c. 63, 40 Stat. 331, which requires that "trustees, executors . . . and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals."

And § 2 (b) of the Act of September 8, 1916, *supra*, specifically declares that the "income received by estates of deceased persons during the period of administration or settlement of the estate, . . . or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for

future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be."

Further, § 2 (c) clearly shows that it was the purpose of Congress to tax gains, derived from such a sale as we have here, in the manner in which this fund was assessed, by providing that "for the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

Thus, it is the plainly expressed purpose of the act of Congress to treat such a trustee as we have here as a "taxable person" and for the purposes of the act to deal with the income received for others precisely as if the beneficiaries had received it in person.

There remains the question, strenuously argued, whether this gain in four years of over $700,000 on an investment of about $500,000 is "income" within the meaning of the Sixteenth Amendment to the Constitution of the United States.

The question is one of definition and the answer to it may be found in recent decisions of this court.

The Corporation Excise Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, was not an income tax law, but a definition of the word "income" was so necessary in its administration that in an early case it was formulated as "the gain derived from capital, from labor, or from both combined." *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415.

This definition, frequently approved by this court, received an addition, in its latest income tax decision, which

is especially significant in its application to such a case as we have here, so that it now reads: "'Income may be defined as the gain derived from capital, from labor, or from both combined,' *provided it be understood to include profit gained through a sale or conversion of capital assets.*" *Eisner* v. *Macomber*, 252 U. S. 189, 207.

The use made of this definition of "income" in the decision of cases arising under the Corporation Excise Tax Act of August 5, 1909, and under the Income Tax Acts is, we think, decisive of the case before us. Thus, in two cases arising under the Corporation Excise Tax Act:

In *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, a coal company, without corporate authority to trade in stocks, purchased shares in another coal mining company in 1902, which it sold in 1911, realizing a profit of $210,000. Over the same objection made in this case, that the fund was merely converted capital, this court held that so much of the profit upon the sale of the stock as accrued subsequent to the effective date of the act was properly treated as income received during 1911, in assessing the tax for that year.

In *United States* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 247 U. S. 195, a railroad company purchased shares of stock in another railroad company in 1900 which it sold in 1909, realizing a profit of $814,000. Here, again, over the same objection, this court held that the part of the profit which accrued subsequent to the effective date of the act was properly treated as income received during the year 1909 for the purposes of the act.

Thus, from the price realized from the sale of stock by two investors, as distinguished from dealers, and from a single transaction as distinguished from a course of business, the value of the stock on the effective date of the tax act was deducted and the resulting gain was treated by this court as "income" by which the tax was measured.

It is obvious that these decisions in principle rule the

case at bar if the word "income" has the same meaning in the Income Tax Act of 1913 that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 335, where it was assumed for the purposes of decision that there was no difference in its meaning as used in the Act of 1909 and in the Income Tax Act of 1913. There can be no doubt that the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913. When to this we add that in *Eisner* v. *Macomber, supra*, a case arising under the same Income Tax Act of 1916 which is here involved, the definition of "income" which was applied was adopted from *Stratton's Independence* v. *Howbert, supra*, arising under the Corporation Excise Tax Act of 1909, with the addition that it should include "profit gained through a sale or conversion of capital assets," there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this court.

In determining the definition of the word "income" thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185; *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207. Notwithstanding the full argument heard in this case and in the series of cases now under consideration we continue entirely satisfied with that definition, and, since the fund here taxed was the amount realized from the sale of the stock in 1917, less the capital investment

as determined by the trustee as of March 1, 1913, it is palpable that it was a "gain or profit" "produced by" or "derived from" that investment, and that it "proceeded," and was "severed" or rendered severable, from it, by the sale for cash, and thereby became that "realized gain" which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress. *Doyle* v. *Mitchell Brothers Co.*, and *Eisner* v. *Macomber*, *supra*.

It is elaborately argued in this case, in No. 609, *Eldorado Coal & Mining Co.* v. *Mager*, *post*, 522, submitted with it, and in other cases since argued, that the word "income" as used in the Sixteenth Amendment and in the Income Tax Act we are considering does not include the gain from capital realized by a single isolated sale of property but that only the profits realized from sales by one engaged in buying and selling as a business—a merchant, a real estate agent, or broker—constitute income which may be taxed.

It is sufficient to say of this contention, that no such distinction was recognized in the Civil War Income Tax Act of 1867, c. 169, 14 Stat. 471, 478, or in the Act of 1894, c. 349, 28 Stat. 509, 553, declared unconstitutional on an unrelated ground; that it was not recognized in determining income under the Excise Tax Act of 1909, as the cases cited, *supra*, show; that it is not to be found, in terms, in any of the income tax provisions of the Internal Revenue Acts of 1913, 1916, 1917 or 1919; that the definition of the word "income" as used in the Sixteenth Amendment, which has been developed by this court, does not recognize any such distinction; that in departmental practice, for now seven years, such a rule has not been applied; and that there is no essential difference in the nature of the transaction or in the relation of the profit to the capital involved, whether the sale or conversion be a single, isolated transaction or one of many.

The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the "general understanding" of the meaning of the word "income" fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the Amendment.

The opinions of the courts in dealing with the rights of life tenants and remaindermen in gains derived from invested capital, especially in dividends paid by corporations, are of little value in determining such a question as we have here, influenced as such decisions are by the terms of the instruments creating the trusts involved and by the various rules adopted in the various jurisdictions for attaining results thought to be equitable. Here the trustee, acting within its powers, sold the stock, as it might have sold a building, and realized a profit of $700,000, which at once became assets in its possession free for any disposition within the scope of the trust but for the purposes of taxation to be treated as if the trustee were the sole owner.

Gray v. *Darlington*, 15 Wall. 63, much relied upon in argument, was sufficiently distinguished from cases such as we have here in *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 191. The differences in the statutes involved render inapplicable the expressions in the opinion in that case (not necessary to the decision of it) as to distinctions between income and increase of capital.

In *Lynch* v. *Turrish*, 247 U. S. 221, also much relied upon, it is expressly stated that, "according to the fact admitted, there was no increase after that date [March 1, 1913] and therefore no increase subject to the law." For this reason the questions here discussed and decided were not there presented.

The British income tax decisions are interpretations of statutes so wholly different in their wording from the

acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved.

Another assessment on a small gain realized upon a purchase, made in 1914, of bonds which were duly called for redemption and paid in 1917, does not present any questions other than those which we have discussed and therefore it does not call for separate consideration.

The judgment of the District Court is

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS, because of prior decisions of the court, concur only in the judgment.

ELDORADO COAL & MINING COMPANY *v.* MAGER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS.

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

No. 609. Argued January 12, 1921.—Decided March 28, 1921.

A mining corporation, upon a sale of its mine and plant in 1917, realized a profit representing an appreciation in their value since March 1, 1913. *Held*, that the increase was taxable as income. P. 526. *Merchants' Loan & Trust Co.* v. *Smietanka*, *ante*, 509.

Affirmed.

THE case is stated in the opinion.

Mr. Herbert Pope, with whom *Mr. Rush C. Butler*, *Mr. James J. Forstall* and *Mr. Frank E. Harkness* were on the briefs, for plaintiff in error:

There is a fundamental difference between a profit realized on a sale by a merchant or trader in the course of his business and a gain resulting from an increase in a capital investment; income arises on the sale in the case of the merchant, but, in the case of the capital investment, income arises neither on the sale nor prior thereto. *Hudson's Bay Co.* v. *Stevens*, 5 Tax Cases, 424, 437; *Assets Company* v. *Forbes*, 3 Tax Cases, 542, 548; *Ex parte Humbird*, 114 Maryland, 627, 633.

This court has decided that, in the case of a merchant in the course of his business, income accrues and is received when he sells for a profit, but that, in the case of an investor, income does not accrue and is not received while his capital investment is increasing in value, nor when the investment is sold. *Gray* v. *Darlington*, 15 Wall. 63, 65, 66; *Lynch* v. *Turrish*, 247 U. S. 221, 229, 230; *Eisner* v. *Macomber*, 252 U. S. 189, 207, 214, 215.

Cases decided by this court under the Corporation Excise Tax Act of 1909 are not inconsistent with the decisions of this court previously cited.

If increase in the value of an investment accrues as income during the period of such increase, it cannot become income only when the investment is sold; and if increase in the value of an investment is capital, and never, even on a sale of the investment, accrues as income, the increase in value can never be received as income. *Lynch* v. *Turrish*, 247 U. S. 221, 229; *Gray* v. *Darlington*, 15 Wall. 63.

An increase in the money value of capital is not realized as income by a sale or conversion of the capital. The idea that income is realized by conversion of capital which has increased in value is evidently due to a confusion of ideas in two particulars: first, the fact that a merchant or trader realizes income only when he sells the property in which he trades suggests the idea that any sale, when increase in value has already occurred, must likewise

produce income; second, it has been assumed that an accounting practice in recording capital values was based on a distinction between capital and income, when in fact it is not.

Prior to the adoption of the Sixteenth Amendment both English and American courts had definitely decided that the sale of capital investments at an advance over cost did not produce income. A winding-up sale does not involve a conversion of two investments, one an investment of the corporation and another an investment of the stockholders. The authorities sustain the contention that on a winding-up sale by a corporation the investment sold is the investment of the stockholders, and that any prior increase in the value of the property sold was an increase in the value of their investment. *Lynch* v. *Turrish*, 247 U. S. 221, 228; *Collector* v. *Hubbard*, 12 Wall. 1; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 635, 636; *Tebrau Rubber Syndicate, Ltd.*, v. *Farmer* (1909), 5 Tax Cases, 658.

The income tax provisions of neither the Act of March 2, 1867, nor the Act of October 3, 1913, imposed any tax on a realized increase in the value of capital assets. *Gray* v. *Darlington*, 15 Wall. 63; *Lynch* v. *Turrish*, 247 U. S. 221; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342.

The provisions of the Revenue Acts of 1916 and 1917 which define the property on which the income and excess profits taxes are imposed are substantially the same as the corresponding provisions of the Acts of 1867 and 1913.

No rulings of the Treasury Department can affect the duty of the court to give the same interpretation, in this respect, to the Revenue Acts of 1916 and 1917 as to the Acts of 1867 and 1913.

Neither the new provisions of the Revenue Act of 1916 making the March 1, 1913, value the basis for com-

puting gain or loss "from the sale or other disposition" of property, nor the new provision in that act with regard to losses of individuals, serve to make the scope of the Revenue Acts of 1916 and 1917 any broader, as to realized increases in the value of capital assets, than the Act of 1867 or the Act of 1913.

All doubts respecting the scope and meaning of a tax statute are to be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; *Crocker* v. *Malley*, 249 U. S. 223, 233.

A statute must be so construed, if fairly possible, as not only to avoid the conclusion that it is unconstitutional but even grave doubts upon that score. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408.

The Solicitor General for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case comes into this court on a writ of error to review a judgment of the District Court of the United States for the Northern District of Illinois, sustaining a demurrer to a declaration in assumpsit to recover an assessment of income and excess profits taxes for the year 1917, under warrant of the Income Tax Act of Congress, approved September 8, 1916, c. 463, 39 Stat. 756, as amended by the Act approved October 3, 1917, c. 63, 40 Stat. 300. Payment was made under protest and the claim to recover is based upon the same contention dealt with in No. 608, this day decided, *ante*, 509, that the fund taxed was not "income" within the scope of the Sixteenth Amendment to the Constitution of the United States, and that the effect given by the lower court to the act renders it unconstitutional and void.

The Eldorado Coal and Mining Company is an In-

diana corporation, which operated a bituminous coal mine and mining plant, which it sold in May, 1917, for cash. The company retained its accounts receivable and prior to September 30, 1917, it distributed among its stockholders, proportionately to their ownership of stocks, the cash received from the sale and the accounts receivable in kind. The corporation, however, was not dissolved nor its charter surrendered, because there were unsettled liabilities against it for federal income taxes and excess profit taxes. Otherwise its affairs were wound up.

It is averred in the declaration that, taking the fair market value as of March 1, 1913, of the capital assets of the company invested and employed in its business, and adding thereto the cost of additions and betterments, and subtracting depreciation and depletion to the date of sale, it appears that there was an appreciation in value of the property after March 1, 1913, of $5,986.02, and it was on this profit realized by the sale that the assessment of $3,073.16 was made which the company paid and in this suit seeks to recover.

It is obvious from this statement of the case that it presents in so nearly the same form precisely the same questions as were considered in No. 608, *Merchants' Loan & Trust Co.* v. *Smietanka*, this day decided, *ante*, 509, that further discussion of them is unnecessary, and, on the authority of that case, the judgment of the District Court is

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS, because of prior decisions of the court, concur only in the judgment.

GOODRICH *v.* EDWARDS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK.

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

No. 663. Argued March 10, 11, 1921.—Decided March 28, 1921.

1. Profit realized upon the sale of stocks held as an investment is income, and so much of it as accrued after March 1, 1913, is taxable under the Income Tax Laws of 1916, 1917, and the Sixteenth Amendment. P. 534. *Merchants' Loan & Trust Co.* v. *Smietanka*, *ante*, 509.
2. The statute imposes the income tax on the proceeds of a sale of personal property to the extent only that gains are derived therefrom by the vendor; and § 2 (c) is applicable only where a gain over the original capital investment has been realized after March 1, 1913. P. 535.

Reversed in part; affirmed in part.

THE case is stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Langdon P. Marvin*, *Mr. Henry M. Ward*, *Mr. Herbert Pope* and *Mr. Rush C. Butler* were on the briefs, for plaintiff in error:

The increase in value of property held for investment, when realized by sale, is not "income" within the meaning of the Sixteenth Amendment. Income here is to be taken as having the meaning commonly understood and judicially defined. *Eisner* v. *Macomber*, 252 U. S. 189; *McCulloch* v. *Maryland*, 4 Wheat. 316, 407.

Prior to the Amendment, income had been judicially defined by this court in *Gray* v. *Darlington*, 15 Wall. 63, by the highest courts of many of the States in the law of estates and trusts, and by the courts of Great Britain

and of the British Dominions and Colonies in construing their income tax laws, as excluding increment of value realized upon the sale of property held for investment. To the same effect as *Gray* v. *Darlington*, was the opinion of Mr. Justice Grier in *Bennet* v. *Baker* (footnote to 15 Wall. 67), and the judgment of the Circuit Court in *Chicago, Burlington & Quincy R. R. Co.* v. *Page*, 1 Biss. 461, 466. This court followed and approved *Gray* v. *Darlington* in *Lynch* v. *Turrish*, 247 U. S. 221.

It must reasonably be presumed that Congress, when it proposed the Sixteenth Amendment, and the state legislatures, when they ratified it, intended to adopt this judicial interpretation and definition of the word income.

The conclusion is, therefore, fully warranted that both those who proposed the Sixteenth Amendment and those who ratified it understood and appreciated the force and effect of the decision of this court in *Gray* v. *Darlington*, and acted upon the belief that such a deliberate and authoritative definition of "income" and "capital" for purposes of taxation would constitute at once the measure and the limitation of the extension of the power of Congress "to lay and collect taxes on incomes . . . without apportionment," so as not to conflict with the constitutional provisions requiring direct taxes on property to be apportioned.

Particularly must it be apparent that this was the understanding of the state legislatures, since they knew that it was universally held to be the law in the United States that a gain realized by a trustee upon the sale of a part of the *corpus* or principal of a trust fund constituted capital or principal and not income, and belonged to the remainderman and not to the life tenant, when the life tenant was, by the express terms of the instrument creating the trust, entitled to all income arising from the trust estate.

That this common and familiar distinction did not

directly appertain to taxation, is quite immaterial. Indeed, this court has so held in *Towne* v. *Eisner*, 245 U. S. 418, 426.

For many years prior to the adoption of the Sixteenth Amendment, the British courts had held and have since continued to hold that capital in any form, whether the realized increment of value upon the sale of property by an individual or of capital assets by a corporation, is not taxable as income under the British income tax laws which have been in force since 1842. This British authority is peculiarly important in view of the well-known fact that American income tax legislation came to us from England and has always been in large part patterned after the English enactments (Black, Income Taxes, 4th ed., § 30); and it should, therefore, reasonably be presumed that both the Sixteenth Amendment and the income tax acts were framed in the light of the British precedents, and "that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute." *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 284. See also *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235, 253–4; *McDonald* v. *Hovey*, 110 U. S. 619, 628. The rule to this effect, thus settled in England and Scotland, also prevails in the British Colonies and Dominions.

Prior, therefore, to 1909 when the Sixteenth Amendment was proposed and 1913 when it was finally adopted, the word "income" was generally understood and had been quite generally defined as having a meaning distinct from, and exclusive of, the increment of value realized upon the sale of property held for investment, by an individual, or the capital assets of a corporation.

If the views expressed by this court subsequent to 1913 be analyzed, this conclusion is strongly reinforced.

The so-called "income" which measured the corporation tax was not and was not intended to be the "income" signified and intended in and by the Sixteenth Amendment, and it has been repeatedly recognized by this court that the senses in which the terms were used are different in the two cases. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414, 416, and other cases.

Where, on the other hand, a true income tax act was involved and capital profits were realized upon the change of an investment under circumstances in nowise related to the carrying on of business, as in *Gray* v. *Darlington*, 15 Wall. 63; or where under a true income tax law capital profits were realized, not in the course of the business, but upon the winding-up and termination thereof, which is after all but another mode or form of changing an investment, as was the case in *Lynch* v. *Turrish*, 247 U. S. 221, the court in each instance declared that the increment remained capital, despite its conversion or transmutation into cash. And this court has recently stated that "enrichment through increase in value of capital investment is not income in any proper meaning of the term." *Eisner* v. *Macomber*, 252 U. S. 214, 215.

An increase in the value of an investment, not made or held as a part of any trade or business transaction, is plainly "a gain accruing to capital" and a "growth or increment of value in the investment," within the definition of the court in *Eisner* v. *Macomber*, *supra*. In no proper sense does it proceed from the property, as do rents, interest, dividends and other familiar forms of income; and such a gain, when realized, cannot properly be described as "severed from the capital" for it remains an integral part of the capital as much as if it had not been converted.

Before conversion into money, no one would question that the property was capital, although it then included the enhancement of value. Bearing in mind that the

Sixteenth Amendment is not to be "extended by loose construction" and that it is "essential to distinguish between what is and what is not 'income' . . . according to truth and substance, without regard to form" (*Eisner* v. *Macomber*, 252 U. S. 206), we must find some distinct benefit to the taxpayer as income directly attributable to the conversion, before it can be declared that what the taxpayer now has is, not merely his capital, but income instead. Otherwise, the mere fact of conversion, that is, the form alone, would prevail over the substance and be made the decisive factor. Yet the court has declared, although in considering the Act of 1909, that "subsequent change of form by conversion into money did not change the essence." *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 187.

Mere conversion of capital investments and change into money cannot, therefore, be determinative, even though more money is thus actually brought to hand than was originally put into the investment several years before. Otherwise, *Lynch* v. *Turrish*, 247 U. S. 221, was wrongly decided.

The Income Tax Law of 1916 does not levy a tax upon the increment in value of capital assets when realized by sale.

As the sale or conversion of the stock of the Goodrich Company represented an actual loss, no part of the proceeds was taxable as income of the taxpayer.

The Solicitor General for defendant in error:

Prior to the adoption of the Sixteenth Amendment, the word "income," as understood by the legislative, the executive, and the judicial branches of the Government, included gains or profits derived from the sale of capital assets. Act of August 5, 1861, c. 45, 12 Stat. 292; Seligman, Income Tax, p. 435; Act of July 1, 1862, c. 119, 12 Stat. 432, 473; Cong. Globe, May 27, 1864, p.

2516; Act of June 30, 1864, c. 173, 13 Stat. 223; Act of March 3, 1865, c. 78, 13 Stat. 469; Act of March 2, 1867, c. 169, 14 Stat. 471; *Gray* v. *Darlington*, 15 Wall. 63, 65, 66; Act of August 27, 1894, c. 349, 28 Stat. 509; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; Corporation Excise Tax Act of 1909, c. 6, 36 Stat. 11, 112; T. D. 1571; T. D. 1606, § 71; T. D. 1675, Art. 55; T. D. 1742; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 183, 185, 187; *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 191–193; *Lynch* v. *Turrish*, 247 U. S. 221, 226; *Eisner* v. *Macomber*, 252 U. S. 189, 207.

In the framing of state income tax laws it has been customary to treat income as including gains derived from the sale of capital assets.

The cases under the Act of 1913 dealing with the distribution of corporate assets among stockholders are in no way in conflict with the Government's contention in this case. *Lynch* v. *Hornby*, 247 U. S. 339; *Eisner* v. *Macomber*, *supra*; *Lynch* v. *Turrish*, *supra*; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330; *Peabody* v. *Eisner*, 247 U. S. 347. These cases establish the proposition that gains derived from the sale of capital assets constitute income when received.

Investments are ordinarily made in contemplation of two kinds of returns,—one current income while the investment is held, and the other the profit to be realized, through appreciation in value, upon the final disposition of the investment.

The debates in Congress, when the Act of 1913 was under consideration, do not show an understanding that such gains as are now in question were not understood to be income.

The tax on gains derived from the sale of property is not confined to such gains arising from transactions conducted as a part of one's business or trade.

Whether under the decisions of the English courts gains of this kind are treated as income can have no determining effect in deciding the question now at issue.

The fact that under the laws of various States gains derived from the sale of capital assets are, as between a life tenant and a remainderman, treated as principal and not as income, affords no reason for saying that such gains are not income which Congress may tax.

The construction of the Act of 1916, under which the taxes in this case were collected, does not work any more hardship or injustice than is inevitable under any general tax law.

But the statute imposes the tax, upon a sale of property, only where there is a gain over the original investment.

Mr. Hoke Smith and *Mr. T. P. Gore,* by leave of court, filed a brief as *amici curiæ.*

Mr. Justice Clarke delivered the opinion of the court.

The plaintiff in error sued the defendant, a collector of Internal Revenue, to recover income taxes assessed in 1920 for the year 1916 and paid under protest to avoid penalties. A demurrer to the complaint was sustained and the constitutional validity of a law of the United States is so involved, that the case is properly here by writ of error. *Towne* v. *Eisner,* 245 U. S. 418.

Two transactions are involved.

(1) In 1912 the plaintiff in error purchased 1,000 shares of the capital stock of a mining company for which he paid $500. It is averred that the stock was worth $695 on March 1, 1913, and that it was sold in March, 1916, for $13,931.22. The tax which the plaintiff in error seeks to recover was assessed on the difference between the

value of the stock on March 1, 1913, and the amount for which it was sold.

(2) The plaintiff in error being the owner of shares of the capital stock of another corporation, in 1912 exchanged them for stock, in a reorganized company, of the then value of $291,600. It is averred and admitted that on March 1, 1913, the value of this stock was $148,635.50, and that it was sold in 1916 for $269,346.25. Although it is thus apparent that the stock involved was of less value on March 1, 1913, than when it was acquired, and that it was ultimately sold at a loss to the owner, nevertheless the collector assessed the tax on the difference between the value on March 1, 1913, and the amount for which it was sold.

The plaintiff in error seeks to recover the whole of these two assessments.

The same contention is made with respect to each of these payments as was made in No. 608, *Merchants' Loan & Trust Co.* v. *Smietanka*, this day decided, *ante*, 509, viz, that the amounts realized from the sales of the stocks were in their inherent nature capital as distinguished from income, being an increment in value of the securities while owned and held as an investment and therefore not taxable under the Revenue Act of 1916 (39 Stat. 756) as amended in 1917 (40 Stat. 300) or under any constitutional law.

With respect to the first payment. It is plain that this assessment was on the profit accruing after March 1, 1913, the effective date of the act, realized to the owner by the sale after deducting his capital investment. The question involved is ruled by No. 608, *supra*, and the amount was properly taxed.

As to the second payment. The Government confesses error in the judgment with respect to this assessment. The stock was sold in the year for which the tax was assessed for $22,253.75 less than its value when it was

acquired, but for $120,710.75 more than its value on March 1, 1913, and the tax was assessed on the latter amount.

The act under which the assessment was made provides that the net income of a "taxable person shall include *gains*, profits, and income derived from . . . sales, or dealings in property, whether real or personal, . . . or *gains* or profits and income derived from any source whatever." (39 Stat. 757; 40 Stat. 300, 307.)

Section 2 (c) of this same act provides that "for the purpose of ascertaining the *gain* derived from a sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such *gain* derived."

And the definition of "income" approved by this court is: "'The *gain* derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets." *Eisner* v. *Macomber*, 252 U. S. 189, 207.

It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that *gains* are derived therefrom by the vendor, and we therefore agree with the Solicitor General that since no gain was realized on this investment by the plaintiff in error no tax should have been assessed against him.

Section 2 (c) is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property.

It results that the judgment of the District Court as to the first assessment, as we have described it, is affirmed, that as to the second assessment it is reversed, and the case

is remanded to that court for further proceedings in conformity with this opinion.

Reversed in part.
Affirmed in part.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS, because of prior decisions of the court, concur only in the judgment.

WALSH, COLLECTOR OF INTERNAL REVENUE, *v.* BREWSTER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 742. Argued March 10, 11, 1921.—Decided March 28, 1921.

1. Bonds bought as an investment in 1909 were sold in 1916 for the amount originally paid, which was more, however, than their market value on March 1, 1913. *Held*, that there was no taxable income. P. 537. *Goodrich* v. *Edwards*, *ante*, 527.
2. Bonds bought in 1902–1903 were sold in 1916 at an increase over the investment price and at a still larger increase over their market value on March 1, 1913. *Held*, that the gain over the investment was the income taxable. P. 538. *Goodrich* v. *Edwards*, *ante*, 527.
3. Interest should not be added to the original investment in computing the amount of gain—income—upon a sale. P. 538.
4. A stock dividend *held* not income of the stockholder. P. 538. *Eisner* v. *Macomber*, 252 U. S. 189.

268 Fed. Rep. 207, reversed in part and affirmed in part.

THE case is stated in the opinion.

The Solicitor General for plaintiff in error.

Mr. William D. Guthrie and *Mr. Henry F. Parmelee*, with whom *Mr. George D. Watrous* and *Mr. Barry Mohun* were on the brief, for defendant in error.

Mr. H. Edgar Barnes, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this case the defendant in error sued the plaintiff in error, a collector of Internal Revenue, to recover income taxes for the year 1916, assessed in 1918, and which were paid under protest to avoid penalties. The defendant answered, the case was tried upon an agreed statement of facts, and judgment was rendered in favor of the taxpayer, the defendant in error. The case is properly here by writ of error. *Towne* v. *Eisner*, 245 U. S. 418.

The defendant in error was not a trader or dealer in stocks or bonds, but occasionally purchased and sold one or the other for the purpose of changing his investments.

Three transactions are involved.

The first relates to bonds of the International Navigation Company, purchased in 1899, for $191,000, and sold in 1916 for the same amount. The market value of these bonds on March 1, 1913, was $151,845, and the tax in dispute was assessed on the difference between this amount and the amount for which they were sold in 1916, viz, $39,155.

The trial court held that this apparent gain was capital assets and not taxable income under the Sixteenth Amendment to the Constitution of the United States, and rendered judgment in favor of the defendant in error for the amount of the tax which he had paid.

The ground upon which this part of the judgment was justified below is held to be erroneous in No. 608, *Merchants' Loan & Trust Co.* v. *Smietanka*, this day decided, *ante*, 509, but, since the owner of the stock did not realize any gain on his original investment by the sale in 1916, the judgment was right in this respect, and under authority of the opinion and judgment in No. 663, *Goodrich* v. *Ed-*

wards, also rendered this day, *ante*, 527, this part of the judgment is affirmed.

The second transaction involved the purchase in 1902 and 1903 of bonds of the International Mercantile Marine Company for $231,300, which were sold in 1916 for $276,150. This purchase was made through an underwriting agreement such that the purchaser did not receive any interest upon the amount paid prior to the allotment to him of the bonds in 1906, and he claimed that interest upon the investment for the time which so elapsed should be added as a part of the cost to him of the bonds. But this claim was properly rejected by the trial court under authority of *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189.

It is stipulated that the market value of these bonds on March 1, 1913, was $164,480, and the collector assessed the tax upon the difference between the selling price and this amount, but since the gain to the taxpayer was only the difference between his investment of $231,300 and the amount realized by the sale, $276,150, under authority of No. 663, *Goodrich* v. *Edwards*, this day decided, he was taxable only on $44,850.

The District Court, however, held that any gain realized by the sale was a mere conversion of capital assets and was not income which could lawfully be taxed. In this respect the court fell into error. The tax was properly assessed, but only upon the difference between the purchase and selling price of the bonds as stated.

The third transaction related to stock in the Standard Oil Company of California, received through the same stock dividend involved in *Eisner* v. *Macomber*, 252 U. S. 189. The District Court, upon authority of that case, properly held that the assessment made and collected upon this dividend should be refunded to the defendant in error.

It results that as to the profit realized upon the second transaction, as indicated in this opinion, the judgment of the District Court is reversed, but as to the other transac-

tions it is affirmed for the reasons and upon the grounds herein stated.

Judgment reversed in part, affirmed in part, and case remanded.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS, because of prior decisions of the court, concur only in the judgment.

SOUTHERN IOWA ELECTRIC COMPANY *v.* CITY OF CHARITON, IOWA, ET AL.

IOWA ELECTRIC COMPANY *v.* CITY OF FAIRFIELD, IOWA, ET AL.

MUSCATINE LIGHTING COMPANY *v.* CITY OF MUSCATINE, IOWA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

Nos. 180, 189, 190. Argued January 26, 28, 1921.—Decided April 11, 1921.

I. In the absence of a contract obligation, the grantee of a franchise to supply the public with electricity or gas cannot constitutionally be required by the State or its agencies to observe rates which, in effect, are confiscatory of its property. P. 541.

2. The acceptance from a municipality of a franchise to supply the public with gas or electricity for a term of years at specified maximum rates does not bind the grantee with a contractual obligation to charge no more if the rates become in effect confiscatory, where the law of the State (Iowa Code of 1897, §§ 720, 725) reposes in the municipality the continuing power to regulate such rates and, that the public may be protected from improvident bargains, forbids any abridgment of the power by ordinance, resolution or contract. P. 542.

256 Fed. Rep. 929, reversed.

THESE were suits brought by the appellants to restrain the appellees from enforcing the maximum rates for electricity and gas, specified in the ordinances granting the appellants' franchises, upon the ground that the rates had become unremunerative and confiscatory. The court below dismissed the bills. The facts are given in the opinion.

Mr. Emmet Tinley, with whom *Mr. W. E. Mitchell, Mr. J. C. Pryor, Jr., Mr. D. L. Ross* and *Mr. Edwin D. Mitchell* were on the brief, for appellant in No. 180.

Mr. J. W. Kridelbaugh, with whom *Mr. H. W. Byers* was on the brief, for appellees in No. 180.

Mr. John A. Reed, with whom *Mr. William Chamberlain* and *Mr. Ralph Maclean* were on the briefs, for appellant in No. 189.

Mr. Ralph H. Munro, with whom *Mr. X. C. Nady* was on the brief, for appellees in No. 189.

Mr. William Chamberlain, with whom *Mr. J. R. Lane, Mr. E. M. Warner, Mr. C. M. Waterman* and *Mr. Don Barnes* were on the brief, for appellant in No. 190.

No appearance for appellees in No. 190.

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

At the time these suits were begun the appellants were engaged in supplying electricity or gas to the municipal corporations who are the appellees. This service was being rendered by virtue of ordinances conferring franchises to use the city streets during 25 years in two of the cases and 20 years in the other. The ordinances contained a schedule of maximum rates. After they were in effect a few years the three suits which are before us were begun against the cities with the object of preventing the en-

forcement of the maximum rates specified in the ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the three cases the court granted a temporary injunction restraining the enforcement of the maximum rates and allowed an order permitting, pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations, although their operation would be confiscatory. In one opinion, applicable to the three cases, the court stated its reasons for maintaining this view, but directed attention to the fact that no proof had been offered concerning the confiscatory character of the rates, and pointing out that, as such subject might become important on appeal, it would be necessary to restore the cases to the docket for proof in that regard unless the situation was remedied by agreement between the parties. Thereupon the pleadings were amended so as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which are now before us for review because of the constitutional question involved.

Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with

the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 194; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial. *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 593; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273; *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417; *Columbus Railway, Power & Light Co.* v. *Columbus*, 249 U. S. 399.

It follows that as the rates here involved are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it.

As to the first, assuming, for the sake of the argument only, that the public service corporations had the contractual power, the issue is, Had the municipal corporations under the law of Iowa such authority? Its possession must have been conferred, if at all, by § 725 of the Iowa Code of 1897, which deals with that subject. That statute came before the Supreme Court of Iowa for consideration in the very recent case of *Town of Woodward* v. *Iowa Railway & Light Co.*, 178 N. W. Rep. 549. That was a suit by the Town of Woodward to compel the Light Company to continue to furnish electric lighting at the rates fixed by the ordinance conferring upon the company its franchise to maintain and operate its plant in the town. The company resisted on the ground that the rates had become confiscatory and were not enforceable. Testimony offered by the company to establish the confiscatory character of the rates was objected to by the town, which asserted that the acceptance by the company of the ordinance bound it by contract to furnish the service at the rates therein prescribed whether or not they were confiscatory, and that the evidence offered was therefore immaterial. The evidence was received, subject to the objection, and the court, finding the rates to be confiscatory, sustained the company's contention and dismissed the bill. Upon appeal by the town, the Supreme Court, affirming the action of the trial court, said:

"The defendant's franchise in the town of Woodward was granted in June, 1912, by ordinance duly enacted by the city council and duly approved by vote of the electors, as required by section 720 of the Code. Section 6 of the ordinance which granted the franchise specified the rates to be charged by the defendant to consumers. The term of the franchise was 25 years. The essence of the plaintiff's contention is that the enactment of this ordinance (including the franchise, and the rates and the approval

of the same by the electors), and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and upon the utility corporation. The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:

"'Sec. 725. *Regulation of Rates and Service.*—They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purposes,[1] [and to regulate and fix the rent or rates for water, gas and electric light or power] . . . and these powers shall not be abridged by ordinance, resolution or contract.'

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. . . . There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. . . . By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative

[1] The words in brackets are found in the section, but are not embraced in the provisions quoted by the court, although as shown by the language of the court as to the rate provision they were clearly taken into view and applied in construing the statute.

power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either ignorantly or corruptly, and utility corporations became empowered through the contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by section 6 of the ordinance, hereinbefore referred to, were not fixed by contract."

Indeed, the doctrine thus expounded was but a reiteration of the rule of the Iowa law laid down in previous cases. *City of Tipton* v. *Tipton Light & Heating Co.*, 176 Iowa, 224; *Iowa Railway & Light Co.* v. *Jones Auto Co.*, 182 Iowa, 982; *Town of Williams* v. *Iowa Falls Electric Co.*, 185 Iowa, 493. And again, more recently, in *Ottumwa Railway & Light Co.* v. *City of Ottumwa*, 178 N. W. Rep. 905, the court, referring to the *Town of Woodward Case* and to the doctrine therein announced based upon the significance of § 725 of the Code of 1897, thus restated its former conclusion on that subject:

"That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting that rates fixed for service shall not be changed. See *Tipton* v. *Light Co.*, 176 Iowa, 224, 157 N. W. 844; *Selkirk* v. *Gas Co.*, 176 N. W. 301. And see *San Antonio Co.* v. *City* (D. C.), 257 Fed. 467. To like

effect is *Iowa Co.* v. *Jones*, 182 Iowa, 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understanding that the same might be changed either upward or downward."

The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the State is urged by municipal corporations whose every power depends upon the state law. *Covington* v. *Kentucky*, 173 U. S. 231, 241; *Worcester* v. *Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 548; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S. 294, 296; *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394, 399.

Decrees reversed and causes remanded for further proceedings in conformity with this opinion.

CITY OF SAN ANTONIO ET AL. *v.* SAN ANTONIO PUBLIC SERVICE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 263. Argued March 23, 1921.—Decided April 11, 1921.

1. The District Court has jurisdiction of a suit by a street railway company to enjoin a city from requiring it to accept an unremunerative rate of fare, and has power to determine whether the right to enforce the rate in question is secured to the city by contract. P. 555.
2. In view of a provision of the Texas constitution (Art. I, § 17), that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof,"—*held*, that an ordinance of the city of San Antonio which extended the rights, privileges and franchises of certain street railway companies and fixed the rate of fare, should not be construed and could not operate as a contract between them and the city binding them to that rate after it became unremunerative and in effect confiscatory. P. 555.
3. *Held*, also, that even if the city gained power to make such contracts through a later amendment of the state constitution, the existing ordinance was not thereby converted, for the future, into a contract. P. 555.
4. A maximum fare limitation in a street railway franchise, granted by a city which was vested with the rate regulating power and forbidden to restrict it by contract, should be taken as in exercise of the regulating power and not as imposing a unilateral contract or condition upon the grantee to observe the limitation even though it become confiscatory, and especially so where the case exhibits no actual intention of the parties to bind the grantee and not the city. P. 556.
5. Where a city consented to a consolidation of a gas and electric with a street railway corporation, upon condition that their existing obligations should be preserved, and where the obligation of the street railway to collect no more than a fare fixed by ordinance arose under and had long been attributed in practice to the city's regulating

power, and that power was expressly reserved as to gas and electricity in the ordinance permitting the consolidation, *held*, that a contract binding the consolidated company to the fare limitation after it became confiscatory could not be implied. P. 556.

Affirmed.

THIS was a suit by the appellee to enjoin the appellants from enforcing an ordinance limiting the fare chargeable on its street car lines to an amount which had ceased to yield adequate returns and had become confiscatory. The court below overruled a motion to dismiss the bill (257 Fed. Rep. 467), and, on final hearing, granted the relief prayed. The facts are given in the opinion.

Mr. R. J. McMillan, with whom *Mr. Claude V. Birkhead* was on the briefs, for appellants.

Mr. S. J. Brooks, with whom *Mr. Howard Templeton* and *Mr. Walter P. Napier* were on the brief, for appellee.

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

The decree below enjoined the City of San Antonio from enforcing a five cents fare against the Public Service Company, operating street railway lines in that city, on the ground that the right to enforce such rate was not secured to the city by contract and such enforcement was beyond the power of the city because of the confiscation of the property of the railway company which would result, in violation of the Fourteenth Amendment to the Constitution of the United States.

The consideration we must give the subject will be clarified by outlining the origin and development of the controversy.

In March, 1899, the City of San Antonio by ordinance extended to July 1, 1940, "the rights, privileges and franchises heretofore granted to and existing in the San

Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company." The ordinance provided, among other things, that the two companies last named, which operated street railways in the city, "shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In April, 1900, all the property of the two railway companies was sold under a decree of a state court to the San Antonio Traction Company, and that company, with the approval of the city, thereafter controlled and carried on both lines.

In 1903 the State enacted a half-fare law, making it the duty of the Traction Company to carry school children and students for half fare, and subsequently an ordinance was passed by the city in furtherance of this law. The company refusing to carry out this legislation on the ground that it impaired the obligation of its contract as to rate of fare resulting from the ordinance of 1899, in violation of the constitutions of the State and of the United States, a suit by mandamus to compel it to do so was begun by an individual, and, from a ruling adverse to the company's contention, the case was taken to the Court of Civil Appeals. That court held that it was unnecessary to consider whether the rate requirement was a contract because, as it was adopted long after the provision of the state constitution, that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof," it was necessarily to that extent restricted, and therefore left the State free, within the limits of the restriction, to exert the authority to regulate. As a result, the half-fare law was upheld, obviously upon the conclusion that it was within the power

to regulate as restricted by the constitutional provision (Tex. Civ. App., 81 S. W. Rep. 106).

Because of the federal question the case was brought to this court, and the decree was affirmed substantially on the ground which had controlled the decision below. In addition, however, the court was careful to point out that the state constitution prohibited a rate regulation which was confiscatory, but that in view of the absence of all averment that the rate in question was confiscatory, it was unnecessary to deal with that subject. *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304.

Presumably under the power to regulate as thus established, the city thereafter passed, and the Traction Company carried out, an ordinance imposing the duty of free transportation of policemen and firemen.

In 1912 the state constitution was amended so as to authorize cities having more than 5,000 inhabitants, by vote of their electors, to amend their charters or adopt new ones, subject to the limitation that the charters should not contain any provision inconsistent with the constitution or general laws of the State.

In the meantime the two companies, gas and electric, dealt with in the ordinance of 1899, were consolidated and became the San Antonio Gas and Electric Company, and in 1917 the appellee, the San Antonio Public Service Company, petitioned the city government to consent to its acquisition of all the rights and property of the San Antonio Traction Company and of the San Antonio Gas and Electric Company, thus proposing to bring under one control the four corporations dealt with in the ordinance of 1899. The city consented by an ordinance which expressly subjected the Public Service Company to all the limitations, duties and obligations which rested upon the Traction Company and the Gas and Electric Company. The ordinance further provided that:

"In accepting the provisions of this ordinance the

San Antonio Public Service Company agrees that the City shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the City and its inhabitants."

This was followed by provisions requiring the keeping of such accounts by the Public Service Company in its gas and electric departments as would enable the city to exercise the power to fix rates as to gas and electricity. The ordinance having been accepted by the Public Service Company, the consolidation was accomplished.

At and for a long time prior to the consolidation the penal code of the city contained a provision, accompanied by a penalty for its violation, forbidding, except during certain hours of the night, the charging of more than a five cents fare within the city limits. Shortly after the approval of the consolidation, another ordinance was passed forbidding and penalizing any person, firm or corporation, enjoying franchises within the city limits, or their agents or employees, from charging more than the rate then charged and collected, without obtaining the permission of the city. In conformity with this last mentioned ordinance, the Public Service Company, in August, 1918, applied to the city for permission to increase its rate of fare from five to six cents, based upon the ground that, although the five cents fare was remunerative at the time it was fixed, it had, by the increase in cost of operation in practically every department, become wholly insufficient for that purpose and could not be continued without confiscating the property of the company. After a hearing, the city, by an ordinance reciting that, as the company was bound by the forty-year franchise granted in 1899 to charge five cents fare, the city did not feel authorized nor called upon to set it aside, and furthermore that the hearing had shown no necessity for

the change in rate asked, refused the company's request, at the same time prohibiting, under a penalty which was stated, any person, firm, or corporation operating any street railway within or partly within the city from charging more than a five cents fare.

Thereupon the company commenced this suit by filing its bill to enjoin the city from enforcing the five cents fare ordinance. The bill, after alleging the adequacy of the rate of five cents when originally fixed in 1899, contained the amplest averments concerning its present confiscatory character. The prayer was for a temporary injunction restraining the enforcement of the five cents fare ordinances and from interfering with the company in putting in a seven cents fare instead, and from enforcing the ordinances which forbade a change of fare. It was prayed that, if the company was not permitted to put in effect the seven cents fare, the court would itself establish that rate, or such other as it might find necessary to enable the company to pay its operating expenses and to earn a reasonable sum on its investment, and that a permanent injunction securing the results prayed be awarded.

The city moved to dismiss the bill for want of jurisdiction because it presented no substantial federal question, as it showed on its face that the parties were bound by the five cents fare provision of the franchise ordinance as a contract subject to be enforced even though the rate was confiscatory, and moreover because the bill otherwise stated no ground for equitable relief. The court overruled the motion. It reviewed the history of the case and decided that, in view of the controversy as to contract growing out of the enforcement of the half-fare law terminated by the ruling of this court in the *Altgelt Case*, as well as of all the subsequent dealings between the parties, the existence of a contract as to the five cents fare was not established, and hence, the attempt to enforce it, because of the confiscation to result, gave a cause of

action under the Constitution of the United States. 257 Fed. Rep. 467.

The city then answered reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation. It further asserted an estoppel to deny the contract, arising from various acts of the city and the corporation or its predecessors from the time of the ordinance in 1899 to the bringing of the suit in 1918. Moreover, disputing the confiscatory character of the five cents fare, it claimed the right to compel its continued exaction in virtue of its general governmental authority to regulate the fares of street railway companies.

The case was referred to a master to report on the facts and the law. Before the master, a hearing was had, followed by an elaborate report on both subjects. As the action of the court overruling the exception to its jurisdiction had adversely disposed of the question of the existence of the contract concerning the five cents fare, the master put that subject out of view and therefore reported only on the facts as to the confiscatory character of the five cents rate and of the power of the court, under the assumption that it was confiscatory, to restrain its enforcement.

A few words from the report will suffice to make manifest the conclusion of the master. He said: "The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed twenty years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for the court to exercise a power it does not possess; . . . A rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

Although the Public Service Company excepted to the conclusion of law thus stated and to some of the separate conclusions of fact made by the master, no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted confiscatory character of the rate, upon the question of contract, and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling, the court declared that it had jurisdiction to prevent the admitted confiscation which would result from the five cents rate. Concluding, however, that, as the court was not a primary rate-making authority, it would not fix a reasonable rate to replace the five cents rate, the enforcement of which would be enjoined, and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven cents fare for the five cents fare and besides enjoined the city from enforcing the various ordinances complained of in the bill prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever because of a change in conditions the five cents fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half-fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which had been upheld in the *Altgelt Case*, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

That in view of the admitted fact of confiscation the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that, as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not and could not be, we are of opinion is the necessary result of the provision of § 17, Article I, of the state constitution, existing in 1899, prohibiting any "irrevocable or uncontrollable grant of special privileges," etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the *Altgelt Case*, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate.

But it is urged that, as by the amendment to the state constitution of 1912 the city was endowed with authority broad enough to enable it to contract, in granting a street railway franchise, concerning the rate of fare to be charged, disenthralled from the limitation of § 17, Article I, of the state constitution, it follows that the franchise ordinance must after that date be viewed as such a contract and treated accordingly. But as no contract between the

city and the Traction Company made after the constitutional amendment in 1912 concerning the fare in question is referred to, it is plain that, even if the proposition as to power of the city after 1912 be, for the sake of the argument, conceded, it is irrelevant to the case we are considering.

And this is true also of the suggestion made in argument, that although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power.

Further, however, it is urged that, as at the time of the consolidation in 1917 the powers of the city were not

limited by the constitutional provision referred to, the necessary effect of the obligations which the Public Service Company came under was to convert the five cents fare ordinance into a contract conferring the right to enforce it even though confiscatory. But that question rests upon mere implications, as no express provision to that effect is pointed out. Moreover, its entire want of merit not only results from that fact but from the unwarranted character of the implications upon which it is based. They proceed upon assumptions that, because the city exacted as a condition for consenting to the consolidation, that the existing obligations and duties of the corporations should be preserved, a contract as to the five cents fare arose. The error of the proposition in all its aspects is equally apparent from a broader view, since from the date of the final decision in the *Altgelt Case* up to the time when the contention as to confiscation resulting from the changed conditions arose, the acts and dealings of the parties unmistakably indicated the purpose to exert the authority derived from the power to regulate, to the exclusion of the limitations resulting from the right of contract which had been unsuccessfully asserted by the Traction Company in the *Altgelt* litigation. This deduction arises not only from the exertion by the city, after the finality of the *Altgelt* litigation, of the power to compel the carrying of policemen and firemen without charge, but also from the general limitations expressed in ordinances making no reference whatever to contract rights, and asserting the right of the city to give or not to give consent to a change of rate.

In fact, the city ordinance expressing the consent to the consolidation makes this clear, since, having in the second section imposed upon the Public Service Company "all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time," yet expressly, in the third section, it

stipulated for the right of the city to regulate the charges for the gas and electric services, and imposed upon the Public Service Company the duty of keeping the accounts as to such services in such a manner as to enable this to be done. Light is necessarily thrown on the purpose of this provision by considering that the right of the Public Service Company to assert that the maximum rates fixed by the ordinance of 1899 in favor of the gas and electric companies were contracts limiting the power of the city to regulate, had not been determined adversely to those companies, as had been done as to the Traction Company by the *Altgelt Case*,—a view the force of which will be felt by recalling that, by the amendment to the city's charter which we have stated, the constitutional limitation which led to the deflection of the contract clause in the *Altgelt Case* was no longer applicable.

The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds, that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273, and cases cited; *Milwaukee Electric Railway & Light Co.* v. *Wisconsin R. R. Commission*, 238 U. S. 174, 180.

Affirmed.

DECISIONS PER CURIAM, FROM JANUARY 25, 1921, TO AND INCLUDING MARCH 28, 1921, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 191. S. A. McHENRY ET AL. *v.* BANKERS TRUST COMPANY ET AL. Error to the Court of Civil Appeals, First Supreme Judicial District, of the State of Texas. Argued January 28, 1921. Decided January 31, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Don A. Bliss* for plaintiffs in error. *Mr. B. F. Louis* and *Mr. D. W. Glasscock*, for defendants in error, submitted.

No. 176. SUPREME LODGE OF THE KNIGHTS OF PYTHIAS *v.* SALLIE N. OVERTON. Error to the Supreme Court of the State of Alabama. Argued January 24, 1921. Decided January 31, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, 39 Stat. 726. See *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 6. *Mr. Lawrence Cooper*, with whom *Mr. Sol H. Esarey* was on the brief, for plaintiff in error. No appearance for defendant in error.

No. 174. W. E. STEWART *v.* E. G. McALLISTER ET AL. Error to the Court of Civil Appeals, Fourth Supreme Judicial District, of the State of Texas. Argued January 24, 1921. Decided January 31, 1921. *Per Curiam.* Dismissed for want of jurisdiction: (1) Act of September 6, 1916, c. 448, 39 Stat. 726. (2) *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580,

583; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184; *Berkman* v. *United States*, 250 U. S. 114, 118; *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193. *Mr. Don A. Bliss*, with whom *Mr. T. T. Vanderhœven* and *Mr. Benjamin A. Greathouse* were on the brief, for plaintiff in error. *Mr. J. C. George*, for defendants in error, submitted.

No. 154. Ben B. Lindsey *v.* People of the State of Colorado at the relation of John A. Rush, District Attorney, etc. Error to the Supreme Court of the State of Colorado. Argued January 18, 1921. Decided January 31, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Edward P. Costigan*, with whom *Mr. Horace N. Hawkins* was on the brief, for plaintiff in error. *Mr. Victor E. Keyes*, for defendant in error, submitted. *Mr. William R. Ramsey* was also on the brief.

No. 144. Kenneth D. Steere *v.* W. W. Beatty et al. Appeal from the District Court of the United States for the Western District of North Carolina. Argued January 17, 1921. Decided February 28, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581. (2) *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. *Mr. George Warner Swain*, with whom *Mr. John E. McLeish* was on the brief, for appellant. *Mr. W. B. Councill*, with whom *Mr. Hiram R. Wood* was on the brief, for appellees.

No. 179. DELAMAR COMPANY, LIMITED, *v.* UNITED STATES. Error to the District Court of the United States for the District of Idaho. Submitted January 24, 1921. Decided February 28, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 582; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. Richard H. Johnson* for plaintiff in error. *The Solicitor General, Mr. Assistant Attorney General Nebeker* and *Mr. H. L. Underwood* for the United States.

No. 198. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL. *v.* HANNAH L. ZUBER. Error to the Supreme Court of the State of Oklahoma. Argued January 28, 1921. Decided February 28, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 303; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271. *Mr. M. D. Green*, with whom *Mr. Joseph M. Bryson, Mr. J. R. Cottingham, Mr. Clifford L. Jackson, Mr. Samuel W. Hayes, Mr. Gardiner Lathrop, Mr. C. S. Burg* and *Mr. Alex. Britton* were on the brief, for plaintiffs in error. *Mr. Charles W. Smith*, for defendant in error, submitted.

No. 259. VIRGINIA TRUST COMPANY ET AL., EXECUTORS ETC. *v.* COMMONWEALTH OF VIRGINIA ET AL. Error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted January 31, 1921. Decided February 28, 1921. *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. John S. Barbour* for plaintiffs in error. *Mr. John R. Saunders* and *Mr. J. D. Hank, Jr.*, for defendants in error.

No. 305. Otto Mueller et al. *v.* Northern Pacific Railway Company. Error to the Supreme Court of the State of Washington. Motion to dismiss submitted January 31, 1921. Decided February 28, 1921. *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. Dallas V. Halverstadt* and *Mr. L. C. Stevenson* for plaintiffs in error. *Mr. Charles W. Bunn* for defendant in error.

No. 618. City of Hillsboro, Oregon *v.* Public Service Commission of Oregon, etc., et al. Error to the Supreme Court of the State of Oregon. Motion to dismiss or affirm submitted January 24, 1921. Decided February 28, 1921. *Per Curiam.* Dismissed for want of jurisdiction on authority of: (1) Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. (2) *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372. (3) *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 397. *Mr. Martin L. Pipes* for plaintiff in error. *Mr. Charles A. Hart* for defendants in error.

No. 422. Henri Eunice Moncravie Van Tine, now Harrison, et al. *v.* Luella Moncravie. Appeal from the Circuit Court of Appeals for the Eighth Circuit.

Motion to dismiss or affirm submitted March 2, 1921. Decided March 7, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Hull* v. *Burr*, 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. (2) *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618. *Mr. T. J. Leahy* and *Mr. C. S. McDonald* for appellants. *Mr. Alfred M. Jackson* for appellee.

No. 429. ALICE HARN ET AL. *v.* INTERSTATE BUILDING AND LOAN COMPANY ET AL. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted February 28, 1921. Decided March 7, 1921. *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. *Alice Harn* and *Mr. W. F. Harn*, pro se. *Mr. Enoch A. Chase* and *Mr. W. F. Wilson* for defendants in error.

No. 612. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL. *v.* TRAVELERS INSURANCE MACHINE COMPANY. Error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm submitted February 28, 1921. Decided March 7, 1921. *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. William Marshall Bullitt* for plaintiffs in error. *Mr. David R. Castleman* for defendant in error.

No. 620. ILLINOIS CENTRAL RAILROAD COMPANY *v.* C. B. JOHNSON. Error to the Supreme Court of the State of Alabama. Motion to dismiss or affirm submitted February 28, 1921. Decided March 7, 1921. *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. Augustus Benners, Mr. W. S. Horton* and *Mr. R. V. Fletcher* for plaintiff in error. *Mr. William Augustus Denson* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF WILLIAM BRADLEY ET AL., PETITIONERS. Submitted February 28, 1921. Decided March 7, 1921. Motion for leave to file petition for a writ of certiorari herein denied. *Mr. Ralph E. Moody* for petitioners.

No. —, Original. *Ex parte:* IN THE MATTER OF EGRY REGISTER COMPANY, PETITIONER. Submitted February 28, 1921. Decided March 7, 1921. Motion for leave to file petition in contempt herein denied. *Mr. H. A. Toulmin* and *Mr. H. A. Toulmin, Jr.*, for petitioner.

No. 389. CORNELIUS C. WATTS ET AL. *v.* ELY REAL ESTATE & INVESTMENT COMPANY. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Motion submitted February 28, 1921. Decided March 7, 1921. Motion to dismiss the petition for writ of certiorari in this case for want of prosecution granted. *Mr. S. L. Kingan, Mr. Herbert Noble* and *Mr. Hartwell P. Heath* for petitioners. *Mr. Selim M. Franklin* for respondent.

No. 551. SOUTHERN PAPER COMPANY *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT. Error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted March 7, 1921. Decided March 14, 1921. *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. W. A. White* for plaintiff in error. *Mr. George Butler* for defendant in error.

No. 142. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* THOMAS M. REYNOLDS. Error to the Superior Court of the State of Massachusetts. Argued March 17, 1921. Decided March 21, 1921. *Per Curiam.* Affirmed with costs, upon the authority of *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218. *Mr. Robert G. Dodge*, with whom *Mr. Joseph M. Bryson* was on the brief, for plaintiff in error. *Mr. William E. Tucker*, with whom *Mr. Burton E. Eames* was on the brief, for defendant in error.

No. 210. WESTERN UNION TELEGRAPH COMPANY *v.* EUGENE E. SOUTHWICK. On a writ of certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas. Submitted March 17, 1921. Decided March 21, 1921. *Per Curiam.* Reversed with costs and cause remanded for further proceedings, upon the authority of *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli*, 251 U. S. 315. *Mr. Rush Taggart, Mr. Francis Raymond Stark* and *Mr. Joseph L. Egan* for petitioner. No appearance for respondent.

No. 231. STATE OF WASHINGTON EX REL. MCPHERSON BROTHERS COMPANY *v.* DOUGLAS COUNTY AND SUPERIOR COURT OF CHELAN COUNTY, WASHINGTON. Error to the Supreme Court of the State of Washington. Submitted March 18, 1921. Decided March 21, 1921. *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. Peter McPherson* for plaintiff in error. *Mr. L. L. Thompson* for defendants in error.

No. 212. Frank M. Hoy *v.* Franklin K. Lane, Secretary of the Interior; and

No. 213. UNITED STATES EX REL. EDMUND O. WATTIS *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. Appeal from and error to the Court of Appeals of the District of Columbia. Submitted March 17, 1921. Decided March 28, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *United States* v. *Boutwell*, 17 Wall. 604, 607; *Pullman Co.* v. *Knott*, 243 U. S. 447, 449; *Shaffer* v. *Howard*, 249 U. S. 200, 201. (2) Act of February 8, 1899, c. 121, 30 Stat. 822; *LeCrone* v. *McAdoo*, 253 U. S. 217, 219. *Mr. Harry A. Hegarty* for appellant and plaintiff in error. *Mr. Assistant Attorney General Garnett* and *Mr. H. L. Underwood* for appellee and defendant in error.

PETITIONS FOR WRITS OF CERTIORARI GRANTED, FROM JANUARY 25, 1921, TO AND INCLUDING MARCH 28, 1921.

No. 664. BRITISH COLUMBIA MILLS TUG & BARGE COMPANY *v.* A. W. MILROIE. January 31, 1921. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles H. Farrell* and *Mr. W. B. Stratton* for petitioner. *Mr. William H. Gorham* for respondent.

No. 686. GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* MERCHANTS ELEVATOR COMPANY. January 31, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. John F. Finerty* and *Mr. F. G. Dorety* for petitioners. No appearance for respondent.

No. 519. HULETT C. MERRITT *v.* UNITED STATES. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. W. H. Anderson, Mr. James A. Anderson, Mr. Howard S. Lewis* and *Mr. Edwin A. Meserve* for petitioner. *The Solicitor General* for the United States.

No. 737. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA *v.* JOHN BARTON PAYNE, AS AGENT, ETC. (LOS ANGELES & SALT LAKE RAILWAY COMPANY). March 14, 1921. Petition for a writ of certiorari to the District Court of Appeal, Second Appellate District, Division 2, of the State of California, granted. *Mr. Warren H. Pillsbury* for petitioner. *Mr. A. S. Halsted* and *Mr. Alex. Britton* for respondent.

No. 758. NORTH CAROLINA RAILROAD COMPANY *v.* EVELYN K. LEE, ADMINISTRATRIX, ETC. March 21, 1921.

Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. S. R. Prince, Mr. H. O'B. Cooper, Mr. John N. Wilson* and *Mr. L. E. Jeffries* for petitioner. *Mr. R. C. Strudwick* for respondent.

No. 783. CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE *v.* NEW YORK LIFE INSURANCE COMPANY. March 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *The Solicitor General* and *Mrs. Annette Abbott Adams,* Assistant Attorney General, for petitioner. *Mr. James H. McIntosh* for respondent.

PETITIONS FOR WRITS OF CERTIORARI DENIED, FROM JANUARY 25, 1921, TO AND INCLUDING MARCH 28, 1921.

No. 671. COMMERCE TRUST COMPANY *v.* SAMUEL RUSNAK, TRUSTEE, ETC. January 31, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. H. Sears, Mr. Eugene L. Garey, Mr. Paul L'Amoreaux* and *Mr. Lewis A. Stebbins* for petitioner. No appearance for respondent.

No. 684. WILLIAM M. DUNCAN, RECEIVER, ETC., *v.* HORACE F. BAKER, RECEIVER, ETC., ET AL. January 31, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur O. Fording* for petitioner. *Mr. John Quinn* for respondents.

No. 659. CHARLES WOOSTER ET AL. *v.* UNION PACIFIC RAILROAD COMPANY. February 28, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. C. C. Flansburg* and *Mr. W. H. Thompson* for petitioners. *Mr. N. H. Loomis* and *Mr. C. A. Magaw* for respondent.

No. 677. ED. HAGEN ET AL. *v.* UNITED STATES. February 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. H. Ferguson* and *Mr. John J. Sullivan* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for the United States.

No. 685. JEWEL CARMEN *v.* FOX FILM CORPORATION ET AL. February 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Burkan* and *Mr. William J. Hughes* for petitioner. *Mr. Saul E. Rogers* for respondents.

No. 656. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* UNITED STATES. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fitzgerald Hall* for petitioner. *The Solicitor General* and *Mr. Robert P. Frierson* for the United States.

No. 678. LOUISE MARIE BAILEY SHANNON ET AL., HEIRS, ETC., ET AL. *v.* GULF PRODUCTION COMPANY ET AL.

March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ned B. Morris* and *Mr. W. W. Moore* for petitioners. *Mr. H. M. Garwood, Mr. A. D. Lipscomb, Mr. Monte M. Lemann* and *Mr. J. Blanc Monroe* for respondents.

No. 682. MRS. JULIA A. WHITEHEAD *v.* RAILWAY MAIL ASSOCIATION. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Mayes* for petitioner. *Mr. William H. Watkins* for respondent.

No. 696. GEORGE A. CALLICOTTE *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. K. B. Randolph* and *Mr. Arthur L. Oliver* for petitioner. *Mr. John E. Dolman* for respondent.

No. 697. G. A. BARNETT *v.* ROLAND R. CONKLIN. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. G. L. Harvey* and *Mr. James A. Reed* for petitioner. *Mr. Leslie J. Lyons* for respondent.

No. 701. CARL H. WRIGHT *v.* INTER-URBAN RAILWAY COMPANY. March 7, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

Mr. Samuel A. Anderson for petitioner. *Mr. Horatio F. Dale* for respondent.

No. 703. BATES COUNTY, MISSOURI, ET AL. *v.* A. V. WILLS, ET AL., PARTNERS, ETC. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Hagerman* for petitioners. *Mr. John F. Green* for respondents.

No. 704. NEW YORK CENTRAL RAILROAD COMPANY *v.* PERFETTI COSMO. March 7, 1921. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied. *Mr. Robert E. Whalen* for petitioner. No appearance for respondent.

No. 705. NATIONAL ORDER OF THE DAUGHTERS OF ISABELLA *v.* NATIONAL CIRCLE, DAUGHTERS OF ISABELLA. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abram J. Rose* for petitioner. *Mr. George D. Watrous* for respondent.

No. 715. HAMILTON INVESTMENT COMPANY ET AL. *v.* OTTO BOLLMAN. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry J. Aaron* for petitioners. *Mr. Dwight S. Bobb* for respondent.

No. 717. SAMUEL J. MASTERS ET AL. *v.* CHARLES A. HARTMANN ET AL. March 7, 1921. Petition for a writ of

certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wilton J. Lambert* for petitioners. *Mr. W. Gwynn Gardiner* for respondents.

No. 719. MAX WAGMAN *v.* UNITED STATES. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William E. Baubie* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 721. CLIFFORD D. HOUK *v.* CHARLES V. WEDDELL ET AL. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry S. Mecartney* for petitioner. *Mr. Horace Kent Tenney, Mr. Roger Sherman* and *Mr. Harry A. Parkin* for respondents.

No. 729. CHURCHWARD INTERNATIONAL STEEL COMPANY *v.* BETHLEHEM STEEL COMPANY. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. F. P. Warfield* and *Mr. H. S. Duell* for petitioner. *Mr. Charles Neave, Mr. Joseph C. Fraley* and *Mr. Clarence D. Kerr* for respondent.

No. 733. CARL E. SPICER, AS ADMINISTRATOR, ETC. *v.* NEW YORK LIFE INSURANCE COMPANY. March 7, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. H. Dent, Jr.,*

and *Mr. D. M. Powell* for petitioner. *Mr. James H. McIntosh, Mr. Benjamin P. Crum* and *Mr. Leon Weil* for respondent.

No. 738. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* JOSEPH S. MCINTYRE, ADMINISTRATOR, ETC. March 7, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. William F. Evans* and *Mr. Edward T. Miller* for petitioner. *Mr. Xenophon P. Wilfley* and *Mr. Robert W. Hall* for respondent.

No. 740. CHESAPEAKE & OHIO RAILWAY COMPANY *v.* L. N. ARRINGTON. March 7, 1921. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. J. M. Perry* for petitioner. *Mr. O. B. Harvey* for respondent.

No. 718. J. A. CALHOUN, SR., AS ADMINISTRATOR, ETC. *v.* SOUTHERN RAILWAY COMPANY. March 14, 1921. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. L. D. Jennings, Mr. John H. Clifton* and *Mr. A. S. Harby* for petitioner. *Mr. S. R. Prince, Mr. H. O'B. Cooper* and *Mr. F. G. Tompkins* for respondent.

No. 700. CHARLES L. KILLGORE *v.* H. W. SKINNER. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. M. Garwood* for petitioner. No appearance for respondent.

No. 713. PHOENIX PORTLAND CEMENT COMPANY *v.* BALTIMORE & OHIO RAILROAD COMPANY. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Jay Turner* for petitioner. *Mr. H. B. Gill* for respondent.

No. 727. FINKBINE LUMBER COMPANY *v.* GULF & SHIP ISLAND RAILROAD COMPANY. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. White* for petitioner. *Mr. B. E. Eaton* for respondent.

No. 734. TEXAS COMPANY *v.* COMMONWEALTH OF VIRGINIA. March 14, 1921. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Thomas H. Willcox* and *Mr. Herman Block* for petitioner. No appearance for respondent.

No. 749. JOSE TAYAS' SONS COMPANY *v.* POMPEIAN COMPANY. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* for petitioner. No appearance for respondent.

No. 754. DUNDEE PETROLEUM COMPANY *v.* R. P. CLAY. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. A. Ledbetter* and *Mr. H. L. Stuart* for petitioner. *Mr. F. E. Riddle* and *Mr. E. G. McAdams* for respondent.

No. 785. CZARNIKOW RIONDA COMPANY ET AL. *v.* BINGHAMTON STEAMSHIP COMPANY ET AL. March 14, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John G. Milburn, Mr. T. Catesby Jones, Mr. George W. Betts, Jr.,* and *Mr. Robert McLeod Jackson* for petitioners. *Mr. James K. Symmers* and *Mr. Edward E. Blodgett* for respondents.

No. 732. THOMAS H. MATTERS *v.* UNITED STATES. March 21, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John Lee Webster* and *Mr. Frank H. Gaines* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for the United States.

No. 775. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ET AL. *v.* H. H. SMITH. March 21, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. J. C. South, Mr. Edward J. White,* and *Mr. W. P. Waggener* for petitioners. No appearance for respondent.

No. 726. WILLIAM G. MCADOO, DIRECTOR GENERAL OF RAILROADS, ET AL. *v.* NEVA M. MCCOY, ADMINISTRATRIX, ETC. March 21, 1921. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas denied. *Mr. Alex. Britton, Mr. J. W. Terry, Mr. A. H. Culwell* and *Mr. Gardiner Lathrop* for petitioners. *Mr. George E. Wallace* and *Mr. C. B. Hudspeth* for respondent.

No. 743. SOUTHERN PACIFIC COMPANY *v.* JOHN J. THOMAS, ADMINISTRATOR, ETC. March 21, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied. *Mr. Charles H. Bates, Mr. Francis M. Hartman, Mr. William F. Herrin* and *Mr. Henly C. Booth* for petitioner. *Mr. O. T. Richey* for respondent.

No. 744. JOHN BARTON PAYNE, AGENT, ETC. *v.* MRS. VIRGIE MILLS, ADMINISTRATRIX, ETC. March 21, 1921. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied. *Mr. F. H. Prendergast* for petitioner. *Mr. Cone Johnson* and *Mr. James M. Edwards* for respondent.

No. 759. EDWARD ANDERSON ET AL. *v.* UNITED STATES. March 21, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Otto Christensen* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for the United States.

No. 774. JOHN BARTON PAYNE, AS AGENT, ETC. *v.* KATHARINE MCL. SMITH, ADMINISTRATRIX, ETC. March 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. A. Manchester* for petitioner. *Mr. D. F. Anderson* for respondent.

No. 745. JOHN GILMORE *v.* UNITED STATES. March 28, 1921. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. George E. Wallace* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 751. BOSTON & MAINE RAILROAD *v.* UNITED STATES. March 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Archibald Tisdale* and *Mr. George E. Kimball* for petitioner. *Mrs. Annette Abbott Adams*, Assistant Attorney General, for the United States.

No. 777. JESSE G. DARROW *v.* POSTAL TELEGRAPH-CABLE COMPANY. March 28, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul J. Sherwood* for petitioner. *Mr. Henry A. Knapp* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 25, 1921, TO AND INCLUDING MARCH 28, 1921.

No. 181. STATE OF KANSAS ON THE RELATION OF RICHARD J. HOPKINS, ATTORNEY GENERAL, ET AL. *v.* WICHITA NATURAL GAS COMPANY ET AL. Appeal from the District Court of the United States for the District of Kansas. January 26, 1921. Dismissed with costs, on motion of counsel for appellants. *Mr. F. S. Jackson* and *Mr. Richard J. Hopkins* for appellants. *Mr. R. R. Vermilion* and *Mr. Earle W. Evans* for appellees.

No. 110. YEE BOW *v.* CITY OF CLEVELAND ET AL. Error to the Supreme Court of the State of Ohio. January 27, 1921. Dismissed, per stipulation. *Mr. John J. Sullivan* and *Mr. John A. Cline* for plaintiff in error. *Mr. Alfred Clum* for defendants in error.

No. 193. ROSE HANSEN, ADMINISTRATRIX, ETC. *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. On petition for writ of certiorari to the Circuit Court of Hudson County, State of New Jersey. January 27, 1921. Dismissed for want of prosecution. *Mr. Alexander Simpson* for petitioner. No appearance for respondent.

No. 2. EASTMAN KODAK COMPANY ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of New York. January 31, 1921. Dismissed, on motion of counsel for appellants. *Mr. John G. Milburn, Mr. William S. Gregg* and *Mr. James J. Kennedy* for appellants. *The Attorney General* for the United States.

No. 362. PETROLEUM COMPANY OF LOUISIANA *v.* L. A. TUMLIN ET AL. Appeal from the District Court of the United States for the Western District of Louisiana. January 31, 1921. Dismissed with costs, on motion of counsel for appellant. *Mr. D. H. Hardy* for appellant. No appearance for appellees.

No. 255. OREGON SHORT LINE RAILROAD COMPANY *v.* BOISE COMMERCIAL CLUB. Error to the Circuit Court of

Appeals for the Ninth Circuit. February 28, 1921. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. George H. Smith* for plaintiff in error. No appearance for defendant in error.

No. 519. HULETT C. MERRITT *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 7, 1921. Reversed, on confession of error by *The Solicitor General;* and cause remanded to the District Court of the United States for the Southern District of California for further proceedings. *Mr. W. H. Anderson, Mr. James A. Anderson, Mr. Howard S. Lewis* and *Mr. Edwin A. Meserve* for petitioner.

No. 203. EVERGLADES SUGAR & LAND COMPANY ET AL. *v.* NAPOLEON B. BROWARD DRAINAGE DISTRICT ET AL. Error to the Supreme Court of the State of Florida. March 8, 1921. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Clair D. Vallette* for plaintiffs in error. No appearance for defendants in error.

No. 204. DAVID M. SIMPSON *v.* BOARD OF SUPERVISORS OF KOSSUTH COUNTY, IOWA, ET AL. Error to the Supreme Court of the State of Iowa. March 9, 1921. Dismissed with costs, pursuant to the tenth rule. *Mr. George S. Wright* for plaintiff in error. *Mr. James W. Morse* for defendants in error.

No. 276. UNITED STATES *v.* FRANCIS FAY, ALIAS FAY YONG. Appeal from the District Court of the United

States for the Southern District of New York. March 21, 1921. Dismissed on motion of *The Solicitor General* for the United States. No appearance for appellee.

No. 277. UNITED STATES *v.* WILLIAM CHAN, ALIAS WILLIAM SHAN. Appeal from the District Court of the United States for the Southern District of New York. March 21, 1921. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. Charles Recht* for appellee.

No. 249. CHARLES W. STEENE ET AL. *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of New York. March 21, 1921. Reversed, on confession of error, and remanded for further proceedings, on motion of *The Solicitor General* for the United States. *Mr. Seymour Stedman* for plaintiffs in error.

No. 258. NATIONAL SURETY COMPANY *v.* COUNTY OF LEFLORE IN THE STATE OF MISSISSIPPI. Appeal from the District Court of the United States for the Northern District of Mississippi. March 23, 1921. Dismissed with costs, on motion of counsel for appellant. *Mr. John R. Tyson* and *Mr. Bynum E. Hinton* for appellant. *Mr. R. C. McBee* for appellee.

No. 264. ERNEST B. DANE *v.* CHARLES L. BURRILL. Error to the Supreme Judicial Court of the State of Massachusetts. March 24, 1921. Dismissed without costs, per stipulation. *Mr. Charles F. Choate* for plaintiff

in error. *Mr. William Harold Hitchcock* for defendant in error.

No. 408. SULTZBACH CLOTHING COMPANY, INC. *v.* STEPHEN T. LOCKWOOD, AS UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF NEW YORK. Appeal from the District Court of the United States for the Western District of New York. March 28, 1921. Decree reversed with costs, and cause remanded for further proceedings on confession of error, on motion of *The Solicitor General* for appellee. *Mr. Martin Clark* for appellant.

No. 499. SEHON, STEVENSON & COMPANY *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of West Virginia. March 28, 1921. Judgment reversed, and cause remanded for further proceedings, on confession of error, on motion of *The Solicitor General* for the United States. *Mr. Malcolm Jackson* for plaintiff in error.

No. 379. UNITED STATES *v.* PEOPLES FUEL & FEED COMPANY. Error to the District Court of the United States for the District of Arizona. March 28, 1921. Dismissed, on motion of *The Solicitor General* for the United States. No appearance for defendant in error.

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6. *Jurors; Corruption.* An experimental approach through a third person to the corruption of a juror constitutes an "endeavor" within Crim. Code, § 135. *United States* v. *Russell* 138

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6. *Id. Contracts; Contribution.* Where services performed under express contracts with some of members of class, compensation may be exacted from such individuals directly (in which case they would have contribution from co-beneficiaries), or claimant may waive rights under contracts and proceed against all beneficiaries directly. *Id.*

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7. *Id. Stock Dividend* is not income of stockholder. *Id.*

8. *Estate Tax.* Act of 1916, § 202, did not impose tax upon property passing under testamentary execution of general power of appointment. *United States* v. *Field*..... 257

9. *Id. Nature of Interest.* To be taxable under § 202 (a), the estate must be (1) an interest of decedent at time of his death, (2) which, after his death, is subject to charges against his estate and expenses of administration, and (3) is subject to distribution as part of his estate; these conditions are expressed conjunctively and cannot be construed as disjunctive. *Id.*

10. *Id. Transfer Effective After Death.* Section 202 (b), describing a transfer of interest in decedent's own property in his lifetime, intended to take effect at or after his death, does not cover transfer by testamentary execution of power of appointment over property not his own. *Id.*

11. *Id. Legislative Interpretation.* Fact that in later Act of 1919, property passing under general power of appointment executed by deceased was expressly included in valuation of his estate for taxation, shows legislative doubt whether Act of 1916 included such property. *Id.*
See **Trusts and Trustees.**

II. **State Taxation.**

1. *Occupation or Property Tax.* Tax upon whisky withdrawn from bond, although described as "annual license tax" on business of owning and storing whisky in bonded warehouses, *held* a property tax. *Dawson* v. *Kentucky Distilleries Co.*..... 288

2. *Id. Uniformity.* As such, it is void for want of uniformity under Kentucky Const., § 171. *Id.*

3. *Injunction; Illegal Tax.* To pay under protest and sue to recover is not such adequate legal remedy as will prevent

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federal courts from restraining enforcement if right to recover back is uncertain under state law. *Id.*

4. *License; Telegraph Company.* See **Constitutional Law,** II, 2.

III. **Territorial Taxation.**

1. *Alaska; License Taxes; Manufacture of Fertilizer.* Local legislature may discriminate against persons who use herring and those who use other fish. *Alaska Fish Co.* v. *Smith* .. 44

2. *Destruction of Business* without compensation does not render license tax, otherwise valid, unconstitutional. *Id.*

3. *Legislative Intent* gathered from taxing statutes, not from allegations in bill attacking them, admitted by demurrer. *Id.*

4. *Fish Laws.* Acts of Congress taxing fish oil and fertilizer works are not " fish laws " of United States, within Act of 1912 limiting powers of local legislature. *Id.*

5. *Federal License,* to continue in business, not implied from federal tax so as to prevent destructive taxation by Territory. *Id.*

6. *Double Taxation,* federal and territorial. *Id.*

7. *Uniformity.* Discriminatory license tax *held* consistent with § 9, Act of 1912. *Id.*

8. *Amount.* Provision limiting tax to one per cent. of assessed valuation of property, does not apply to license taxes. *Id.*

TELEGRAPH COMPANIES. See **Constitutional Law,** II, 2.

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1. *Constitution, Art. I, § 17,* forbids cities from fixing rates by contract with public service corporations. *San Antonio* v. *San Antonio Pub. Serv. Co.* 547

2. *Id.* Powers of City of San Antonio considered. *Id.*

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TRADE-MARKS:

1. *Infringement. Damages* limited by Trade-Mark Act to those inflicted after registration, and, if notice has not been affixed to mark, to those arising after defendant notified. *Stark Bros. Co.* v. *Stark*..... 50

2. *Id. Accounting; Unfair Competition; Jurisdiction of District Court.* Where action arises wholly under the act, District Court is without jurisdiction to require accounting for profits resulting from unfair competition before registration, or before notice conditioning liability to damages. *Id.*

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1. *Powers in Trust.* A general power of appointment by will does not of itself vest any estate in donee of power. *United States* v. *Field*..... 257

2. *Id. Title of Donee.* In equity, property passing under such power treated as assets of donee, distributable to his creditors, but only when power has been executed, and executed in favor of a volunteer, and then only to extent to which donee's own estate is insufficient to pay his debts; his executor, if he take appointed property at all, takes not as executor but as representative of creditors. *Id.*

3. *Id.* Property subject to such power is not subject to distribution as part of estate of donee. *Id.*

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Federal Land Banks. See *Id.*, I, 3–8.
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1. *State of Washington. Title* to navigable waters and land beneath passed to State, upon her creation, in full proprietary ownership, subject to federal control over navigation. *Port of Seattle* v. *Oregon & Washington R. R.*..... 56

2. *Tide Lands.* In making conveyance, State may grant or withhold rights in adjoining water area. *Id.*

3. *Id. Riparian Rights.* In Washington, grantee from State of uplands on a natural, navigable waterway takes only to high-water mark, without riparian or littoral rights. *Id.*

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4. *Id. Adjoining Waters.* Grant by State of described tide land conveys no rights in adjoining tide land or water, these being withheld for development of waterways and harbors. *Id.*

5. *Id. Reclamation.* Same rule applies to tide lands reclaimed by State by filling, and abutting on a natural waterway confined by such reclamation and deepened by dredging. *Id.*

6. *Id. Wharves.* Conveyance by State of lots abutting on waterway without mention of water rights does not imply intention to convey with right to wharf out to "pier head line," shown on plat referred to in deed. *Id.*

7. *Id.* Establishment of "pierhead line" by United States does not create right to wharf out, as against State. Effect, under state law, of its presence on plat. *Id.*

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