UNITED STATES REPORTS

VOLUME 259

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1921

FROM MAY 2, 1922
TO AND INCLUDING JUNE 5, 1922

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

WILLIAM HOWARD TAFT, 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.

HARRY M. DAUGHERTY Attorney General.
JAMES M. BECK, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.[1]

ORDER OF ALLOTMENT OF JUSTICES.

There having been a Chief 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, WILLIAM H. TAFT, 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 24, 1921.

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[1] For next previous allotment see 256 U. S., p. iv.

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1921.

BRITISH COLUMBIA MILLS TUG & BARGE COMPANY *v.* MYLROIE.

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

No. 190. Argued March 23, 24, 1922.—Decided May 15, 1922.

1. A vessel, off her course on a dark and stormy night in the vicinity of dangerous shores, is held to the highest degree of vigilance in maintaining the most effective lookout. P. 7. *The Ariadne,* 13 Wall. 475.
2. In this case there was negligence in stationing the lookout in the wheelhouse only when a better opportunity to see ahead was afforded at the bow. P. 6.
3. Upon the evidence, *held,* that the petitioner's tug was guilty of negligence in taking her tow, the respondent's barge, dangerously near to the shore, and in then changing her course by a right angle suddenly, without a warning signal, with the result that the barge's shackle, to which the tow-line was attached, gave way under a sudden lateral strain and the barge was cast adrift and grounded. P. 4.
4. A towage contract providing that a tug will render reasonable assistance to a barge from time to time in any emergency, and whilst at anchor be within call to render such reasonable assistance, but that the tug owner shall not be liable for any damage to the barge or cargo while in tow or at anchor, is to be construed as

leaving the tug liable for damage to the barge or cargo, while in tow, due to the tug's failure to render reasonable assistance to the barge in an emergency. P. 11.

268 Fed. 449, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing a libel *in rem* filed by the present respondent, against a tug owned by the petitioner, to recover for damage to the respondent's barge and its cargo, resulting, as it was alleged, from the unseaworthiness of the tug and the negligence and want of skill of those in charge of her.

Mr. W. B. Stratton, with whom *Mr. C. H. Farrell* and *Mr. J. H. Kane* were on the briefs, for petitioner.

Mr. William H. Gorham for respondent.

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

This case was begun by a libel *in rem* filed by A. W. Mylroie, the respondent herein, as owner of the American barge "Bangor", and lawful bailee of its cargo, against the British tug "Commodore", in the District Court of Alaska. The libel, as later amended, charged, in substance, that the Commodore was engaged in towing the Bangor on a voyage from the international boundary between British Columbia and the State of Washington to Anchorage, Alaska; that the tug at 2 o'clock in the morning on March 26, 1917, being then in Alaskan waters, and out of her course in heavy wind and sea and a snow storm, sighting land immediately ahead, put her wheel hard over and under a full head of steam suddenly changed her course to avoid the rocks and reefs on the shore of Mary Island; and that by reason of the snapping strain due to the sudden change of the tug's course, the barge's shackle by which the towline was attached to the barge, was broken; that the barge drifted and

grounded on Mary Island, Alaska, with consequent damage to the barge and cargo, all through the negligence and carelessness and want of skill and want of knowledge of the waters on the part of those in charge of the tug, and also because of the lack of seaworthiness of the tug, in that it did not have a full complement of men sufficient to keep a proper lookout at the bow of the boat.

The petitioner joined issue upon these allegations by denying negligence, lack of skill and unseaworthiness, and charged the stranding of the barge, with the consequent loss, to the unseaworthiness of the shackle which had been furnished by the barge owner. The tug owner further set up the defense against recovery that he was exempted from liability for negligence because of a clause of the towing contract.

The District Court found for the owner of the tug and dismissed the libel. It did not find it necessary to determine the effect of the exemption clause of the towing contract, because, from a preponderance of the evidence, it found that there was neither negligence nor lack of skill on the part of the tug, and that the accident arose from the breaking of the shackle, which was furnished by the barge owner, and that he had not sustained the claim that it was subject to unusual or unnecessary strain through the negligence of the tug. The Circuit Court of Appeals reversed the action of the District Court, and took an entirely different view of the effect of the evidence. It found that the tug was unseaworthy in that it did not have a large enough crew to station a lookout at the bow, and that, if it had done so at a time when the emergency required it, it could have avoided putting itself and the barge in the position of danger which resulted in the loss of the barge. It found further that the shackle was a new one with a year's test and that its breaking was due to the strain caused by the sudden change of the course by the tug when it sighted

the rocks of Mary Island immediately ahead, and within dangerous proximity, and put its helm hard down without notice by whistle to the barge to enable the barge by putting its own helm hard down to save itself. It held, moreover, that the clause of the contract relied on by the tug owner exempting him from responsibility for loss to the barge while in tow was void and could form no defense.

We have read the voluminous evidence in this record and have compared with care the findings of the two courts. After giving due weight to the findings of the court which heard the witnesses, the examination satisfies us that the District Court was influenced too much by the mere preponderance in number of the witnesses for the tug owner, and that it did not sufficiently consider the significance of certain conceded facts in sustaining the evidence of the fewer witnesses for the barge owner. It was established without contradiction that the night was a dirty one; that there was a succession of snow squalls; that it was very dark; that the proper course of the vessel was from Tree Point Light to a point two or three miles off Mary Island upon which there was a light having a wide radius of observation; that the distance from Tree Point Light to the place of the wreck was 18 miles, and that the actual course of the vessel in going that 18 miles was more than two miles nearer to the shore of Mary Island than it should have been. There was a following wind of at least 30 miles an hour. In the distance which the navigators of the vessel calculated she had run, she would have picked up the Mary Island Light a considerable time before the accident, had she been on her right course. This delay in picking up the light should have advised them that she was out of her course and in dangerous proximity to the shore. Their calculations showed that they were only 16½ miles from Tree Point Light when they had really made 18.

They did not put out a taffrail log, excusing this on the plea that it was not the custom and would not aid them. They did not try echo signals because they said it would have done no good. They did not try the lead to feel the depth and proximity to shore. No explanation is given of why they departed so far from their course. Suggestions are made of hidden currents, but none are shown to exist there. Several of the expert witnesses called by the tug owner in excusing the conduct of those in charge said that they frequently had found difficulty in making this passage by Mary Island and were often out of their course. If that is true, and the place is a dangerous one, then it called for additional care on the part of the tug.

The tug had a captain, a mate and a pilot, so-called, who had shipped as a purser. His name was Bjerre. The captain's name was Johnson, and the mate's name was Dawe. Bjerre was pecuniarily interested in the company which owned the tug, was its shore captain and went along to help the captain of the tug, as he explained, because the captain of the tug was not used to outside work—that is to work in the open ocean, and part of the trip would be in the open ocean. On the stand, Bjerre praised the seamanship of Johnson somewhat extravagantly, and then on cross-examination was obliged to admit that, in a subsequent towage of the same barge, he had to discipline Johnson for getting drunk on shore and coming to the vessel drunk—an impeachment of his unstinted praise. It is difficult to avoid the impression that Bjerre went on the trip because the company was not certain of Johnson's capacity to do the work safely. This seems to have been understood by the crew and explains why it was that the helmsman said that he obeyed the orders of Bjerre, and why the mate explained that he obeyed Bjerre's orders, because he represented the owners. Indeed the vessel seems to have had two captains.

The evidence shows that, on the night in question, Bjerre and Johnson were both in the wheelhouse; that the mate was there sometimes, and that a helmsman named Charles Croft was at the wheel. Johnson and Bjerre were constantly conferring as to the course and Bjerre professed to be the lookout. The wheelhouse was forty feet from the stem, and eighteen feet above the deck. There was no forecastle on the bow, and there were some obstructions there, but nothing that a man of ordinary height could not have seen over if at the bow, and there was no obstruction to the sight from the wheelhouse. Bjerre testifies that, in addition to the snow squalls that night, the following wind had blown the peculiarly dirty smoke, due to the kind of coal they were using, in front of them and thus produced greater obscurity. This, Bjerre says, had cleared up to some extent because at 1 a. m., as the log shows, they slowed down, though the distance made conflicts with the suggestion of a great reduction of speed. Through all this difficulty of vision, the tug was attempting to make its course and find land.

There was expert evidence that a lookout could see from the wheelhouse better than from the bow; though some of the experts for the tug testified that under circumstances like these they would have sent a man to the bow as well. We agree with the Court of Appeals that this was a case where a lookout should have been stationed at the bow, and that the difference in position between those in the wheelhouse and the man at the bow would have offered greater opportunity to pick up the land by either the one or the other than where the eyes of the tug were in the wheelhouse only. The emergency was such that the greatest care of this kind was necessary to avoid disaster. It is probable that if a lookout had been put at the bow, he might have seen the rocks for which they were headed at a greater distance than they were seen by Captain Bjerre. Bjerre says he sighted land

when it was half a mile away and Captain Johnson agrees with him. He is contradicted in this by the helmsman and the supercargo of the barge and the subsequent event.

The injunctions with respect to the necessity for a lookout devoting his whole attention to the situation ahead, contained in the opinions of this court, are so many that it is hardly necessary to refer to more than one, that of *The Ariadne,* 13 Wall. 475, in which Mr. Justice Swayne used this language:

" The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. . . . It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

Attempt has been made in argument to distinguish cases in which this rule has been applied from the one at bar, on the ground that they were cases in crowded harbors where collisions might have been expected unless great care was taken. Certainly no such distinction can be given weight in this case. A lookout is for the purpose of seeing and advising those navigating the ship of what is in the way, and the danger on a night like the one here presented an exigency requiring the peculiar services of a lookout quite as much as in a crowded harbor. We agree with the Court of Appeals that the dangerous situation in which the tug and her tow were brought can be reasonably charged to the absence of a proper lookout.

We come then to the question, what caused the breaking of the shackle? As to that, there is a sharp conflict of evidence between the helmsman, Charles Croft, Captain Johnson and Captain Bjerre. Croft testified for the barge owner and the District Judge said his honesty made an impression on him. Croft said that Bjerre jumped to the wheel and took it out of his hand, and put the wheel hard aport, with the statement "You are too darned slow", that he looked out and saw mist on the water looking like wash upon the rocks, that shortly after the turn, he felt a jar, and asked what it was, that Bjerre answered "We have lost the tow", and then within a short time when Captain Johnson came, he repeated "The damn tow is gone." Johnson and Bjerre would give the impression in their evidence that Bjerre made out the land about half a mile away, that he ordered the helmsman to change their course two points only, and it was sometime after that when the mate came in and reported that the tow was gone. They said that there was at no time any jar. They said that Croft's story applied to what happened after they had lost the tow and had turned and gone toward the shore to her assistance when suddenly they heard the surf and then had to put their helm hard down to avoid going ashore. Croft is not shown to have had any motive to misstate his evidence or to pervert facts. It is not a situation that he would be likely to forget. The relation and order of events were so clear that they would naturally remain in his mind. Johnson and Bjerre both had very strong motives for their story. The most noteworthy circumstance, however, supporting Croft and shaking the credibility of the two captains, is that though Bjerre and Johnson kept the log, they made no note whatever of the change of course of two points, so that the log does not show anything except "1.45 Barge broke away." The omission of what it was most natural they should have put down, if it were such a leisurely change

as they testify, and one not in excitement and hurry, gives much the greater weight in our judgment to the evidence of the helmsman. It is an indication that the present story is one of later origin than that night. The statement of the helmsman is supported too by the evidence of the men on the barge, who testified to the jar that they felt and then the breaking of the shackle.

A part of the shackle was recovered. The uncontradicted evidence is that it was bought from a ship chandler a year before and had been tested by service during that period. Experts were called to testify as to inferences to be drawn from the character of the break in the shackle. The most satisfactory witness was called by the barge owner who made the laboratory test and said positively that the break was due to crystallization caused by a sudden strain. The test showed that an arm of the shackle had a tensile strength of 47 tons and less than that of the tow line. On cross-examination, the tow's witness conceded that if the strain was straight and direct and steady, the tensile strength by the two arms of the shackle might be doubled, but not so if the strain fell on one side or the other. As the strain here was necessarily on one side, the shackle became the weakest link in the chain between the tug and the tow.

The Circuit Court of Appeals found that the breaking of the shackle was due to additional strain or snap of the sudden change of course, and we concur in this view. The change of course by 90 degrees or at a right angle as this was would probably slacken the tow line at first as the tow proceeded on its course and the tug veered, but the progress of the tug on the new course would take up the slack with a jerk.

The respondent's counsel charges negligence on the part of the tug in not giving notice to the tow of the sudden change of course by whistle. Expert evidence was called on behalf of the tug to show that this was

not the custom. Indeed it is not too much to say that the expert evidence in this case as to customs prevailing in navigation in those difficult inside passages on the British Columbia and Alaskan coast indicate such a laxity in the use of precautions that we are not inclined to credit it and certainly not to dignify such alleged customs into a standard of due care. The evidence as to the absence of necessity for the use of signals between tug and tow was not satisfying. Indeed, it was admitted that at least one of the great towing firms of that region had departed from the so-called custom and had prepared a set of signals to be used between tug and tow and that this set of signals was on the tug that night. It was not denied that an ordinary signal that the tug was about to change her course would have notified the tow of the maneuvre. We agree with the Circuit Court of Appeals that under the circumstances, and in the great emergency, it was negligence not to have warned the tow. Had the tow put her helm hard down, there is every probability that it would have avoided the strain and the break in the shackle.

Counsel on behalf of the tug owner press us with the argument that there was a device on the tug for taking up and letting out the tow line automatically to relieve the strain and that this had been set in operation that night. The mate testified that he had his hand on the tow when he felt the jar of the break. If he had his hand on the tow line, it is quite evident that it could not have been paying out fast and clearly it did not relieve the strain.

We conclude that the tug was guilty of negligence in taking her tow dangerously near to the shore from which though she was able to escape, she did not help her tow to escape as she might have done by due warning. If she be liable for negligence, she must pay for the loss to the tow and her cargo.

1. Opinion of the Court.

This brings us to the question how far the tug is exculpated from liability for negligence by the contract. The clause of the contract relied on by the tug owner is as follows:

"3. That the Tug will render to the said Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and while discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency which might arise. The Tug Company is not to be held liable for any damage which might happen to the said barge 'Bangor' or its cargo while in tow or at anchor."

The agreement of the tug to render to the barge reasonable assistance from time to time in any emergency which might arise, and the exemption of the tug company from liability for any damage which might happen to the barge or its cargo while in tow, seem in conflict, but it is our duty to reconcile them if we can.

In *Elderslie S. S. Co.* v. *Borthwick* (H. of L.), 10 Asp. Mar. Cas., N. S., 24, 26, the House of Lords was called upon to declare the legal effect of a contract of affreightment with an exemption clause relieving the ship, owners and charterers from liability for negligence of the master or other person in their service, together with a provision that excepted loss or damage from defects in hull if reasonable means had been taken to provide against such defects. Lord Chancellor (Halsbury), in considering these provisions apparently in conflict, used this language:

"The true construction of the clause is, according to my view, that he is to be exempted from any liability for the particular injury that has happened, and if that had stood alone I should have thought it perfectly clear that he was not to be liable; but instead of that, he goes on to say in another part of the same contract, to which I must, if I can, give some effect because of that rule of

construction from which I cannot escape: 'I shall not be liable for this same injury (as I must call it) if all reasonable means have been taken to avoid it.' The only mode of reading as an entire contract that instrument which has those two stipulations in it, is to suppose that you must read the first part of it thus: 'I am not to be liable for this,' and then what comes after it by way of exception, 'I shall not be liable unless I have failed to take all reasonable means against the injury that has happened.' In that way you can read the two together, and you can make a reasonable contract out of it."

Dealing with the clause in this case in the same way, we must read it to mean that the tug was not to be held liable for any damage which might happen to the barge or its cargo, while in tow, unless the tug should not render reasonable assistance to the tow in an emergency. As our view of the evidence results in the conclusion that the negligence of the tug in not providing a proper lookout created the emergency and that the tug did not render proper assistance to the tow in the emergency so created, the tug is clearly liable for the loss. This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void.

The Circuit Court of Appeals directed a decree for the owner of the tow and sent the case back for a more satisfactory assessment of damages. We brought the decree here by certiorari under § 240 of the Judicial Code. We now affirm the decree and remand the case to the District Court for assessment of damages in conformity to the mandate of the Circuit Court of Appeals.

Affirmed.

ATHERTON MILLS *v.* JOHNSTON ET AL.

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

No. 16. Argued December 10, 1919; restored to docket for reargument June 6, 1921; reargued March 7, 8, 1922.—Decided May 15, 1922.

A father and minor son secured a permanent injunction preventing a manufacturer from discharging the son from employment in consequence of the Federal Child Labor Tax Law, upon the ground that the law was unconstitutional; but, pending an appeal, the son ceased to be within the ages affected by the statute. *Held*, that, as the case had become moot, the merits could not be considered, but the decree should be reversed with direction to dismiss the bill without costs. P. 15.

Reversed.

APPEAL from a decree of the District Court granting a permanent injunction. See *Child Labor Tax Case, post*, 20.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder* was on the brief, for the United States, as *amici curiae*.[1]

Mr. William P. Bynum and *Mr. W. M. Hendren*, with whom *Mr. Clement Manly* and *Mr. Junius Parker* were on the briefs, for appellees.

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

The two Johnstons, father and son, citizens of North Carolina, the former in his own right, and as the author-

[1]At the former hearing *Mr. Solicitor General King* and *Mr. Assistant Attorney General Frierson* argued the case on behalf of the United States, as *amici curiae*, by special leave of court. No brief was filed for either hearing by the appellant.

ized next friend of his son, filed their bill of complaint April 15, 1919, against the Atherton Mills, a corporation of the same State. The bill averred that Johnston, the son, was a minor between the ages of fourteen and sixteen years, that Johnston, the father, supporting his son, was entitled to his earnings until he attained his majority, that the son was in the employ of the defendant, that by the terms of the so-called Child Labor Tax Act, approved February 24, 1919, c. 18, § 1200, 40 Stat. 1057, 1138, the defendant was subjected to a tax of one-tenth of its annual profits if it employed a child within the ages of fourteen and sixteen for more than eight hours a day, six days a week, or before the hour of 6 A. M. or after the hour of 7 P. M.; that the defendant was unwilling to arrange a schedule of working hours to comply with this requirement for the minor complainant, and was about to discharge him because of the act, thus depriving the son and father of all of the son's earnings. On the ground that the act was invalid because beyond the powers of Congress, and that the discharge would injure both complainants by a serious deprivation of earnings, which but for the law they would enjoy, and that the granting of an injunction would prevent a multiplicity of suits, they prayed for an injunction against the defendant from discharging the complainant son or in any manner curtailing his employment to eight hours a day or otherwise. The defendant answered admitting all the substantial averments of the bill except the invalidity of the Child Labor Tax Act. It specifically admitted its intention to discharge the complainant son when the act went into effect and solely because of the act. On April 23, 1919, a motion for a preliminary injunction was heard. The United States Attorney for the Western District of North Carolina, not entering an appearance, but speaking as *amicus curiae,* suggested "the want of jurisdiction because there is no allegation in the bill of a contract preventing the de-

fendant from discharging the employee for any reason that might seem fit to it, and also because the case is not one arising under the internal revenue or other federal laws so as to give the court jurisdiction to pass on the validity of the law." The court granted the temporary injunction and made it permanent by order of May 2, 1919.

The defendant appealed directly to this court under § 238 of the Judicial Code, assigning error (1) to the failure to dismiss the bill; (2) to the holding that the Child Labor Tax Act was invalid; (3) to the injunction.

The record shows that the pleadings were framed to bring this case within that of *Truax* v. *Raich,* 239 U. S. 33, 38; but it differs from that case in that the sole defendant here is the employer, while in that case there was joined with the employer the state officer who threatened to enforce the alleged invalid law against his codefendant and compel him to end the contract against his will and to the complainant's irreparable damage. The record further raises the doubt whether on its face this is a real case within the meaning of the Constitution upon which the judgment of this court upon the validity of an act of Congress under the Constitution can be invoked, and whether it does not violate the principle and ignore the caution of the words of Mr. Justice Brewer in *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345, which are quoted in *Muskrat* v. *United States,* 219 U. S. 346, 359. These are serious questions requiring full consideration. We only state them in order that it may not be thought by our conclusion that we here decide them.

The lapse of time since the case was heard and decided in the District Court has brought the minor, whose employment was the subject-matter of the suit, to an age which is not within the ages affected by the act. The act, even if valid, can not affect him further. The case for an injunction has, therefore, become moot and we can

not consider it. *Mills* v. *Green,* 159 U. S. 651; *Codlin* v. *Kohlhausen,* 181 U. S. 151; *Tennessee* v. *Condon,* 189 U. S. 64, 71; *American Book Co.* v. *Kansas,* 193 U. S. 49, 51; *Jones* v. *Montague,* 194 U. S. 147; *Fisher* v. *Baker,* 203 U. S. 174.

The case having become moot the decree is reversed with a direction to dismiss the bill without costs to either party.

Reversed.

BAILEY, COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* GEORGE, TRADING AND DOING BUSINESS AS VIVIAN COTTON MILLS, ET AL.

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

No. 590. Argued March 7, 8, 1922.—Decided May 15, 1922.

A bill to enjoin a levy and sale of property to satisfy a penalty prescribed as a tax by an unconstitutional act of Congress, will not lie, in face of the inhibition of Rev. Stats., § 3224, when it sets up no extraordinary circumstances rendering that section inapplicable and exhibits no reason why the legal remedy of payment under protest and action to recover would not be adequate. P. 19.

274 Fed. 639, reversed.

APPEAL from a decree of the District Court permanently enjoining a collector and his deputy from collecting an assessment under the Federal Child Labor Tax Law. See also *Child Labor Tax Case, post,* 20.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for appellants, attacked the jurisdiction of the lower court, citing Rev. Stats., § 3224, and contending that the imposition in question was a tax within the meaning of that section, whether unconstitutional or not;

that there were no extraordinary circumstances justifying interposition in equity, and that the policy of the law confined the remedy to an action for refund.

Mr. W. Cleveland Davis and *Mr. Campbell B. Fetner* for appellees.

The purpose of § 3224, Rev. Stats., is that the Government shall not be delayed in the collection of its revenue. The statute relates to exactions properly called taxes—that is, exactions for the purpose of raising revenue with which to run the Government. *Barnes* v. *The Railroads,* 17 Wall. 307; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122.

The Child Labor Law does not levy a tax within the meaning of that term. Its purpose is not to raise revenue with which to run the Government. Looking only at the statute itself one must conclude that it is more in its direct and necessary result—in its natural and reasonable effect—a regulation of the hours of labor permitted in factories and mines. It is not a tax at all, but is an attempt by Congress to exert a power as to a purely local matter, to which the federal authority does not extend. *Houck* v. *Little River Drainage District,* 239 U. S. 254; *New Jersey* v. *Anderson,* 203 U. S. 483, 492.

Clearly the tax in question is not levied upon person nor upon property. Is it, then, a privilege tax? Would a reasonable mind, upon reading the statute, conclude that Congress meant to collect the tax upon the theory that it was extending to the manufacturer the privilege of employing children under the prohibited age? *McBride* v. *Adams,* 70 Miss. 716. See *Thorne* v. *Lynch,* 269 Fed. 995; *Accardo* v. *Fontenst,* 269 Fed. 447; *Kaush* v. *Moore,* 268 Fed. 668.

That no revenue was intended to be raised by the Child Labor Act, but that it was intended to exert a power as to a purely local matter, to which the federal authority

did not extend and to penalize or fine the manufacturer for his failure to comply with the will of Congress, is shown by the discussion in the Senate. 57 Cong. Rec. 619, 620, 626.

The propositions laid down in *Hammer* v. *Dagenhart,* 247 U. S. 251, should apply equally to all grants of power under the Constitution, including the power to tax, unless, forsooth, there are no constitutional barriers against the powers of taxation, and Congress may be allowed under the guise of taxation to exert any influence upon matters purely local, at the congressional will, and those affected are to be deprived of their ordinary remedies and rights in courts of justice.

This Child Labor statute being a criminal or penalizing statute over matters of which Congress has no control, it is condemned by the principles announced by this court in cases in which taxing statutes have been upheld. *McCray* v. *United States,* 195 U. S. 27. No revenue was contemplated and none raised.

It will be noted that the act itself does not expressly provide for a collection of a tax by a warrant of distraint. In the absence of such provision, the usual method of collecting a penalty is by suit or other appropriate proceedings in court. 22 Cyc. 1680; 30 Cyc. 645; *Lees* v. *United States,* 150 U. S. 479.

Notwithstanding the inhibition of § 3224, the courts hold that the collection of the tax should be restrained if the enforcement of the tax would produce irreparable injury, or other circumstances justify equitable relief. *Allen* v. *Baltimore & Ohio R. R. Co.,* 114 U. S. 311; *Cummings* v. *National Bank,* 101 U. S. 153; *Poindexter* v. *Greenhow,* 114 U. S. 270. See also, *State Railroad Tax Cases,* 92 U. S. 575, 614; *Hannewinkle* v. *Georgetown,* 15 Wall. 547; *Shelton* v. *Platt,* 139 U. S. 591.

The petition alleges that a forced sale now would produce irreparable loss, because of depressed market con-

ditions. Under this and other allegations and admissions, this is a case in which a court of equity may enjoin the collection of the tax in spite of § 3224. *Snyder* v. *Marks,* 109 U. S. 189; *Cheatham* v. *United States,* 92 U. S. 85; *State Railroad Tax Cases,* 92 U. S. 575; *Dodge* v. *Osborn,* 240 U. S. 118.

The Child Labor Tax being admittedly not for the purpose of raising revenue but for the purpose of regulating child labor, and no revenue being contemplated by the act, the reason for the application of § 3224 fails.

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

The decree entered herein by the District Court and appealed from, directly, to this court, under § 238 of the Judicial Code, recited that the complainants operated a manufacturing plant for the production of cotton goods in Gaston County, North Carolina; that the defendant was a Federal Collector of Internal Revenue; that on the ground that complainants had employed children in their factory within the limits of ages prescribed in § 1200 of the act of Congress, known as the Child Labor Tax Law, approved February 24, 1919, c. 18, 40 Stat. 1057, 1138, they were under its terms assessed the sum of $2,098.06; that they filed a claim for abatement of the same, which was denied, that the Collector was about to make the exaction by distraining complainants' property, levying on it and selling it, that the act of Congress purporting to authorize the assessment was invalid under the Constitution of the United States, and on these grounds permanently enjoined the Collector from proceeding to collect the assessment.

An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver "That these your petitioners have exhausted all legal remedies and it is necessary for them to be given

equitable relief in the premises"; but there are no specific facts set forth sustaining this mere legal conclusion. Section 3224, Rev. Stats., provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable. *Dodge* v. *Brady*, 240 U. S. 122, 126. In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy.

The decree of the District Court is reversed and the cause remanded with directions to dismiss the bill.

Reversed.

CHILD LABOR TAX CASE.[1]

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 657. Argued March 7, 8, 1922.—Decided May 15, 1922.

1. An act of Congress which clearly, on its face, is designed to penalize, and thereby to discourage or suppress, conduct the regulation of which is reserved by the Constitution exclusively to the States, can not be sustained under the federal taxing power by calling the penalty a tax. P. 37. *Veazie Bank* v. *Fenno*, 8 Wall. 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; and *United States* v. *Doremus*, 249 U. S. 86, distinguished.

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[1] The docket title of this case is *J. W. Bailey and J. W. Bailey, Collector of Internal Revenue for the District of North Carolina*, v. *Drexel Furniture Company*.

2. Title XII of the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1138, entitled "Tax on Employment of Child Labor," provides that any person operating (a) any mine or quarry in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year, or (b) any mill, cannery, workshop or factory in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after 7 o'clock P. M. or before 6 o'clock A. M., during any portion of the taxable year, shall pay for such taxable year an excise equivalent to ten per cent. of the entire net profits received or accrued for such year from the sale or disposition of the product of his mine or other establishment; but relieves from liability one who employs a child believing him to be above the specified ages, relying on a certificate issued under authority of a board consisting of the Secretary of the Treasury, the Commissioner of Internal Revenue and the Secretary of Labor, or under the laws of a State designated by them. Provision is made for inspection of the mines, etc., by or under authority of the Commissioner of Internal Revenue, or by or under authority of the Secretary of Labor upon request of the Commissioner, and obstruction of such inspections is made punishable by fine and imprisonment. *Held* unconstitutional. P. 34. 276 Fed. 452, affirmed.

Error to a judgment of the District Court for the plaintiff in an action against an internal revenue collector to recover the amount of a tax previously paid under protest.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for plaintiff in error.

I. Congress has described this as a tax, and whether constitutional or otherwise by reason of its incidences, it is nevertheless an excise tax. It may not be easy to draw a line of demarcation between a penalty and a tax, but the line of demarcation seems to be that, where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then

it is a penalty, and not a tax at all; but, where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it be, in its practical results, prohibitive.

The Child Labor Law does not pretend to, and does not in fact, prohibit the employment of child labor. If a manufacturer desires to employ such labor, he is free to do so; but, if he does so, he must pay an excise tax for the privilege. Where the excise tax is prohibitive in amount, there may be little practical difference between such an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power.

II. *Hammer* v. *Dagenhart,* 247 U. S. 251, does not rule this case. While the federal commercial power only relates to interstate and foreign commerce, the taxing power comprehends all taxable objects, whether interstate or intrastate.

The *License Tax Cases,* 5 Wall. 462, are analogous to the present case. The court there conceded that "Congress has no power of regulation nor any direct control" over the domestic trade of a State, "except such as is strictly incidental to the exercise of powers clearly granted to the legislature," 5 Wall. 470, 471; but nevertheless sustained the power to impose an excise upon the sale of liquor wherever the sale was permitted.

So, also, the question whether child labor may be employed or not is a matter for the determination of the States. But the tax law in the instant case does not regulate the internal affairs of the States any more than did the taxing statute sustained in the *License Tax Cases.* It does not prohibit child labor. It merely requires the manufacturer who employs child labor to pay a tax not imposed upon one who does not employ child labor. Certainly Congress may select the subjects of taxation.

III. Subject only to limitations named in the Constitution, the power of Congress to tax may be exercised at discretion.

"The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." *License Tax Cases,* 5 Wall. 462, 471. The court has repeatedly taken the same position in other cases. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153, 154; *United States* v. *Doremus,* 249 U. S. 86, 93, 94; *Nicol* v. *Ames,* 173 U. S. 509, 519; *McCray* v. *United States,* 195 U. S. 27, 57–62.

While the Federal Government may not tax the governmental agencies of the States, it may tax the nongovernmental activities of the people of the States. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531, 536, 537; *South Carolina* v. *United States,* 199 U. S. 437.

When a State adopts a law the necessary effect of which is to exercise a power granted by the Constitution to the Federal Government, it must follow that the act is void. But, as pointed out in *McCray* v. *United States,* 195 U. S. 27, 60, this is due to the paramount nature of the Constitution. Under Art. VI, where there is any conflict between state and federal activity, the Federal Government is supreme. Where Congress in exerting its power to levy taxes deals with a subject which might also be regulated by the police power of the State, the federal statute is not nullified by any power which the State might otherwise possess.

IV. The power to lay taxes is not limited to the raising of revenue. Story, Const., § 973. See also § 965.

Taxes have rarely, if ever, been levied solely with reference to fiscal necessities. From time out of mind the

body that imposed taxes has considered all the varying influences upon the public welfare that such a levy would incidentally entail, and frequently the social, economic or moral effect of the tax is a far more influential consideration with the legislature than the mere question of revenue. It has always been true that in levying taxes Congress has taken into consideration matters that are beyond the scope of federal authority. From the beginning, import duties, and at times internal taxes, have been levied in order to accomplish ends, sometimes moral and sometimes economic, which were in themselves not within the scope of federal power.

Thus, when liquor was a permissible commodity, it was always recognized that to impose heavy excise taxes upon its sale accomplished a moral purpose, and yet, until the Eighteenth Amendment, the morality of drinking was not a question with which the Federal Government had any concern.

And, in *McCray* v. *United States,* 195 U. S. 27, where it may be supposed that Congress had sought to attain an economic end by means of a taxing statute, this court refused to declare the legislation unconstitutional.

Well-known examples of the use of the taxing power in connection with social or economic ends are the protective tariff system; the tax on foreign-built yachts, *Billings* v. *United States,* 232 U. S. 261; on notes of state banks, *Veazie Bank* v. *Fenno,* 8 Wall. 533; on importation of alien passengers, *Head Money Cases,* 112 U. S. 580; graduation of taxes, *Magoun* v. *Bank,* 170 U. S. 283; *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; on oleomargarine, *In re Kollock,* 165 U. S. 526; *McCray* v. *United States,* 195 U. S. 27; on sugar refiners, *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89. Well-known uses of the power in connection with moral ends are taxes on dealers in liquors and lottery tickets, *License Tax Cases,* 5 Wall.

462; on dealers in narcotic drugs, *United States* v. *Doremus,* 249 U. S. 86.

V. The motive of Congress is immaterial. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *Chinese Exclusion Case,* 130 U. S. 581, 602, 603; *McCray* v. *United States,* 195 U. S. 27, 54, 56; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180.

This court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor. Moreover, if, in levying the tax upon manufacturers that employ child labor, Congress did so with a recognition that such a tax might result in no revenue at all, and virtually prohibit the employment of child labor, such purpose, while it may be politically anti-constitutional, in the sense that it may indirectly and incidentally regulate a matter otherwise within the discretion of the States, yet it is not juridically unconstitutional, because it is an exercise of an undoubted power to impose a tax; and the motives and objectives of the tax are within that broad field of political discretion into which the judiciary is powerless to enter. To use Madison's phrase, it is an "extra-judicial" question and as such beyond the power of the court.

Such an excise is not expressly prohibited, and, as it does raise revenue, if a manufacturer exercises his undoubted right to employ child labor, it, in the language of Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423, "is really calculated to effect any [one] of the objects intrusted to the Government." Certainly such a case falls expressly within the doctrine announced in *McCray* v. *United States, supra,* that this court will not restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.

We do not concede that no fiscal reason can be assigned which justifies the Child Labor Law as a revenue meas-

ure. It is notorious that child labor is cheap labor, and this being so, Congress may have considered this privilege of cheaper production as a fiscal reason for the tax.

However, if this court is empowered to consider the motive of Congress, then the contention that the dominant motive was to make the employment of child labor expensive by reason of added taxation is not unreasonable.

If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes. The question is, not what the motive of Congress is, but does this statute impose an excise tax; and, if so, whether the imposition of such a tax has been forbidden by the Constitution?

Certainly by no express prohibition, and it remains to inquire whether it is by an implied prohibition.

The doctrine of implied powers is a natural and necessary one; but the doctrine of implied limitations is one for which there is little countenance in either the text of the Constitution or its judicial interpretation.

Few, if any implied limitations upon expressly delegated powers have ever had the sanction of this court. The greatest of all was that which was recognized in *McCulloch* v. *Maryland*, and it is the only implied limitation upon the taxing power, and it was decided from an obvious and imperative necessity, for neither the Federal Government nor the constituent States could possibly continue to exist if either had the power to tax the agencies of the other out of existence.

With this exception, however, this court has said repeatedly that the power to tax is only restricted by the express prohibitions of the Constitution, and none can be implied where, as in the instant case, they depend upon a question of fact, viz, the motive for the exercise of the delegated power.

VI. In considering this question of invalidating the exercise of a delegated power by reason of its assumed

motives or objectives, a distinction should be made between the following classes of cases:

(a) Where the exercise of a federal power has an unquestioned but incidental effect upon some right reserved to the States. In this case obviously the federal statute can not be invalidated. Few laws could be passed, either by State or Nation, that would not have a reflex action.

(b) Instances where it is clear that Congress in passing a federal statute not only has a legitimate federal purpose but may also have been actuated by some motive beyond the province of the Federal Government. In this case, there is also no power to invalidate a federal statute. This court could not, even if it would, weigh different motives.

(c) Cases where, from the history of the legislation, there is reason to believe that the power was exercised, not to accomplish some purpose intrusted to the Federal Government by the Constitution, but wholly to accomplish by indirect action some purpose which was not within its scope. Here, too, this court can not invalidate a statute, because, however plausible the inference may be in a given case of an ulterior and unconstitutional motive, it can not judge the motive and object of Congress, either by declarations in debate or even by the history of the legislation. The good faith of Congress in passing the law must be assumed.

(d) Cases in which this court can indubitably deduce *from the language of the act* that the exercise of the power was not to accomplish *any* purpose intrusted to the Federal Government, but rather some purpose beyond the scope of federal power. Here, if in any case, this court may nullify the law. Such a case was *Hammer* v. *Dagenhart, supra.*

Can such a case arise in a taxing statute? Can it be safely adjudged that Congress did not intend to impose a tax, when it expressly says that it does? In *McCray* v.

United States, supra, this court answered this question in the negative.

In the instant case it may be that Congress intended incidentally to regulate child labor by the exercise of its taxing power, but this is one of the cases where Congress, having lawfully chosen the subjects for taxation, its exercise of an undoubted power cannot be challenged, because such tax may have an incidental effect upon some reserved rights of the States. If this were not so, many federal taxes would be assailed, because it has always been true that in levying taxes Congress has taken into consideration matters that are beyond the scope of federal regulation.

Mr. William P. Bynum, with whom *Mr. Jno. N. Wilson, Mr. Clement Manly, Mr. W. M. Hendren* and *Mr. Junius Parker* were on the brief, for defendant in error.

That this statute is unconstitutional is determined by the decision in *Hammer* v. *Dagenhart,* 247 U. S. 251, declaring the Child Labor Law of 1916 unconstitutional.

Notwithstanding this solemn decision by this court, Congress in its enactment of the Federal Revenue Act of 1918, the consideration of which began soon after the decision in *Hammer* v. *Dagenhart,* prescribed precisely the same minimum ages and the same working hours which it had prescribed in the statute of 1916, and provided that the employer operating a mine, quarry, mill, cannery or factory, who saw fit to disregard the will of Congress in his employment of children, should, instead of having his goods shut out of interstate commerce, as the statute of 1916 had provided, be subjected to a so-called tax of ten per cent on all the profits of his business additional to all other taxes.

It needs no reference to the debates to ascertain the purpose of Congress in this enactment, and the direct effect of such enactment—if it is to have validity and

effect at all. If recourse to the debates were necessary or desirable, it shows the frankest and clearest expression of the congressional will and purpose.

It does not consist with the dignity that should characterize arguments in this court to discuss, as if it were an uncertain thing, the purpose and effect of this statute. Of course, it is not a revenue statute, and of course it is an attempt to impose upon all the citizens in all the States the congressional will as to their conduct in the operation of their manufacturing, mining and quarrying enterprises.

The statute is condemned by the principles announced by this court in numerous cases, including cases in which taxing statutes have been upheld. *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *United States* v. *Doremus,* 249 U. S. 86, 93; Cooley on Taxation, 3d ed., 82.

If sustained as a tax, it must be as a privilege tax, and yet it does not purport to bear any relation in amount to the extent that the privilege is enjoyed. It is not a tax on the products of child labor, but it is a tax on the employing of children under circumstances not approved by Congress, and the amount to be paid for disobedience to the will of Congress is arrived at precisely as the criminal judge arrives at the fine to be paid by a convicted criminal. So this statute imposes a tax of ten per cent on the total profits, whether from the employment of children or the employment of adults—whether from the investment of large capital, or skill or good fortune in management—that the offending employer has made during the year.

The employment of children, under conditions and circumstances condemned by the competent legislative authority, has never in the history of the world been treated as a privilege, but has always been treated as a crime. Whatever may be said as to the hours and cir-

cumstances of employment of adults, no one for many years has doubted that the regulation of minimum ages for children's employment, and maximum hours for a child's day labor, is within the police power of the States.

This statute is a criminal statute, under the general title "A Bill to Raise Revenue." It is an attempt to make regulations, in accordance with congressional wishes, and applicable to the whole country, in a matter so influenced by local surroundings as to be properly regulated only by local legislatures.

It is not true that the taxing power of Congress is limited only by the limitations expressly stated by the Constitution to be applicable to the power to tax, to-wit, that exports may not be taxed, and that direct taxes must be apportioned, and excise taxes uniform. This court has expressly and repeatedly recognized other limitations. *Evans* v. *Gore,* 253 U. S. 245; *Collector* v. *Day,* 11 Wall. 113; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 585, 601, 652, 653; *United States* v. *Railroad Co.,* 17 Wall. 322.

Considering the sovereign powers of the Federal Government and of the States respectively in their several spheres, this court has condemned this statute in principle in its condemnation of certain taxing statutes of the States. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 37; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.

It is the Constitution and the federal statutes enacted in accordance therewith that constitute the supreme law of the land, and federal statutes enacted otherwise are not only not the supreme law of the land but not law at all. Under our Constitution the Nation and the States are not to be weighed in the balance to ascertain any general supremacy—the Nation is supreme in the exercise of the powers delegated to it, and the States are supreme in the exercise of the powers reserved to them. *Collector* v. *Day, supra.*

The attributes of sovereignty that belong to the States in matter of taxation have been declared by this court in numerous cases to be of the kind, character and quality that belong to the Federal Government. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 160.

The power of Congress is "to lay and collect taxes, duties, imposts and excises," and there is no expressly given power to provide, under color of a tax law, for the "general welfare of the United States."

The fact that protective tariffs have been levied and have always been assumed to be valid is in no way controlling or influential in the present case. It is frequently suggested that this analogy requires the courts to sustain any tax imposed in the ostensible exercise of the taxing power, even though it is plainly apparent that revenue is not sought. This, though, leaves out of consideration the fact that Congress does have the undoubted power to exclude importations altogether, and since the greater includes the less, it must have the power to place such conditions upon the importations as it sees fit.

The decisions of this court that sustain revenue acts of Congress which incidentally affect conduct directly to be regulated only by the States, do not constitute authorities for sustaining this statute.

Congress could not possibly levy internal excise taxes, whether collected by stamps or otherwise, without some incidental interference with the conduct of citizens in those fields which are directly regulatable only by the States. *License Tax Cases,* 5 Wall. 462; *Nicol* v. *Ames,* 173 U. S. 509; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Knowlton* v. *Moore,* 178 U. S. 41; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Springer* v. *United States,* 102 U. S. 586.

Veazie Bank v. *Fenno,* 8 Wall. 533; *United States* v. *Doremus,* 249 U. S. 86; and *McCray* v. *United States,*

195 U. S. 27, are distinguishable from the case at bar, and are not authorities for holding this statute constitutional.

The decision in the *Veazie Bank Case*—as distinguished from some of the unnecessary words of the Chief Justice—is authority only for the proposition, not here contested, that, where the power to regulate exists, the court will not deny the validity of any statute that accomplishes such regulation.

This is a Federal Government with a written constitution, and if any statute, federal or state, is not in accordance with that written constitution, it is the duty of this court to declare such statute void. *Fairbank* v. *United States,* 181 U. S. 283, 285.

This is a federated government—"an indissoluble union of indestructible States"—and no state legislation is valid that encroaches upon the powers delegated to the union, and no federal legislation is valid that encroaches upon the powers reserved to the States. Inevitably the efficient exercise of a federal power may incidentally diminish, or otherwise affect, a state power; but if the encroachment be direct, and not incidental, then the federal statute is void. *Hammer* v. *Dagenhart, supra,* 275; *Lane County* v. *Oregon,* 7 Wall. 71, 76; *Fairbank* v. *United States,* 181 U. S. 283, 289.

The enforcement of the constitutional limitations on the legislative powers of Congress or the States, resolves itself always into a practical matter. It is quite impossible, by precise legal formula, to limit the extent of the police power of the States as opposed to the limitation of the Fourteenth Amendment; or to define the limitations on the power of Congress prescribed by the due process clause; or to separate the proper functions of State and Nation. After all is said and done, there remains the question of practical effect, and there must be a point, the location of which depends to some extent on the qualities and characteristics of statesmanship of the members

of the court, where the court must say "Thus far and no farther."

The maxim of our law, first enunciated by Marshall, that the power to tax is the power to destroy, is not an admonition to the courts to assume that every tax law passed by the sovereign power is valid; but it is an admonition to scrutinize carefully whether the power exists, because of the realization that, if it exists, it may be used to the extent of destruction. *Knowlton* v. *Moore,* 178 U. S. 41, 60.

Even this court may not declare a congressional enactment void because it is in the judgment of members of the court unwise; there must be "juridical unconstitutionality," and not simply "political anti-constitutionality," to warrant the court holding a statute passed by Congress unconstitutional and void. This does not mean, though, that this court must demonstrate the constitutionality or unconstitutionality of a statute by the application of a legalistic formula or distinction, such as might be very useful in disposing of the ordinary legal question. It does not mean, either, that this court is to shut its eyes to every tendency of the times, or to every consideration of the effect on our institutions of the decision that it is called upon to make. The decisions of this court announced by John Marshall stopped the tendency toward magnification of the individual States, and if that tendency had not been stopped the Nation would have been impotent. The present tendency is in the other direction, and the Federal Government is overloaded, while the States are being left to function hardly at all.

The question before this court in this case, is, Whether a resort to the commerce clause of the Constitution having failed, Congress may, by a resort to the tax clause of the same instrument, control the entire police power of the States, and so open the door to the complete nationalization of our Government, so ardently desired by some of the publicists of our day.

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

This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, United States Collector of Internal Revenue for the District, that it had been assessed $6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent. on its net profits for that year. The Company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the Company against the Collector for the full amount with interest. The writ of error is prosecuted by the Collector direct from the District Court under § 238 of the Judicial Code.

The Child Labor Tax Law is Title XII of an act entitled "An Act To provide revenue, and for other purposes", approved February 24, 1919, c. 18, 40 Stat. 1057, 1138. The heading of the title is "Tax on Employment of Child Labor". It begins with § 1200 and includes eight sections. Section 1200 is as follows:

"SEC. 1200. That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to

work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment."

Section 1203 relieves from liability to the tax any one who employs a child, believing him to be of proper age, relying on a certificate to this effect issued by persons prescribed by a Board consisting of the Secretary of the Treasury, the Commissioner of Internal Revenue and the Secretary of Labor, or issued by state authorities. The section also provides in paragraph (b) that "the tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child, and without intention to evade the tax."

Section 1206 gives authority to the Commissioner of Internal Revenue, or any other person authorized by him, "to enter and inspect at any time any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment." The Secretary of Labor, or any person whom he authorizes, is given like authority in order to comply with a request of the Commissioner to make such inspection and report the same. Any person who refuses entry or obstructs inspection is made subject to fine or imprisonment or both.

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by § 8, Article I, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay;

that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a coördinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before

us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us can not be distinguished from that of *Hammer* v. *Dagenhart,* 247 U. S. 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority."

In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

The analogy of the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires as did the *Dagenhart Case* the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423, in a much quoted passage:

" Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect or tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law.

The first of these is *Veazie Bank* v. *Fenno,* 8 Wall. 533. In that case, the validity of a law which increased a tax on the circulating notes of persons and state banks from one per centum to ten per centum was in question. The main question was whether this was a direct tax to be apportioned among the several States " according to their respective numbers." This was answered in the negative. The second objection was stated by the court:

" It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress."

To this the court answered (p. 548):

" The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

It will be observed that the sole objection to the tax there was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all. There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax.

It should be noted, too, that the court, speaking of the extent of the taxing power, used these cautionary words (p. 541):

"There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

But more than this, what was charged to be the object of the excessive tax was within the congressional authority, as appears from the second answer which the court gave to the objection. After having pointed out the legitimate means taken by Congress to secure a national medium or currency, the court said (p. 549):

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to se-

cure a sound and uniform currency for the country must be futile."

The next case is that of *McCray* v. *United States,* 195 U. S. 27. That, like the *Veazie Bank Case,* was the increase of an excise tax upon a subject properly taxable in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one-quarter of a cent a pound, and on the yellow oleomargarine was first two cents and was then by the act in question increased to ten cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. It was the same principle as that applied in the *Veazie Bank Case.* This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.

The third case is that of *Flint* v. *Stone Tracy Co.,* 220 U. S. 107. It involved the validity of an excise tax levied on the doing of business by all corporations, joint stock companies, associations organized for profit having a capital stock represented by shares, and insurance companies, and measured the excise by the net income of the corporations. There was not in that case the slightest doubt that the tax was a tax, and a tax for revenue, but it was attacked on the ground that such a tax could be made excessive and thus used by Congress to destroy the exist-

ence of state corporations. To this, this court gave the same answer as in the *Veazie Bank* and *McCray Cases*. It is not so strong an authority for the Government's contention as they are.

The fourth case is *United States* v. *Doremus*, 249 U. S. 86. That involved the validity of the Narcotic Drug Act, 38 Stat. 785, which imposed a special tax on the manufacture, importation and sale or gift of opium or coca leaves or their compounds or derivatives. It required every person subject to the special tax to register with the Collector of Internal Revenue his name and place of business and forbade him to sell except upon the written order of the person to whom the sale was made on a form prescribed by the Commissioner of Internal Revenue. The vendor was required to keep the order for two years, and the purchaser to keep a duplicate for the same time and both were to be subject to official inspection. Similar requirements were made as to sales upon prescriptions of a physician and as to the dispensing of such drugs directly to a patient by a physician. The validity of a special tax in the nature of an excise tax on the manufacture, importation and sale of such drugs was, of course, unquestioned. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax and were therefore held valid.

The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect of the law now before us. The court, there, made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.

For the reasons given, we must hold the Child Labor Tax Law invalid and the judgment of the District Court is *Affirmed.*

MR. JUSTICE CLARKE dissents.

HILL, JR., ET AL. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL.

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

No. 616. Argued January 11, 12, 1922.—Decided May 15, 1922.

1. Members of an incorporated board of trade have standing to maintain a bill against its president and directors to restrain them from complying with an unconstitutional act of Congress threatening seriously to impair the value of the board to its members and the value of their memberships, when the directors have refused to bring the suit for fear of antagonizing government officials. P. 60.
2. Section 3224 of the Revised Statutes forbidding suits to restrain collection of a tax *held* inapplicable to this case because of its exceptional and extraordinary circumstances. P. 62. *Dodge* v. *Brady,* 240 U. S. 122.
3. The Act of August 24, 1921, c. 86, 42 Stat. 187, known as the Future Trading Act, is in purpose, in essence and on its face a regulation of the business of grain boards of trade, with a heavy penalty, called a tax, imposed on sales of grain for future delivery to coerce boards and their members into compliance with the regulations, and, therefore, it cannot be sustained as an exercise of the taxing power of Congress, insofar as concerns this so-called tax and the regulations related to it. P. 66. *Child Labor Tax Case, ante,* 20.
4. Neither are the tax and related regulations sustainable under the Commerce Clause. P. 68.
5. Sales of grain for future delivery made at Chicago between the members of a board of trade, to be settled there by off-setting purchases or by delivery of warehouse receipts for grain there stored, are not in themselves interstate commerce and cannot come within the regulatory power under the Commerce Clause unless they are regarded by Congress, from the evidence before it, as

directly interfering with interstate commerce so as to obstruct or burden it. P. 68.

6. A direction in an act that, if any of its provisions or the application thereof to any person or circumstance be held invalid, the validity of the remainder of the act or the application of such provision to other persons and circumstances shall not be affected, is an assurance that separable valid provisions may be enforced consistently with legislative intent, but does not and cannot empower the courts to amend inseparable provisions of the act by inserting limitations which it does not contain. P. 70.
7. Under § 11 of the Future Trading Act, *supra*, directing severance of valid from invalid provisions and applications, § 9, which authorizes investigations by the Secretary of Agriculture, and, *semble*, § 3, imposing a tax on certain kinds of options of purchase or sale of grain, are unaffected by the conclusion that § 4, imposing the tax on sales for future delivery, and the regulations interwoven with it in subsequent sections, are invalid. P. 71.

Reversed.

This is a suit attacking the validity of the Future Trading Act, approved August 24, 1921, c. 86, 42 Stat. 187. The act imposes a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery, but excepts from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the act.

The bill is filed by eight members of the Board of Trade of the City of Chicago, who sue in behalf of all other members of that body who may wish to join and share in the relief granted, against the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States District Attorney for the Northern District of Illinois, the Collector of Internal Revenue for the first district of that State, the Board of Trade of the City of Chicago, its president, vice-presidents and directors. The bill avers that the appellants applied to the Directors of the Board of Trade to institute a suit to have the Future Trading Act adjudged unconstitutional before they should comply with

it, but the Board of Directors refused to take any steps, and announced that they intended to comply with the provisions of the act; that the Board refused because they feared to antagonize the public officials whose duty it was to construe and enforce the act, and the complainants feared that, acting under the coercion imposed upon them by the act, the Board of Directors would admit to membership on the Board the representatives of the coöperative associations of producers; that the Secretary of Agriculture would designate such Board as a contract market, and that such action by the Board of Directors would cause irreparable injury to the complainants and all the other members of the Board. Complainants set out the character of the Board of Trade of Chicago and its organization as a corporation under a special charter of the State of Illinois in 1859, by which certain persons engaged in the purchase and sale of grain were created a corporation and given power to admit members, and expel them, to adopt regulations and by-laws for the management of the business and the mode in which it should be transacted; to appoint committees of arbitration for the settlement of differences between the members; to appoint persons to examine, measure, weigh, gauge, inspect, grain and other articles of produce, with authority to issue a certificate as to quality or quantity; and to make the brand or mark thereof evidence between any buyer and seller assenting to the employment of such person, and to do and carry on business usual in the management of boards of trade.

The bill avers that the Board has 1610 members, of whom the complainants are members in good standing; that its memberships are salable for more than $7,000 apiece; that in recent years there have been organized in most of the grain-producing States, among so-called farmers, coöperative societies who desire to market their crops at actual cost and to market them through the exchanges

at actual cost, and without paying the commissions charged by the members of such exchange; the plan being to sell all grain through an authorized member of such organization admitted to the exchange who shall charge the prescribed commission and ultimately rebate back to the members of such organization the aggregate of such commissions after paying his salary and incidental expenses, on the basis of the number of bushels of grain which each producer has sold through said organization; that the admission of such representatives of coöperative societies to the Chicago Board of Trade would destroy the business of its members, and the value of the memberships, and make it difficult for the Board to maintain sufficient members to pay the assessments to meet the expenses of its maintenance; that many of its members engage in making contracts with other members for the purchase and sale of grain for future delivery; that during the years from 1884 to 1913, wheat of the grade contemplated in the contracts for future delivery on the Board sold as low as 48⅞ cents per bushel, and never for more than $2.00 per bushel; and that during most of said time its price was below $1.00; that during the same years corn sold as low as 19½ cents a bushel, and never higher than $1.00, and most of the time sold below 60 cents; that oats sold as low as 14¾ cents per bushel and never higher than 62½ cents, and much the greater part of said period under 40 cents per bushel; that, at the time of the filing of the bill, contract wheat was selling for $1.05 per bushel, and that no member of the Board could afford to make contracts for future delivery and pay the tax thereon imposed by the Future Trading Act of 20 cents a bushel; that the law in effect prohibits all those who are not members of a board of trade, which has been designated by the Secretary of Agriculture a contract market under said act, from making any contracts of sales for future delivery.

The bill charges that the Future Trading Act violates the Constitution of the United States (1) in depriving the members of the Board of their property without due process of law, in the compulsory admission to membership on said board of representatives of the coöperative associations of producers, in accord with § 5 of the act; (2) in that it attempts to regulate commerce, which is not commerce with foreign governments or among several States, but is commerce wholly between persons contracting within the State of Illinois respecting the purchase or sale of grain which forms a part of the common property of that State, and is intrastate and not interstate; (3) in that it violates the Tenth Amendment to the Constitution, by interfering with the right of the State of Illinois to provide for and regulate the maintenance of grain exchanges within its borders upon which are conducted the making of contracts which are merely intrastate transactions.

The bill avers the complainants are not in collusion with defendants or any of them to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have jurisdiction; and that the amount involved in the matters in dispute is, exclusive of interest and costs, more than $3,000.

The decrees prayed for are:

To enjoin the Secretary of Agriculture from taking any steps to induce or compel the Board of Trade or its directors to comply with the provisions of the act;

To enjoin the Commissioner of Internal Revenue, the Collector of Internal Revenue and the District Attorney named as parties from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, under the act; and

To enjoin the Board of Trade and each of its officers and directors from applying to the Secretary of Agriculture to have the Board designated as a contract market

under the act, and from admitting to membership into such board any representative of any coöperative association of producers in compliance with § 5 of the act, or from taking any other steps to comply with the act.

The Board of Trade and its president, its officers and directors moved to dismiss the bill of complaint on the ground that it was without equity on its face and did not state facts sufficient to constitute a cause of action in a court of equity.

The Secretary of Agriculture appeared specially to move the court to dismiss the suit as to him because he was not a resident of the Northern District of Illinois and had not been served with process, and the court had no jurisdiction over him.

The United States Attorney for the Northern District of Illinois, and the Collector of Internal Revenue, moved the court to dismiss on the grounds that the suit was to restrain the collection of a tax contrary to § 3224 of the Revised Statutes; and that the bill sought to restrain the enforcement of a criminal statute without showing that the complainants suffered irreparable injury. The District Court denied the motion for a temporary injunction and ordered that the bill be dismissed as to all the defendants for want of equity.

Mr. Henry S. Robbins for appellants.

The provision of the Future Trading Act (§ 5–e) requiring the exchange to admit to membership any duly authorized representative of a coöperative association of producers, and sanctioning "patronage dividends," deprives the Board of Trade and its members of their property without due process of law.

The provisions which aim to regulate boards of trade are not within the commerce power of Congress.

Congress by the title has said that parts of this act are not the exercise of the taxing power, and has left this

court free to treat as the exercise of the commerce power those provisions which are clearly regulatory in character.

The question whether the provision of § 5–e which modifies the commission rule of the exchange in the interest of coöperative associations of producers is within the commerce power is answered in the negative in *Hopkins* v. *United States,* 171 U. S. 578.

All contracts for future delivery of grain made by or through members of this Board are made in its exchange room in Chicago during certain market hours only, and the only parties to these contracts are members then and there present. Less than one-quarter in volume of these contracts are performed by delivery, and upon such contracts the delivery is of warehouse receipts entitling the holders to receive a specified number of bushels of grain of a particular grade out of a larger common mass in store. These receipts on their face state that the grain, for which they are issued, has been mixed with other grain of the same grade; and when the receipt holder calls for his grain, the warehouseman, to comply with the state law, makes delivery out of the grain that has been longest in store. If any component parts of the common mass of grain out of which the receipt is filled have come from other States, they have completely lost their interstate character by this inter-mixing. Such contracts for the future delivery of grain are not interstate commerce. *Ware & Leland* v. *Mobile County,* 209 U. S. 405. See also *Engel* v. *O'Malley,* 219 U. S. 139; *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, 511; *Hopkins* v. *United States,* 171 U. S. 578; *Brown* v. *Maryland,* 12 Wheat. 419; *May* v. *New Orleans,* 178 U. S. 496; *Austin* v. *Tennessee,* 179 U. S. 343; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Weigle* v. *Curtice Bros. Co.,* 248 U. S. 285; *Public Utilities Commission* v. *Landon,* 249 U. S. 236; *Mutual Film Corporation* v. *Ohio Industrial Commission,* 236 U. S. 230; *Askren* v. *Continental Oil Co.,* 252 U. S. 444.

Contracts which by their terms contemplate the shipment of grain across state lines are, of course, interstate commerce. But the purpose or intention of some of the purchasers in this future trading upon this exchange to ship out of the State property they purchase does not make their contracts for future delivery made in these "pits" interstate contracts. And if one such contract is not, a large number of such contracts do not constitute interstate commerce. *United States* v. *Knight Co.,* 156 U. S. 1, 13; *Coe* v. *Errol,* 116 U. S. 517; *New York Central R. R. Co.* v. *Mohney,* 252 U. S. 152; *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 151; *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Merchants Exchange* v. *Missouri,* 248 U. S. 365; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129. All this future trading, therefore, should be regarded as intrastate commerce, the regulation of which is not within the commerce power of Congress.

We have here a non-profit corporation created by a State, which does no business itself and whose chief function is to furnish in Chicago an exchange hall where its members individually may conveniently and economically transact business. To that end it provides for the admission as members of only such persons as seem to it to be fit in point of character and financial responsibility, it provides a method by which members, who default on their contracts or otherwise misbehave, may be suspended or expelled, it provides rules respecting the terms of the contracts made by its members in the absence of express stipulations to the contrary, it provides arbitration committees to decide the business disputes of its members, and it promulgates and enforces rules to control the business relations of its members to each other and to the exchange itself. Should all these be treated as together constituting an instrumentality, which is but an aid to commerce?

Much the larger part of the trading between members in the exchange hall is so-called future trading, which, as already shown, is not interstate commerce. Another substantial part of the trading in the exchange hall is that of members who, as agents, receive grain on consignment to sell and account for the proceeds or buy grain as agents which, so far as the business of these agents is concerned, has been held by this court not to be interstate commerce. The bidding for, or offering, grain by letters or telegrams sent by members is in no sense a part of the trading on the exchange. Hence, if any, only a minor part of the total volume of trading on this exchange possesses any of the characteristics of interstate commerce.

From the foregoing facts does not the conclusion arise that the maintaining of this exchange hall—and everything that the Board does in connection therewith—lacks any element of interstate commerce within the definition that this court has frequently given to that term? Hence, is not Congress without power to regulate this exchange? Such seems to have been the practical construction of state and federal legislators for more than one hundred years prior to the passage of the Future Trading Act. *Hopkins* v. *United States,* 171 U. S. 578, seems to support the view here urged. Also, *Nathan* v. *Louisiana,* 8 How. 73, 80.

The Board of Trade, in furnishing a building where traders meet to make contracts—only a small portion of which relate to grain which has, before the sale on the exchange is made, come across state lines, or is to go across state lines after it reaches the purchaser on the exchange—seems to have no more connection with interstate commerce than have the owners of the grain-mixing warehouses of Chicago, which store much grain that has come from, or is to go to, other States. *Munn* v. *Illinois,* 94 U. S. 135; *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 213; *Budd* v. *New York,* 143

U. S. 517, 545. See *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *New York Life Insurance Co.* v. *Cravens,* 178 U. S. 389; *Merchants Exchange* v. *Missouri,* 248 U. S. 365; *Brodnax* v. *Missouri,* 219 U. S. 285; *House* v. *Mayes,* 219 U. S. 270; *Pittsburg & Southern Coal Co.* v. *Louisiana,* 156 U. S. 590; *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436; *Williams* v. *Fears,* 179 U. S. 270; *Cargill Co.* v. *Minnesota,* 180 U. S. 452, 470; *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; *United States Fidelity Co.* v. *Kentucky,* 231 U. S. 394.

It is not here claimed that, if elevator or board of trade does some act, which prejudicially touches, or will interfere with interstate commerce—as was claimed of a rule of this Board in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, or if members of an exchange conspire to run a corner "*affecting the entire trade of the country*" in a particular commodity, as in *United States* v. *Patten.* 226 U. S. 525,—Congress may not, as to such encroachments, enact a prohibiting act. All that we do contend is that—considering together this Board of Trade and all its activities—the general regulation thereof as respects admissions to membership, commission rates, what, if any, memoranda of contracts should be made, etc., should be held to be a part of intrastate commerce, and within the exclusive power of the State. *Hammer* v. *Dagenhart,* 247 U. S. 251, 273, 275.

The Constitution expressly limited the taxing power of Congress to certain purposes—which were necessarily expressed in general terms. It conferred on Congress the "power to lay and collect taxes, duties, imposts and excises, to pay [for the purpose of paying] the debts and provide [providing] for the common defense and general welfare of the United States."

The protective tariff was then an established governmental system in England and elsewhere, and doubtless

the Constitution contemplated that in the laying of imposts Congress might fix the duties with a view to excluding importation rather than raising revenue.

But there is no warrant for saying that at that time the power to lay internal taxes had any other legitimate purpose than the raising of revenue; or that the States, in conferring on the National Government a concurrent power to levy taxes, ever contemplated that Congress might exercise that power for any other purpose than to raise revenue.

This, we think, is apparent for this reason: Under its then existing constitution each State had unlimited power to regulate the commercial and other transactions of its citizens. Resort to a roundabout way of doing this through the levying of taxes was not necessary. This is also true of the governments of Europe. There was nowhere any dual system of government requiring a written constitution to accurately separate and define the powers that belong to each of the separate governments, and hence no occasion or incentive to use the taxing power as a cloak to accomplish something other than getting revenue.

Indeed, does anyone suppose that—considering the pronounced disinclination of the States to surrender their own powers—the Constitution would have been adopted by the requisite number of States, if John Marshall in Virginia and Alexander Hamilton in New York, had responded affirmatively to the question, whether the proper exercise of power to tax thus to be conferred, included also the power to regulate, or to prohibit each State from regulating, its internal trade and other local affairs?

In *McCulloch* v. *Maryland,* 4 Wheat. 316, 431, in deciding that a state statute, providing a tax on a branch of the United States Bank, was an illegal encroachment upon this federal power, this court made use of the expression, " that the power to tax involves the power to

destroy." This was only a way of saying that any state taxing-statute might impair the federal power. It was a mere phrase, used argumentatively and not to support a federal statute, but to annul a state statute. In *Veazie Bank* v. *Fenno,* 8 Wall. 533, the power of Congress to impose a tax on the notes of a state bank was upheld upon the ground that it was the proper exercise of the power to provide a circulation of coin and to authorize the emission of letters of credit, although it was also stated—in answer to the argument that the tax was so excessive as to indicate the purpose of Congress to destroy the bank's franchise—that the court could not pronounce the law unconstitutional for the reason "that the tax was excessive." With this as a basis, this phrase of Chief Justice Marshall—that the power to tax involves the power to destroy—has now become in the minds of many in and out of Congress a fixed legal maxim, by which the powers of Congress are to be measured. Congress now treats it as fully warranting the use of the taxing power to regulate or prohibit whatever it may not otherwise regulate or prohibit.

But Congress has not always thought that the power to tax implied the power to regulate or destroy. In 1892 a bill passed one House of Congress, commonly known as the "Hatch Anti-Option Bill," which—like the present act—excepted from its provisions contracts for future delivery of grain when made by farmers. It imposed a tax of 20 cents a bushel on all other contracts for the future delivery of grain, required every person engaged in the business of making such contracts to take out a license, and required that the terms of all such contracts should be in writing, and be recorded in books. The purpose was, by the size of the tax, to suppress all future trading. But it was defeated in the Senate, largely by the arguments against its constitutionality. One of these was by Senator (afterwards Chief Justice) White, who argued

that the bill was "flagrantly unconstitutional legislation." 39 Cong. Rec. 6513, 6515–6517.

This court was not yet decided that where, as here, the law does not profess to be solely a taxing measure, but by its title and its terms is also a law regulating something which it is beyond the power of Congress to regulate, the statute must be sustained under the taxing power. To so hold would be to shut one's eyes to the real purpose of the law, when Congress had disclosed that motive and purpose in the terms of the statute.

Distinguishing: *McCray* v. *United States,* 195 U. S. 27; *United States* v. *Dewitt,* 9 Wall. 41; *License Tax Cases,* 5 Wall. 462; *United States* v. *Doremus,* 249 U. S. 86, 93.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, *Mr. R. W. Williams,* and *Mr. Fred. Lees* were on the brief, for appellees.

"Trading in futures" and the evils attendant thereupon are subjects with which both legislative and judicial bodies have long been familiar. If extraneous light for the proper interpretation of the statute is helpful, the "history of the times" or "the environment at the time of the enactment of a particular law—that is, the history of the period when it was adopted"—may be resorted to. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

As to the history and purposes of the act see: Report of Federal Trade Commission on the Grain Trade, September 15, 1920, vol. I, p. 315; Report, Senate Committee on Agriculture, 67th Cong., 1st sess., Sen. Rep. No. 212; Appendix D, statement of Senator Capper, August 9, 1921, 61 Cong. Rec., pp. 5220–5227.

The court has long been familiar with the organization of the Chicago Board of Trade and its methods of trans-

acting business. *Nicol* v. *Ames,* 173 U. S. 509; *Clews* v. *Jamieson,* 182 U. S. 461; *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236; *Chicago Board of Trade* v. *United States,* 246 U. S. 231. The Supreme Court of Illinois has frequently considered the same subjects. *Pickering* v. *Cease,* 79 Ill. 328; *Lyon* v. *Culbertson,* 83 Ill. 33; *Pearce* v. *Foote,* 113 Ill. 228; *Cothran* v. *Ellis,* 125 Ill. 496; *New York & Chicago Grain & Stock Exchange* v. *Board of Trade,* 127 Ill. 153; *Schneider* v. *Turner,* 130 Ill. 28; *Soby* v. *People,* 134 Ill. 66; *Central Stock Exchange* v. *Board of Trade,* 196 Ill. 396; *Weare Commission Co.* v. *People,* 209 Ill. 528, affirming 111 Ill. App. 116; *Board of Trade* v. *Dickinson,* 114 Ill. App. 295.

The motives of Congress in laying the tax and fixing the amount of it may not be inquired into. *McCray* v. *United States,* 195 U. S. 27, 59; *Hammer* v. *Dagenhart,* 247 U. S. 251, 276; *Treat* v. *White,* 181 U. S. 264, 269; *Fletcher* v. *Peck,* 6 Cr. 87, 130, 131; *Lottery Cases,* 188 U. S. 321. In the last cited case the commerce power was used to discourage gambling in lotteries as the taxing power is now used to discourage gambling in the greatest staple of commerce.

The fact that the tax may be burdensome even to the extent of causing the discontinuance of the particular business affected will not influence the court in reaching its judgment. *Patton* v. *Brady,* 184 U. S. 608, 623; *Spencer* v. *Merchant,* 125 U. S. 345, 355; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48.

The provision for admission to membership in the Board of Trade of a representative of a coöperative association is not a taking of property without due process of law.

The Future Trading Act is essentially a taxing statute. This is not less so even if the court assumed that the tax was prohibitive, but there is nothing before the court which would justify the belief that the tax is prohibitive.

The provisions, other than that which imposes the tax, are merely a method of classification. The power to classify subjects for taxation, in order to determine when the tax is imposed and when it is not, is certainly as great or greater than the like power of classification in the exercise of any other constitutional power. This being so, the propriety of the classification in this instance is justified in the case of *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. See *McCray* v. *United States,* 195 U. S. 27, 61, 62; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 418; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Tanner* v. *Little,* 240 U. S. 369, 382; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48, 49.

Precedents for the classification made by the Future Trading Act are found in other statutes, the constitutionality of which has been upheld by this court. The oleomargarine tax; the tax on sugar refineries, excepting farmers and planters grinding and refining their own molasses; the tax on state bank notes, inapplicable to national bank notes; the tax on phosphorus matches but not on other matches; the tax on sales of boards of trade but not sales made elsewhere.

The tax is not a direct tax upon the property but a tax on the privilege of selling the property for future delivery. *Nicol* v. *Ames,* 173 U. S. 509, 519, 520; *Thomas* v. *United States,* 192 U. S. 363, 371.

The tax is uniform throughout the United States and therefore within the constitutional requirement.

For a hundred years the use of the taxing power has not been limited to the raising of revenue alone, but, through the protective tariff, has been employed to encourage industries in this country. In the application of the tariff, Congress has looked to the "general welfare" of the country, as is done in the case of the Future Trading

Act, and not merely to the raising of revenue. In laying a tax, Congress necessarily uses discretion, imposing the burden upon those objects which are least useful or valuable to the public, or perhaps even hurtful to its interests, thereby aiding and encouraging those objects which are of greater use or value to the public. The use of the taxing power to promote the moral welfare of the nation—as the heavy duties on liquors or tobacco—is as old as the taxing power. The tax imposed by the Future Trading Act puts the burden upon the least necessary and perhaps the harmful transactions affecting the grain market of the country, and at the same time provides for the making of the transactions necessary to the growers and users of grain.

Even though the tax may be heavy enough to cause discontinuance of the present manner of conducting the business, still a reasonable method of preserving the business, and one which Congress believes is for the public welfare, is provided. The price of cash grain is influenced by quotations on the future markets. If, for reasons peculiar to exchange methods and transactions, the price of futures is depressed unduly, as frequently happens, by conditions not in anywise connected with the total available supply of grain or the demand therefor, an indefensible economic and commercial condition arises, harmful to all persons owning or dealing in cash grain, including not only the farmer, but the grain merchant as well. That the taxing power may be used in this way is well settled. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 49.

Precedents are to be found in the Cotton Futures Act, August 11, 1916, 39 Stat. 446, 476; the Warehouse Act, August 11, 1916, 39 Stat. 486; the Cotton Futures Act (as originally enacted,) August 18, 1914, 38 Stat. 693, upheld in *Hubbard* v. *Lowe,* 226 Fed. 135, 137.

The supertax is not a new device in the history of our legislation. It was as long ago as 1866 applied to the

circulation of state bank notes (14 Stat. 146); in 1886, to the sale of artificially colored oleomargarine (24 Stat. 209; 32 Stat. 193), and in 1912, to the manufacture of phosphorus matches (37 Stat. 81). The first of these two statutes was sustained in *Veazie Bank* v. *Fenno,* 8 Wall. 533, and the second in *McCray* v. *United States,* 195 U. S. 27.

The taxing power of Congress is not limited to the purpose of raising revenue. Story, Const., §§ 965, 973.

Congress could lay a tax on the privilege of doing a warehouse business and except warehouses operated under federal license, as it did by the Warehouse Act of August 11, 1916. The Future Trading Act does no more than this except that the two provisions—the laying of the tax and the means of avoiding it—are combined in one act. The State is still left free to legislate as it pleases with reference to future trading. Designation as a contract market would not authorize the Board of Trade or its members to violate any state law; on the contrary, they would have to comply with it. See *United States* v. *Doremus,* 249 U. S. 86, 92.

The Future Trading Act may readily be sustained as an act to regulate commerce. *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 247; *Otis* v. *Parker,* 187 U. S. 606, 609; *Chicago Board of Trade* v. *United States,* 246 U. S. 231.

An exchange which deals in the purchase and sale of more grain than the whole world either produces or consumes must have a very real relation to interstate and foreign commerce. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282.

Mr. Chief Justice Taft, after making the foregoing statement of the case, delivered the opinion of the court.

The first question for our consideration is whether, assuming the act to be invalid, the complainants on the

face of their bill state sufficient equitable grounds to justify granting the relief they ask. We think it clear that within the cases of *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 10; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Dodge* v. *Woolsey*, 18 How. 331, 341, 346, the averments of the bill entitle them to relief against the Board of Trade of Chicago, its president and its directors. The bill shows that the act, if enforced, will seriously injure the value of the Board of Trade to its members, and the pecuniary value of their memberships. If the law be unconstitutional, then it was the duty of the Board of Directors to bring an action to resist its enforcement. It is quite like the case of *Dodge* v. *Woolsey*, in which the court said with respect to a similar refusal (p. 345):

"Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not 'an error of judgment merely,' and cannot be so called in any case."

The averments of the bill are that the Board of Directors refused the request to bring the suit because they feared to antagonize the public officials whose duty it was to construe and enforce the act, and not because they thought the act was constitutional. They must be taken to have admitted this by the motion to dismiss.

In *Wathen* v. *Jackson Oil & Refining Co.*, 235 U. S. 635, and in *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, thought to cast doubt upon the sufficiency of the averments made herein to sustain complainants' right to file the bill, there had been no request made of the corporation or the Board of Directors to bring suit and no refusal, both of which are present in the case at bar.

A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of § 3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S. 123; *Ohio Tax Cases*, 232 U. S. 576, 587; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 82. Does § 3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge* v. *Brady*, 240 U. S. 122, 126, that § 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge* v. *Osborn*, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make § 3224 inapplicable. The right to sue for an injunction against the

taxing officials is not, however, necessary to give us jurisdiction. If they were to be dismissed under § 3224, the bill would still raise the question here mooted against the Board of Trade and its directors. The Solicitor General has appeared on behalf of the Government and argued the case in full on all the issues. Our conclusion as to the validity of the act will, therefore, have the same effect as did the judgment of the court in respect to the income tax law in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, to which the Government was not a party but in which the Attorney General on its behalf was heard as *amicus curiae*.

The act whose constitutionality is attacked is entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and *providing for the regulation of boards of trade,* and for other purposes." (Italics ours.)

Section 4 imposes a tax, in addition to any imposed by law, of 20 cents a bushel involved in every contract of sale of grain for future delivery, with two exceptions. The first exception is where the seller holds and owns the grain at the time of sale, or is the owner or renter of land on which the grain is to be grown, or is an association made of such owners or renters. The second exception is where such contracts are made by or through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market, and are evidenced by a memorandum containing certain particulars to be kept for a period of three years or as much longer as the Secretary of Agriculture shall direct and to be open to official inspection. This tax on sale contracts for future delivery is in addition to a tax now imposed by the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057, 1136, Title XI, Schedule A, of 2 cents on every hundred dollars in value of such sales.

Section 5 authorizes the Secretary of Agriculture to designate boards of trade as contract markets when and

only when such boards comply with certain conditions and requirements, as follows:

a. When located at a terminal market where cash grain is sold in sufficient amount and under such conditions as to reflect the value of the grain in its different grades, and where there is recognized official weighing and inspection service;

b. When the governing body of the Board adopts rules and enforces them, requiring its members to make and keep the memorandum of all transactions in grain whether cash or for future delivery as directed by the Secretary;

c. When the governing body prevents the dissemination by the Board or any member thereof of false, misleading, or inaccurate reports, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

d. When the governing board provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

e. When the governing body admits to membership on the Board and all its privileges any authorized representative of any lawfully formed and conducted coöperative associations of producers having adequate financial responsibility; "*Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among bona fide members of any such cooperative association."

f. When the governing body of the Board shall make effective the orders and decisions of the commission appointed under § 6.

Section 6 provides that any board of trade desiring to be designated as a contract market shall apply to the Secretary of Agriculture, with a showing that it complies with the conditions already stipulated in § 5, and a sufficient assurance of future compliance. The section ap-

points a commission of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, who may, after due notice to the officers of the Board, suspend for six months or revoke the designation of any board as a contract market, upon a showing of failure to comply with the requirements of § 5.

Provisions are made for an appeal from this order to the Circuit Court of Appeals, and appeal is granted to the commission from the refusal of the Secretary of Agriculture, upon application, to designate any board as a contract market.

Section 6 also provides that if the Secretary of Agriculture has reason to believe that any person is violating any provisions of the act or is attempting to manipulate the market price of grain in violation of the provisions of § 5, or any of the rules or regulations made pursuant to its requirements, he may have served upon such persons a complaint for a hearing before a referee, to take evidence, to be transmitted to the Secretary as chairman of the commission, and the commission may, after a finding of guilt, issue an order requiring all contract markets to refuse such person trade or privileges. This order may be revised in the Circuit Court of Appeals.

Section 7 provides that the tax imposed shall be paid by the seller and shall be collected either by affixing stamps or by such other method as may be prescribed by the published regulations of the Secretary of the Treasury.

Section 10 provides a penalty for any person who shall fail to evidence the contract of sale he makes by memorandum or to keep the record of it, or to pay the tax as provided in §§ 4 and 5, with a penalty of 50 per cent. of the tax and a punishment as a misdemeanor and a fine of $10,000, with imprisonment for one year or both and the costs of the prosecution.

It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. As the bill shows, the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome. The tax upon contracts for sales for future delivery under the Revenue Act is only 2 cents upon $100 of value, whereas this tax varies according to the price and character of the grain from 15 per cent. of its value to 50 per cent. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. Even if we conceded, as we do not, that the keeping of a memorandum and of the particulars of each sale as a record for three years or more, not only of contracts for future delivery, but also of cash sales, neither of which are subject to tax in designated boards of trade, would help taxing officers in any way to detect the evasions of this tax outside of such boards, no such construction can be put upon the provisions which require the board of trade to prevent a dissemination of false or misleading reports or to prevent the manipulation of prices or the cornering of grain or which enforce the admission to membership in the Board of the representatives of co-operative associations of producers or the abrogation of rules against rebate as applied to such representatives. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all " futures " to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the pro-

visions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by the commission of violations of these regulations, with the withdrawal by the commission of the designation of the Board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

Our decision, just announced, in the *Child Labor Tax Case, ante,* 20, involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like *Veazie Bank* v. *Fenno,* 8 Wall. 533, and *McCray* v. *United States,* 195 U. S. 27, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the State, with a heavy exaction to promote the efficacy of such regulation. We there say (pp. 37, 38):

"Out of a proper respect for the acts of a coördinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of

public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing can not be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I.

We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State. *House* v. *Mayes,* 219 U. S. 270; *Brodnax* v. *Missouri,* 219 U. S. 285. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not

introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, it was held that contracts for the sale of cotton for future delivery which do not oblige interstate shipments are not subjects of interstate commerce, and that a state tax on persons engaged in buying and selling cotton for future delivery was not a regulation of interstate commerce or beyond the power of the State.

It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. *United States* v. *Ferger*, 250 U. S. 199. It was upon this principle that in *Stafford* v. *Wallace*, 258 U. S. 495, we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.

So, too, in *United States* v. *Patten*, 226 U. S. 525, it was held that though this court, as we have seen, had decided in the *Ware & Leland Case* that mere contracts for sales of cotton for future delivery which did not oblige interstate shipments were not interstate commerce, an indictment charging the defendants with having cornered the whole cotton market of the United States by excessive purchases of cotton for future delivery and thus conspired to restrain, obstruct and monopolize interstate

commerce in cotton, was sustained under the first and second sections of the Sherman Anti-Trust Law. This case, like *Stafford* v. *Wallace,* followed the principles of *Swift & Co.* v. *United States,* 196 U. S. 375. But the form and limitations of the act before us form no such basis as those cases presented for federal jurisdiction and the exercise of the power to protect interstate commerce. Our conclusion makes it necessary for us to hold § 4 and those parts of the act which are regulations affected by the so-called tax imposed by § 4, to be unenforceable.

Section 11 of this act directs that " if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States* v. *Reese,* 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

" We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be deter-

mined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Trade-Mark Cases, 100 U. S. 82; *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126.

To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

There are sections of the act to which under § 11 the reasons for our conclusion as to § 4 and the interwoven regulations do not apply. Such is § 9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion. It provides:

" That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as ' privileges,' ' bids,' ' offers,' ' puts and calls,' ' indemnities,' or ' ups and downs.' "

This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling or offer full opportunity for it and does not seem to be associated with § 4. Such a tax without more would seem to be within the congres-

sional power. *Treat* v. *White,* 181 U. S. 264; *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363. But these are questions which are not before us and upon which we wish to express no definite opinion.

The injunction against the Board of Trade and its officers, and the injunction against the Collector of Internal Revenue and the District Attorney, should be granted, so far as § 4 is concerned and the regulations of the act interwoven within it. The court below acquired no personal jurisdiction of the Secretary of Agriculture and the Commissioner of Internal Revenue by proper service and the dismissal as to them was right.

The decree of the District Court is reversed, and the cause is remanded for further proceedings in conformity to this opinion.

MR. JUSTICE BRANDEIS, concurring.

I agree that the Future Trading Act is unconstitutional; but I doubt whether the plaintiffs are in a position to require the court to pass upon the constitutional question in this case. It seems proper to state the reasons for my doubt.

In essence this is a suit by eight members of the Chicago Board of Trade to prevent its directors and officers from accepting the offer of the Government to designate it a "contract market." The act does not require the corporation to become a "contract market." If—and only if—it elects to become such, must its rules, and the conduct of its business, conform to requirements prescribed by the act or the Secretary of Agriculture. In that event its members may likewise be subjected individually to some slight additional trouble and expense; for the Secretary of Agriculture may require a more detailed record of transactions than is ordinarily kept and may require that the records be preserved three years. Members may, in that event, also suffer individually some loss of business

through the competition of representatives of producers coöperative organizations who are to be admitted to the privileges of the exchange if it becomes a " contract market." On the other hand, by acceptance of the designation as a " contract market " members of the Board of Trade would be relieved from all danger of liability for taxes on their future trading; and if the act is enforced generally, the profits of the individual members may increase largely; because the general public, being debarred by the act from gambling on futures in bucket shops, will naturally turn to the few " contract markets " when desiring to speculate in futures.

To decide whether the corporation and its members will be benefited or injured by its becoming a " contract market " is a matter calling for the exercise of business judgment. The charter vests in the directors and managers broad powers; and, so far as appears, there is nothing in the by-laws or in the nature of the action proposed which prevents their exercising freely their judgment in this, as in other matters affecting the business. No radical or fundamental change in the object, character or methods of the business of the corporation or of its members is involved. There is no allegation that the directors and managing officers are incapacitated from acting because their interests are adverse to the corporation or its members; or that their action should be interfered with because they are purposing to exercise their powers fraudulently or otherwise in violation of their trust. Nor is it alleged that efforts have been made to control their action by calling a meeting of the 1600 members or that such efforts would be vain, or that there is an emergency requiring interposition of a court of equity. The requirements of Equity Rule 27 are not complied with by alleging simply that plaintiffs requested the Board of Directors " to institute a suit to have said Future Trading Act adjudged unconstitutional " and that the plaintiffs " are informed and

believe that said Board of Directors refused said request because they fear to antagonize the public officials whose duty it is to construe and enforce said Act."

That under such circumstances a stockholder's bill is fatally defective, although it was brought to restrain the enforcement of a statute alleged to be unconstitutional, is well settled; and the rule has been recently applied. *Wathen* v. *Jackson Oil & Refining Co.*, 235 U. S. 635; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455. In the case at bar, plaintiffs' case is still weaker than it was in those cited. For aught that appears most of the members of the exchange, as well as its directors and managing officers, may be of opinion that they will be benefited by the enforcement of the act. Nothing is better settled than that an individual may acquiesce in or waive an admitted infringement of a constitutional right; and I am not aware of any rule of law which requires a corporation, upon request of a minority stockholder, to play the knight-errant and tilt at every statute affecting it, which he believes to be invalid. A corporation, like an individual, may refrain from embarking in litigation to enforce even a clear right of action if litigation is deemed inadvisable; and it is immaterial, in this respect, whether the right of action arises at common law or under a statute or under a constitutional provision. Nor do I know of any reason why the disadvantages which may flow from "antagonizing public officials" may not properly be considered by directors and managing officers of a corporation in determining whether to embark in litigation. The fear of antagonizing customers or other business connections or the public is a motive which quite commonly and properly influences the conduct of men.

If, after the corporation has become a "contract market" its directors and managing officers should seek to subject the plaintiffs, as members, to unauthorized restrictions or should attempt to deprive them of vested rights,

relief may, of course, be had in a proper proceeding. And likewise if the plaintiffs now have, as individuals, rights entitled to protection, there are appropriate remedies. But this is not such a suit. Here members of a corporation seek to enforce alleged derivative rights; and I doubt whether they have shown that they are in a position to do so.

AMERICAN SMELTING AND REFINING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 221. Argued April 25, 1922.—Decided May 15, 1922.

1. A contract made during war for war material to be delivered by a specified date, which was as early as delivery would be practicable under the circumstances, is within the exception of Rev. Stats., § 3709, dispensing with advertising for purchases when public exigencies require immediate delivery. P. 78.
2. The formalities of Rev. Stats. § 3709, are to protect the United States, not the seller. P. 78.
3. The fact that an offer and an acceptance by correspondence are both made in express contemplation of a more formal document to follow does not prevent their constituting a contract. P. 78.
4. At a time when a price for copper to the Government had been fixed under Act of August 29, 1916, c. 418, § 2, 39 Stat. 649, claimant received from the War Department a proposal in writing for delivery of a stated amount at that price before a certain date under shipping orders to be supplied by the Department and accepted it in writing at the Department's request and upon its advice that no payment could be made without such acceptance. *Held:*

(a) A contract, and not a requisition under the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 213, which authorized, in addition to purchase, the obtaining of material by compulsory orders, for a fair and just compensation. P. 78.

(b) The claimant, having completed deliveries after alleged delays in shipping orders and after the government price had been increased under the Act of August 29, 1916, *supra*, could not, in respect of such deliveries, claim freedom from the contract because

of such delays and recover the difference between the new and contract prices upon the theory that the deliveries were compulsory and called for a fair compensation under the National Defense Act and the Fifth Amendment. P. 79.

(c) Damages for the Government's delay in performing, could not be had upon a petition framed on the theory of a compulsory requisition. P. 79.

(d) The case was not within the Act of March 2, 1919, c. 94, 40 Stat. 1272, authorizing relief to contractors furnishing supplies under agreements not executed in the manner provided by law. P. 79.

55 Ct. Clms. 466, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition on demurrer.

Mr. William B. King and *Mr. George A. King,* with whom *Mr. Charles Earl* and *Mr. George R. Shields* were on the brief, for appellant.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for $512,515.50, being the price of 20,500,620 pounds of copper at twenty-six cents a pound less payments received at twenty-three and a half cents. The petition was dismissed by the Court of Claims on demurrer. The facts alleged are as follows. The Government had some correspondence with the United Metals Selling Company ending in an order or proposal for 30,000 metric tons of copper for the French Government to be delivered on or before June 1, 1918. To this the Company replied on March 26, 1918, that the Copper Producers Committee had divided the handling of copper and had given the export business to the American Smelting & Refining Company. The letter requested that the order be changed to apply to the last named company and concluded " they tell us that it will quite fit in with their operations to handle this present order along

with the other shipments." Thereupon, on March 28, 1918, a letter was written by the Ordnance Department to the American Smelting & Refining Company, "to advise you that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½c. per pound net, f. o. b. New York basis. Deliveries are to be completed on or before June 1, 1918"; shipping instructions to be taken up with the Supply Division, Ordnance Department; with further particulars not material and ending, "Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days." The representative of the claimant seems to have delayed an answer in the hope of adjusting one or two details but on April 11, wrote "We have your favor March 28th . . . and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future." The copper except the 20,500,620 pounds, was delivered before July 2, 1918, has been paid for and no question is raised about it. But it was practically impossible to deliver this last amount until after that date and no shipping orders for it were received until a later time. It was delivered finally and the claim for the advanced price is based upon the facts and arguments that we shall state.

At the time when the order was accepted the Price-Fixing Committee of the War Industries Board, an agency of the Council of National Defence, had fixed the price of copper at 23½ cents per pound f. o. b. New York, under the Act of August 29, 1916, c. 418, § 2, 39 Stat. 619, 649, and the authority of the President. On July 2, 1918, the price was advanced to 26 cents per pound. The National Defence Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213, had authorized the President in time of war "in addition to the present authorized methods of purchase or procurement, to place an order" for material required;

made compliance with such orders obligatory under a penalty, and gave them precedence. The compensation paid was to be fair and just. The position of the claimant is that, although the language of contract was used, it was yielding to the requirements of the statute and is entitled to the fair price that the statute promised. The fair price, it contends, for copper delivered after the change of July 2, is twenty-six cents, because the delay is alleged to have been due to the failure of the Government to send shipping orders and to the fact that further deliveries were made impossible for the time by the Government's appropriating all the copper available to other uses. It also argues that there was no valid contract, since the agreement was not made by advertising and was not within the exception when the public exigencies require immediate delivery. Rev. Stats., § 3709.

We may lay the latter objection on one side. There can be no question that the war created a public exigency and it would be going far to deny that the contract was for a delivery as immediate as was practicable for the subject-matter. Moreover the statutory requirements were for the protection of the United States, not of the seller. *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88. Of course the expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had. The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did not discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered. As was pointed out by the Court of Claims, the acceptance was sent because

the claimant was advised by the Government that no payment could be made until the claimant had accepted in writing the Government's proposal, whereas no acceptance was necessary if the order was a compulsory requisition. We are of opinion that the claimant must stand upon the letters of March 28 and April 11.

The claimant argues that under its contract it was set free by the delay in shipping orders, and that although it did not refuse to proceed on that account, the omission should be credited to patriotism not to a waiver of legal rights. But whatever the motives for its conduct the claimant kept the contract on foot. It even is said to have requested to be allowed to continue deliveries after June 1. Its claim if any must be for damages on the ground that the United States did not perform its part of the contract on time. Such a claim is not necessarily waived by completing performance. *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159, 164. But the petition is framed on the theory that there was no contract but a requisition under the above mentioned Act of June 3, 1916, c. 134, § 120, and that the claimant is entitled to just compensation by that section and by the Fifth Amendment to the Constitution. This we hold to be a mistake. Whether any claim for damages could be urged is not before us; the petition discloses grounds for doubt at least. Our judgment excludes any remedy under the Act of March 2, 1919, c. 94, 40 Stat. 1272, providing for supplies and services furnished under agreements not executed in the manner prescribed by law. We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made.

Judgment affirmed.

GROGAN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF MICHIGAN, ET AL. *v.* HIRAM WALKER & SONS, LTD.

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

ANCHOR LINE (HENDERSON BROTHERS), LTD. *v.* ALDRIDGE, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK.

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

Nos. 615, 639. Argued April 19, 1922.—Decided May 15, 1922.

The transportation in bond from Canada through the United States of whisky intended as a beverage, destined to a foreign country, and transshipment of whisky from one British ship to another in a port of the United States, are forbidden by the Eighteenth Amendment and the National Prohibition Act, which, in this regard, supersede the provisions of Rev. Stats., § 3005, as amended, and Art. XXIX of the Treaty with Great Britain of May 8, 1871, (if it was not previously abrogated), authorizing transit of foreign merchandise through this country without payment of duty. P. 88.

275 Fed. 373, (No. 615), reversed.

No. 639, affirmed.

APPEALS from decrees of the District Court, the first granting, and the second refusing, an injunction, in suits to prevent interference with transportation and transshipment of whisky.

Mr. Assistant to the Attorney General Goff, with whom *Mr. Abram F. Myers,* Special Assistant to the Attorney General, was on the brief, for appellants in No. 615 and appellee in No. 639.

The Eighteenth Amendment and the Prohibition Act apply to and prohibit the transshipment of intoxicating liquors for beverage purposes in or through the United States.

While the ultimate object is the prevention of the use, the immediate purpose is the destruction of all traffic in or dealing with the interdicted commodities.

This follows from the language employed. Neither the amendment nor the act in terms forbids the use of intoxicating liquors; they are concerned merely with the incidents of ownership, such as the manufacture, sale, transportation, possession, etc. *Street* v. *Lincoln Safe Deposit Co.*, 254 U. S. 88, 95.

The reason for this is that a more effective method of eradicating the evil of use is by preventing the means by which it comes into being, than by direct inhibition on the use.

The amendment and the act clearly were intended to prohibit the possession or transportation of liquor for beverage purposes, whether for consumption within the United States or without. It is impossible to understand why the proviso exempting liquor in transit through the Panama Canal was made in § 20, Title III, while no similar clause was added to § 3, Title II, if Congress intended to exempt from the latter the transshipment of liquors.

Again, both the amendment and the act expressly prohibit the exportation of intoxicating liquors from the United States. Such prohibition is inconsistent with an intention to restrict their application to liquors intended for consumption in the United States. When the act was passed there were stored in bonded warehouses many millions of gallons of distilled spirits manufactured here strictly in accordance with law. Congress in forbidding the exportation of this legally acquired liquor could have been influenced only by apprehension of inevitable losses and diversions to unlawful uses attendant upon the transportation to seaboard.

The proceedings in Congress evidence the legislative intention to prohibit all possession and all transportation

except as specifically authorized. 58 Cong. Rec. 2449; Sen. Rep. 151; Title II, § 3. The transshipment or "in transit" conveyance of intoxicating liquor necessarily involves its "possession" as well as its "transportation."

United States v. *Gudger,* 249 U. S. 373, and *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88, distinguished.

Unlike *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, there is involved in the present cases no attempt to apply the laws of the United States to acts committed in a foreign country. Cf. *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348.

The Prohibition Act, in its application to the transshipment of intoxicating liquor for beverage purposes, is constitutional. Congress in legislating for the enforcement of the amendment may provide all means reasonably necessary effectively to suppress the prohibited acts. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, 423; *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *Otis* v. *Parker,* 187 U. S. 606, 608, 609; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Ruppert* v. *Caffey,* 251 U. S. 264. And because of their noxious qualities all traffic in or dealing with intoxicating liquor may be absolutely suppressed. *Crane* v. *Campbell,* 245 U. S. 304, 307, 308.

Plaintiffs have not by proper allegations brought themselves within Art. XXIX of the Treaty with Great Britain of 1871; but in any event that article has been abrogated.

Section 3005, Rev. Stats., conferred no affirmative rights with respect to the transshipment of merchandise. Assuming that it did, it was superseded by the Prohibition Act so far as shipments of liquor are concerned.

Mr. Alfred Lucking for appellee in No. 615.

The bill alleges a case under the Treaty with Great Britain of 1871. Article XXIX of that treaty is still in full force.

There is in the National Prohibition Act no express repeal of Rev. Stats., § 3005; nor has there been a repeal of that section by implication, so far as intoxicating liquors are concerned. There is no inconsistency between § 3005, permitting transshipments through the United States from one foreign country to another, and the National Prohibition Act, which aims to prevent the manufacture and sale and in part the use of intoxicating beverages within the United States. Both may stand and be enforced. Repeals by implication are not favored.

No doubt Congress may pass a law breaking down this treaty, *pro tanto,* and withdrawing the rights which have so long obtained under it; but treaty rights should be regarded as inviolable and not be held to be impaired by subsequent legislation unless the intention of Congress is perfectly clear. *Chew Heong* v. *United States,* 112 U. S. 540, 549; *Frost* v. *Wenie,* 157 U. S. 59; *United States* v. *Gue Lim,* 176 U. S. 464; *United States* v. *Lee Yen Tai,* 185 U. S. 221; *Johnson* v. *Browne,* 205 U. S. 321.

The purpose of the Eighteenth Amendment and the Prohibition Act being to prohibit the use as a beverage within the United States, the prevention of shipping through in bond, duly sealed up and beyond the possibility of being used in the United States, is not within the spirit or purpose of either the amendment or the act. *United States* v. *Palmer,* 3 Wheat. 610; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

Not being within the spirit or purpose of the act, the act will not be construed to include the case. *Faw* v. *Marsteller,* 2 Cr. 10; *Taylor* v. *United States,* 207 U. S. 120; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459; *American Security Co.* v. *District of Columbia,* 224 U. S. 491, 495; *Lau Ow Bew* v. *United States,* 144 U. S. 47, 61; *United States* v. *Palmer,* 3 Wheat. 610.

Bringing into the United States for transshipment through the United States to another foreign country is

not an "importation." 27 Ops. Atty. Gen. 440; *McLean* v. *Hager,* 31 Fed. 602, 604, 605; *The Conqueror,* 166 U. S. 110, 115; *United States* v. *85 Head of Cattle,* 205 Fed. 679; *The Concord,* 9 Cr. 387. The cases just cited are also authority that the sending out of the same goods is not an "exportation." See also *Kidd* v. *Flagler,* 54 Fed. 369; *Swan & Finch Co.* v. *United States,* 190 U. S. 143; 17 Ops. Atty. Gen. 583. Nor is transportation through the United States from one foreign country to another a "transportation within" the United States. *United States* v. *Gudger,* 249 U. S. 373; *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88.

The practice in question is a separate and distinct act, recognized by the statutes and in congressional and departmental proceedings since 1866, as "conveyance in transit" or "transit in bond." Counsel for the Government contend that all "possession" is forbidden by § 3 of the act, and hence this practice is banned. But this is not so. Under the "conveyance in transit" practice, the possession is constructively and actually the possession of the United States, through its customs officers and its bonded carriers. U. S. Comp. Stats., 1916, §§ 5695, 5698–5700; *Seeberger* v. *Schweyer,* 153 U. S. 612, 613; *Hartranft* v. *Oliver,* 125 U. S. 528, 530; *Harris* v. *Dennie,* 3 Pet. 303, 304; Treasury Regulations, 1915, Art. 695.

The provision expressly excepting transportation through the Panama Canal has no application here. It is not connected with or a part of the sections now being interpreted. The rule "*expressio unius*" is only an aid to discovering the legislative intent when not otherwise manifest. It is never hard and fast. *United States* v. *Barnes,* 222 U. S. 518, 519; *Dwight* v. *American Co.,* 263 Fed. 318; 36 Cyc. 1122.

Mr. Lucius H. Beers, with whom *Mr. Franklin B. Lord* and *Mr. Allen Evarts Foster* were on the brief, for appellant in No. 639.

The Eighteenth Amendment and the National Prohibition Act do not purport to apply to the use of intoxicating liquor outside of the United States. It expressly appears from the amendment that it is to prevent the use of intoxicating liquors as a beverage only within the United States and territory subject to the jurisdiction thereof.

An intention ought not to be attributed to Congress to interfere with the use of liquor as a beverage outside of United States territory. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Milliken* v. *Pratt*, 125 Mass. 374.

Where Congress has intended to prevent the transshipment in American ports of merchandise moving from one foreign country to another, it has expressly provided to that effect.

A thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 458, 459; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 61; *Taylor* v. *United States*, 207 U. S. 120.

The transshipment here involved is not "transportation" within the prohibition of the amendment or of the act. *United States* v. *Gudger*, 249 U. S. 373; *Street* v. *Lincoln Safe Deposit Co.*, 254 U. S. 88. Nor is it "importation" or "exportation," as these words have heretofore been defined by the federal courts. *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 144; *Flagler* v. *Kidd*, 78 Fed. 341, 344; *United States* v. *85 Head of Cattle*, 205 Fed. 679, 681; *The Concord*, 9 Cr. 387, 388; 27 Ops. Atty. Gen. 440.

Even if it could be held that the transshipment here involved amounts legally to "importation" or "exportation," such transshipment does not constitute "importation" or "exportation" within the prohibition of the amendment or of the act. The Federal Government was seeking to prevent the use of alcoholic beverages by per-

sons subject to its jurisdiction. It is well known that this use of alcoholic beverages has been opposed partly on economic grounds, but also on moral grounds; and it would have put the United States in an unfortunate moral position if the amendment and act had still left it possible for Americans to ship to other countries beverages, the use of which was considered immoral and uneconomic in the United States. And it is therefore not surprising that the framers of the amendment and of the act made use of the words "exportation" and "export" so as to put the United States in a proper moral position in this regard.

The inherent character of this merchandise does not require its exclusion and Congress has provided that liquor may be imported for medicinal and other nonbeverage purposes.

A special federal statute has long existed permitting the transshipment in our ports of merchandise destined for a foreign country, and a general statute such as the Prohibition Act, does not repeal such a special statute "unless the repeal be expressed or the implication to that end be irresistible." Rev. Stats., § 3005. *Ex parte United States,* 226 U. S. 420; *Washington* v. *Miller,* 235 U. S. 422.

It is inherently improbable that Congress can have intended to prohibit these transshipments when it framed the Prohibition Act. These transshipments are not our commerce; our interference with them is an interference with the commerce of other nations; and we have every reason to assume that this interference will be resented and might well lead to action by foreign countries which would seriously affect American exports.

If the Prohibition Act be construed as prohibiting transshipments of the kind here involved, it is unconstitutional. It cannot be sustained under the commerce clause. *Trade-Mark Cases,* 100 U. S. 82, 96. A statute enacted pursuant to a constitutional amendment which

authorizes Congress to enact laws for the enforcement of the rights secured by such amendment, is void if it is broader than the amendment which it is designed to enforce. *United States* v. *Reese,* 92 U. S. 214; *Karem* v. *United States,* 121 Fed. 250. A construction prohibiting these transshipments ought, therefore, to be avoided.

Laws of Congress are always to be construed to conform to the provisions of a treaty, if possible to do so without violence to their language. Article XXIX of the Treaty of 1871 with Great Britain, providing for the transshipment of merchandise without the payment of duties, was not repealed in 1883, and is still in force. *United States* v. *43 Gallons of Whiskey,* 108 U. S. 491, 496; *Lem Moon Sing* v. *United States,* 158 U. S. 539, 549.

Mr. Justice Holmes delivered the opinion of the court.

These cases raise the question whether the Constitution and the Volstead Act prohibit the transportation of intoxicating liquors from a foreign port through some part of the United States to another foreign port. The first is a bill by a corporation of Canada against the Collector of Customs and the Collector of Internal Revenue for the Eastern District of Michigan to prevent their carrying out the orders of the Treasury Department to stop the plaintiffs from shipping whiskey intended as a beverage from Canada by way of Detroit in bond through the United States to Mexico, Central or South America. The irreparable injury that will be done to the plaintiff's business is fully shown, and the decision depends on the single question stated above. An injunction was granted by the District Court. 275 Fed. 373. The second case is to prevent similar interference with the transshipment of whiskey from one British ship to another in the harbor of New York. Upon a consideration of the same general questions an injunction was refused by the District

Court for the Southern District of New York, October 21, 1921.

The plaintiffs rely upon Rev. Stats., § 3005, as amended, and Article XXIX of the treaty, concluded with Great Britain on May 8, 1871, 17 Stat. 863. By the former, an exemption in a revenue act, merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house and conveyed in transit through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe. See *United States* v. *Yuginovich,* 256 U. S. 450. By the treaty, for the term of years mentioned in Article XXXIII merchandise arriving at the ports of New York, Boston and Portland, and other ports specially designated by the President, and destined for British possessions in North America, may be entered at the customs house and may be conveyed in transit without the payment of duties through the territory of the United States under such rules, &c., as the Government of the United States may prescribe; and under like rules, &c., from such possessions through the territory of the United States for export from the said ports of the United States. President Cleveland and President Harrison in messages to Congress expressed the opinion that Article XXIX had been abrogated. In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But makeweights of that sort are not enough to affect the result here.

On the other side is the Eighteenth Amendment forbidding " the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all

territory subject to the jurisdiction thereof for beverage purposes." There is also the National Prohibition Act of October 28, 1919, c. 85, Title II, § 3, 41 Stat. 305, 308, which provides that, except as therein authorized, after the Eighteenth Amendment goes into effect no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor. All the provisions of the act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some

of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, § 20, 41 Stat. 322.

Street v. *Lincoln Safe Deposit Co.*, 254 U. S. 88, was decided on the ground that the liquors were in the strictest sense in the possession of the owner (254 U. S. 92, 93, see *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 537), and that to move them from the warehouse to the dwelling was no more transportation in the sense of the statute than to take them from the cellar to the dining room; whereas in *Corneli* v. *Moore*, 257 U. S. 491, they were not in the owner's possession and required delivery and transportation to become so. In *United States* v. *Gudger*, 249 U. S. 373, the only point was that transportation through a State was not transportation into it within the meaning of the statute before the court. None of these cases has any bearing upon the question here. We are of opinion that the decree in *Grogan* v. *Hiram Walker & Sons, Ltd.*, should be reversed, and the decree in *The Anchor Line, Ltd.*, v. *Aldridge*, affirmed.

615. Decree reversed.
639. Decree affirmed.

Mr. Justice McKenna, with whom concurred Mr. Justice Day and Mr. Justice Clarke, dissenting.

I am unable to concur in the opinion and judgment of the court.

80. McKENNA, DAY and CLARKE, JJ., dissenting.

The first case presents the right to transport intoxicating liquor in bond through the United States in accordance with certain rights given by the Revised Statutes and a treaty with Great Britain, notwithstanding the Eighteenth Amendment of the Constitution and its auxiliary legislation, the Volstead Act.

The second case concerns the transshipment of like liquor from one British ship to another British ship in New York harbor. In the first case it was decided that the right of transportation still exists. 275 Fed. 373. In the second case a prohibitive effect was ascribed to the Amendment and the legislation.

The factors of decision are the policies constituted by the amendment to the Constitution, the statute enacted in aid of it, other statutes preceding it, and a treaty of the United States with Great Britain. And their relation is to be determined, and range. What shall be the test of determination? The words of the instruments? These, indeed, may make individuality, and express purposes, but if the purposes collide, which must give way? And upon what considerations? It is the view of the court that the purposes do collide and the court assigns prevailing force to the Eighteenth Amendment and the Volstead Act—the reform they instituted having annulled § 3005 of the Revised Statutes as amended, and Article XXIX of the treaty with Great Britain, May 8, 1871.

I am unable to assent. The factors are not in antagonism but each has a definite purpose consistent with the purpose of every other.

I consider first the Eighteenth Amendment. Its provision is that one year from the date of its ratification, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes, is prohibited.

It will be observed that the Amendment provides against the manufacture, sale and certain movements of intoxicating liquors. Those movements are its transportation within, its importation into, and its exportation from the United States. The last two may be put immediately out of consideration. The liquor in the cases at bar, neither in common nor legal sense, was an importation into the United States or exportation from it.[1] Importation and exportation are constituted of something more than ingress of the intoxicants, under bond, at one border of the country and egress, under bond, at another border, the purpose being for passage only through the country and having as impalpable effect upon it as if the passage were by airship. Still less, if I may suppose the impossible, is the transshipment of liquors in New York harbor from one British ship to another under the supervision of revenue officers, the importation or exportation of the liquors into or from the United States.

The other movement is a case of *transportation within the United States* in the literal sense of the words, but this court in *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88, has limited its apparent universality by accommodating it to conditions and preëxistent rights, and this against the executive and reforming zeal of a public officer sustained by the judgment of a District Court, thereby applying the rule, denominated by Mr. Justice Brewer as "familiar," and variously illustrated by him, in *Holy Trinity Church* v. *United States,* 143 U. S. 457, that a statute should not be taken at its word against its spirit, and intention. The rule has had illustration since and this court following it, and its sanction in common sense, declared

[1] 27 Ops. Atty. Gen. 440; *McLean* v. *Hager,* 31 Fed. 602; *The Conqueror,* 166 U. S. 110, 115; *United States* v. *85 Head of Cattle,* 205 Fed. 679; *The Concord,* 9 Cranch, 387; *Swan & Finch Co.* v. *United States,* 190 U. S. 143.

against the destructive revolution urged, based upon the literal meaning of words. The court decided that it was not " unlawful to have or possess " (the words of the Volstead Act) liquors, and that *transportation* thereof from a room leased in a public warehouse, where they were stored, to the dwelling house of the owner of them for consumption for himself and family was not adverse to the act or to the Eighteenth Amendment. The decision was only possible by rejecting the literal meaning of the words unlawful " to have or possess " intoxicating liquors or the " transportation " of them " within the United States " and accommodating those words to the spirit and intention of their use.

In *Corneli v. Moore,* 257 U. S. 491, a distinction between a room leased in a public warehouse and a public warehouse was made, and the *transportation* from the latter was decided to be prohibited. In other words, it was decided that liquor in a public warehouse was not in possession of the owner of the liquor and that, therefore, its removal from the warehouse was a transportation of it within the United States from one place to another. The intention of the word was satisfied and the case is consistent with *Street* v. *Lincoln Safe Deposit Co.*

But in *United States* v. *Gudger,* 249 U. S. 373, it was decided that the *transportation* of liquor through a State was not *transportation* into it, within the meaning of a provision in the Post Office Appropriation Bill. To me the case is decisive of those at bar.

With the suggestion of it and the other cases in our minds, let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the Volstead Act. It is certainly the first sense of every law that its field of operation is the country of its enactment. *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347. And this is true of the Eighteenth Amendment and the Volstead Act, and necessarily, they get their meaning

from the field and purpose of their operation—from the conditions which exist in that field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States, and "for beverage purposes." The importance of the purposes suggests the emphasis of italics, and the Volstead Act is at pains to declare that it shall be construed "to the end that the use of intoxicating liquor as a beverage may be prevented."

The transportation and the purposes are, therefore, complements of each other and both must exist to fulfill the declared prohibition. Neither exists in the cases at bar—the transportation in neither is, in the sense of the Amendment and act, "within" the United States "for beverage purposes." In one it is through the United States, in the other transshipment in a port of the United States, and both under the direction and control of the revenue officers of the United States and for use in other countries than the United States. Not only, therefore, are the cases not within the prohibition of the Eighteenth Amendment or the Volstead Act, but they are directly within § 3005 of the Revised Statutes and the treaty with Great Britain. In the view of the court, however, the section and the treaty have been extinguished—superseded by a world-wide reform that cannot tolerate any aid by the United States to the offensive liquor.

"The Eighteenth Amendment," is the declaration, "meant a great revolution in the policy of this country" and did not timidly confine itself "to the use of intoxicants in this country." There is appeal in the declaration. It presents the attractive spectacle of a people too animated for reform to hesitate to make it as broad as the universe of humanity. One feels almost ashamed to utter a doubt of such a noble and moral cosmopolitanism, but the facts of the world must be adduced and what they dictate. They are the best answer to magnified sen-

timent. And the sentiment is magnified. The Amendment and the Volstead Act were not intended to direct the practices of the world. Such comprehensive purpose resides only in assertion and conjecture and rejects the admonitory restraint of § 3005, the treaty with Great Britain and the non-interfering deference that nations pay to the practices of one another.

If such mission had been the purpose it would have been eagerly avowed, not have been left to disputable inference. Zeal takes care to be explicit in purpose and it cannot be supposed that § 3005 and the treaty were unknown and their relation—harmony or conflict—with the new policy; and it must have been concluded that there was harmony, not conflict. The section and the treaty support the conclusion. The section permits all merchandise arriving at certain ports of the United States and destined for places in the adjacent British provinces, and arriving at certain ports and destined for places in Mexico, to be entered at the custom-house and conveyed in transit through the United States. In a sense, it has its complement in § 3006 which gives to merchandise of the United States the same facility of transportation through the British provinces or the Republic of Mexico.

The treaty (Article XXIX) provides a reciprocation of privileges. Merchandise arriving at ports in the United States and destined for British possessions in North America may be entered at the proper custom-house and conveyed in transit through the United States without payment of duties. A like privilege is given United States merchandise arriving at ports in the British possessions for transit through those possessions.

In other words, the treaty is an exchange of trade advantages—advantages not necessary to the commerce of either, but affording to that commerce a facility. And yet, it is said, that it is the object of the Eighteenth Amendment to take away that facility, and to take away

the transshipment of liquor in an American port from one British ship to another. This is the only accomplishment! What estimate can be put upon it? It takes away not a necessity of British commerce, as I have said, but a convenience to it, in disregard of a concession recognized by law and by a treaty. And upon what prompting? Universal reform? If so why was the Panama Canal given up as a convenience to the prohibited beverage and apparently with purposeful care? There is a perversion in one or the other of those actions that needs to be accounted for. There seems to be a misunderstanding of their respective effects, an overlooking of their antagonism, if the purpose of our legislation be a reversal of things not only in the United States but elsewhere. To deny the distribution of intoxicants by forbidding them transit through the United States and affording them distribution through the Panama Canal cannot both be conducive to the world-wide reform which the court considers was the mission instituted by the Eighteenth Amendment and put in execution by the Volstead Act.

It is said, however, that regarding the United States alone, the Amendment and the act have a practical concern. If liquor be admitted for transit, is the declaration, some may stay for consumption. The apprehension is serious—not of itself but because of its implication. It presents the United States in an invidious light. Is it possible that its sovereignty, and what it can command, cannot protect a train of cars in transit from the Canadian border to the Mexican border or the removal of liquors from one ship to another from the stealthy invasions of inordinate appetites or the daring cupidity of bootleggers? But granting that the care of the Government may relax, or its watchfulness may be evaded, is it possible that such occasional occurrences, such petty pilferings, can so determine the policy of the country as to justify the re-

peal of an act of Congress, and violation or abrogation of a treaty obligation, by implication?

I put my dissent upon the inherent improbability of such intention—not because it takes a facility from intoxicating liquor but because of its evil and invidious precedent, and this at a time when the nations of the earth are assembling in leagues and conferences to assure one another that diplomacy is not deceit and that there is a security in the declaration of treaties, not only against material aggression but against infidelity to engagements when interest tempts or some purpose antagonizes. Indeed I may say there is a growing aspiration that the time will come when nations will not do as they please and bid their wills avouch it.

I think the judgment in No. 615 should be affirmed and that in No. 639 reversed.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, ET AL. *v.* CITY OF NEWPORT, KENTUCKY.

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

No. 203. Argued April 13, 1922.—Decided May 15, 1922.

The bill alleged that the plaintiffs were corporations operating electric street cars and distributing electric current under perpetual franchises in the city; that under supervision and direction of the city authorities they constructed a high tension wire to obtain necessary additional current from another company; that afterwards the city council by resolution directed speedy removal of the wire, declaring it dangerous to life and property, contrary to the fact, and that, unless restrained, the city would forcibly remove and destroy it, thereby interfering with the operation of plaintiffs' railway, lighting and power systems, and causing them irreparable damage, in violation of their rights under the Contract Clause of the Constitution and the due process clause of the Fourteenth

Amendment; and prayed that the resolution be declared null and the city, its officers, etc., be enjoined from enforcing it, *Held:*

(1) That the bill set up a substantial federal question and conferred jurisdiction on the District Court. P. 99. *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, distinguished.

(2) That the jurisdiction, having attached, could not be defeated by an answer denying the city's intention to enforce the resolution except through an order of court. P. 100.

Reversed.

APPEAL from a decree of the District Court dismissing for want of jurisdiction a bill to restrain the defendant city from forcible removal and destruction of an electric wire.

Mr. Alfred C. Cassatt, with whom *Mr. Richard P. Ernst, Mr. Frank W. Cottle* and *Mr. Matt Herold* were on the briefs, for appellants.

Mr. Brent Spence for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In their original bill appellants allege: That they hold perpetual franchises over certain streets in Newport, Kentucky, for operating street cars and distributing electric current; that in due course it became necessary for them to obtain an additional current from another company; and that to that end in 1915, under supervision and direction of the city authorities, they constructed a high tension wire extending from Central Bridge to their power house. That on November 20, 1917, the Board of Commissioners of Newport adopted a resolution which declared this current dangerous to life and property, and directed removal of the wire not later than December 1, 1917.

The bill further alleges that " unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street rail-

way system and the electric lighting and power system above described, causing plaintiffs injury which cannot be compensated in money and to their irreparable damage," and that "it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10 of the Constitution of the United States and is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment to said Constitution of the United States."

The relief prayed is that the resolution be declared null and that the City, its officers, agents and employees be enjoined from enforcing or attempting to enforce the same.

Relying upon *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, the court below dismissed the bill for want of jurisdiction. The cause comes here by direct appeal, and only the question of jurisdiction is before us.

Where, as here, the jurisdiction of a District Court has been invoked on the sole ground that the cause involves a federal question, and this is duly challenged, the issue must be determined by considering the allegations of the bill. If they distinctly disclose a real, substantial question of that nature, there is jurisdiction; otherwise there is none. *City Ry. Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, 562; *Pacific Electric Ry. Co.* v. *Los Angeles*, 194 U. S. 112, 118; *Columbus Ry., Power & Light Co.* v. *Columbus*, 249 U. S. 399, 406.

A mere formal statement that such question exists does not suffice. The allegations must show that "the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States." *American Sugar Refining*

Co. v. *New Orleans,* 181 U. S. 277, 281; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147.

Properly understood, *Des Moines* v. *Des Moines City Ry. Co., supra,* is in harmony with these well-established principles. There the bill disclosed that the only affirmative action contemplated by the City was the institution of an orderly proceeding in court. Such action could not in any proper sense violate a right under the Constitution, laws or treaties of the United States. The bill did not, therefore, present a substantial federal question, and for that reason jurisdiction did not exist.

Here it is affirmatively alleged that the City intends forcibly to remove and destroy appellants' property and thereby violate their constitutional rights. This presented a substantial claim under the Constitution.

In an amended answer defendant denied intention to enforce the resolution except through an order of court. But the necessary facts having been alleged by the bill, jurisdiction could not be thus defeated. The denial went to the merits of the claim. *The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *St. Paul, M. & M. Ry. Co.* v. *St. Paul N. P. R. R. Co.,* 68 Fed. 2, 10.

The judgment below must be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice Pitney concurs in the result.

Mr. Justice Brandeis and Mr. Justice Clarke dissent.

NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

SAME *v.* NEW YORK & QUEENS GAS COMPANY.

SAME *v.* CENTRAL UNION GAS COMPANY.

SAME *v.* NORTHERN UNION GAS COMPANY.

SAME *v.* NEW YORK MUTUAL GAS LIGHT COMPANY.

SAME *v.* STANDARD GAS LIGHT COMPANY OF THE CITY OF NEW YORK.

SAME *v.* NEW AMSTERDAM GAS COMPANY.

SAME *v.* EAST RIVER GAS COMPANY OF LONG ISLAND CITY.

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

Nos. 750, 751, 752, 753, 832, 833, 844, 845. Argued April 28, 1922.—Decided May 15, 1922.

1. Conclusions of a master and the District Court that the eighty-cent gas rate fixed by c. 125, New York Laws 1906, had become confiscatory, sustained. P. 103. See *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165.
2. In fixing the fees of a master, the District Court, under Equity Rule 68, enjoys a judicial discretion, but subject to review in case of abuse. P. 104.
3. The compensation of a master should be adequate to the work done, time employed and responsibility assumed—liberal, but not exorbitant; salaries prescribed for judicial officers performing similar duties are valuable guides in fixing it, but a higher rate is generally necessary. P. 105.
4. *Held*, that the compensation allowed in these cases was excessive. P. 105.

Reversed.

APPEALS from decrees of the District Court holding the gas rate prescribed by New York Laws of 1906, c. 125, unconstitutional, and from supplemental decrees fixing the compensation of a master. See *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165.

Mr. Harry Hertzoff, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, *Mr. Wilber W. Chambers, Mr. John P. O'Brien, Mr. Clarence R. Cummings* and *Mr. James A. Donnelly* were on the briefs, for appellants in Nos. 750 and 751.

Mr. William Schuyler Jackson, with whom *Mr. John P. O'Brien* was on the brief, for appellants in Nos. 752 and 753.

Mr. Judson Hyatt, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, *Mr. Wilber W. Chambers, Mr. Clarence R. Cummings, Mr. John P. O'Brien, Mr. James A. Donnelly* and *Mr. Harry Hertzoff* were on the briefs, for appellants in Nos. 832, 833, 844 and 845.

Mr. John A. Garver and *Mr. William L. Ransom*, with whom *Mr. Charles A. Vilas* and *Mr. Jacob W. Goetz* were on the briefs, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These are appeals in separate but related causes wherein the Consolidated Gas Company of New York and certain of its subsidiary and affiliated corporations alleged that the maximum selling rate for gas prescribed by c. 125, Laws of New York, 1906, was confiscatory and asked that its enforcement be enjoined.

The principal issues between the original parties in *Newton* v. *Consolidated Gas Co.*, and *Newton* v. *New*

York & Queens Gas Co., were disposed of upon former appeals decided March 6, 1922, 258 U. S. 165, 178. By supplemental decrees the court below undertook to fix the master's compensation. From them appeals Nos. 750 and 751 were taken. They are discussed below.

Appeals Nos. 752, 753, 832, 833, 844 and 845 bring up final decrees which declare the maximum rate prescribed by c. 125, *supra,* confiscatory. Compensation allowed to the master is considered later. Concerning the merits little need be said. In each cause the controverted questions of fact were referred to a master, who took evidence and made reports supporting appellees' claims, and these were confirmed by the court. We are entirely satisfied with the ultimate conclusions; and none of the points relied upon are sufficient to justify general reversals. See *Newton* v. *Consolidated Gas Co., supra.*

The Attorney General and the Public Service Commission of New York were defendants in the eight cases; the District Attorney of New York County was defendant in Nos. 750, 832, 833, 844 and 845; the District Attorney of the County of Bronx in Nos. 752, 753 and 833; and the District Attorney of the County of Queens in Nos. 751 and 845.

By separate orders A. S. Gilbert, Esquire, was appointed master in all of the causes and directed to take proof and report. His compensation and disbursements were determined and allowed by timely decrees entered in December, 1921, after all his reports had come in, and evidently upon a view of the whole litigation. It was also ordered that such sum " shall be paid in the first instance by the complainant and shall be taxed as costs to be paid equally by the defendants." The disbursements are not questioned; but the several allowances for compensation are challenged as excessive and unreasonable.

No appeal has been taken by the Public Service Commission or by any of the gas companies (complainants

below) from the orders touching the matter of compensation.

Detailed statements filed by the master show the nature and responsibility of his duties, the number of hours occupied on specified dates in hearings, preparing opinions, etc., etc., with the equivalent number of days, reckoned at five hours each. It appears: That he was appointed in Newton v. Consolidated Gas Co., May 16, 1919, and by subsequent decrees in the other causes; that 192 days (five hours) were devoted to the cause wherein the Consolidated Gas Co. was complainant—No. 750—and $57,500 allowed as compensation therefor; that 30 days were devoted to the cause wherein the New York & Queens Gas Co. was complainant—No. 751—and $12,500 allowed as compensation; that 22 days were given to cause No. 752 and $12,500 allowed as compensation; 8 days to cause No. 753 and $7,500 allowed as compensation; 9 days to cause No. 832 and $11,500 allowed as compensation; 7 days to cause No. 833 and $7,500 allowed as compensation; 7 days to cause No. 844 and $4,500 allowed as compensation; and 7 days to cause No. 845 and $4,500 allowed as compensation. The eight causes occupied two hundred and eighty-two (282) " days of five hours each based on the average court day in this district "; the total allowed compensation is $118,000. He began to hold hearings July 22, 1919; separate reports were submitted May 6, 1920, July 19, 1920, February 16, 1921, and (the final ones) July 29, 1921. The record in the Consolidated Gas Co. case (No. 750) is very large—20,000 printed pages; in the New York and Queens Gas Co. case (No. 751) it is approximately 2,000 pages, and in the remaining six cases the records contain from 1417 to 2929 pages.

Equity Rule 68 provides—" The district courts may . . . appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, hav-

ing regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct." Discretion within intendment of the rule is a judicial one; it does not extend to arbitrary and unreasonable action; and our review is limited to the question of its improvident exercise.

The value of a capable master's services can not be determined with mathematical accuracy; and estimates will vary, of course, according to the standard adopted. He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed and the responsibility assumed. His compensation should be liberal, but not exorbitant. The rights of those who ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings. See *Finance Committee of Pennsylvania* v. *Warren,* 82 Fed. 525, 527; *Middleton* v. *Bankers' & Merchants' Tel. Co.,* 32 Fed. 524, 525.

Having regard to these general principles and the special value of knowledge possessed by the trial court, much weight must be given to its opinion. Ordinarily we may not substitute our judgment for its deliberate conclusions, nor interfere with the exercise of its discretion. But when that court falls into error which amounts to abuse of discretion and the cause comes here by proper proceedings, appropriate relief must be granted.

Notwithstanding protracted, painstaking and for the most part excellent services rendered by the master and the large amounts involved in these causes, after viewing

the records and considering the circumstances disclosed, we cannot doubt that the allowances are much too large—certainly twice and three times what they should be. If the time devoted to the entire service—282 days—be accepted as equivalent to one year, the total allowance is fifteen times the salary of the trial judge and eight times that received by justices of this court. It may be compared to the compensation of the Mayor of New York City—$15,000, the salaries of the Governor and members of the Court of Appeals of New York—$10,000, and the $17,500 paid to judges of the Supreme Court in the City of New York. Although none of these can be taken as a rigid standard, they are to be considered when it becomes necessary to determine what shall be paid to an attorney called to assist the court. His duties are not more onerous or responsible than those often performed by judges.

So far as the several decrees undertake to adjudicate the master's compensation they will be reversed and the causes remanded with instructions to fix the same within the following limitations: In the cause wherein the Consolidated Gas Company is appellee here (No. 750) not exceeding $28,750—one-half of the amount heretofore allowed; in each of the other seven causes, Nos. 751, 752, 753, 832, 833, 844 and 845, not exceeding one-third of the amount heretofore allowed therein; and in the eight cases allowances totaling not more than $49,250. Such further action in conformity with this opinion as may be necessary shall also be taken.

Appellants will pay the costs of appeals Nos. 750 and 751 with the right to claim credit therefor upon any judgment hereafter entered against them on account of the master's compensation. The costs in the remaining causes will be taxed against the appellants.

Reversed.

Mr. Justice Clarke concurs in the result.

UNION TOOL COMPANY *v.* WILSON.

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

No. 132. Argued March 1, 2, 1922.—Decided May 15, 1922.

1. Upon an application of the plaintiff in a pending suit charging the defendant with several contempts of an injunction in the case, the District Court fined the defendant upon part of the charges, partly as punishment and partly as compensation to the plaintiff, and purged the defendant in other respects without prejudice to a renewal of the application. *Held:*

(a) That the order, taking character from its criminal feature, was subject as a final judgment to immediate review, on behalf of the defendant, by writ of error from the Circuit Court of Appeals. P. 110.

(b) That, when the order was thus brought before it, the Court of Appeals acquired jurisdiction to review it in its civil as well as its criminal aspects. P. 111.

(c) That the defendant having taken a writ of error, the plaintiff was entitled to review the part of the order unfavorable to himself, and that, only legal questions arising upon agreed facts being involved, his appropriate method was by a cross writ of error, irrespective of the remedial provision of the Act of September 6, 1916, c. 448, § 4, 39 Stat. 726. P. 111.

2. An order of the District Court in a contempt proceeding, which, through failure to apply well settled legal principles to a conceded state of facts, refuses to impose a fine on one party to a suit as compensation to the other for injury resulting from violation of an injunction, is subject to correction by an appellate court. P. 112.

3. A direction by the Circuit Court of Appeals that the District Court, in a contempt case, "impose such punishment as may seem proper," *interpreted,* in view of the opinion and other proceedings as referring to civil compensation. P. 112.

4. A writ of injunction, in a patent-infringement suit in the District Court, may properly bear teste of the Chief Justice of the United States. Rev. Stats., § 911; Jud. Code, §§ 289, 291. P. 112.

5. A party knowing of an injunction is bound to obey it, even if the writ has not issued. P. 113.

6. Objection to the teste of a writ of injunction may be waived if not seasonably made. P. 113.

7. Where a patentee obtained an injunction forbidding manufacture and sale of machines infringing his patent and of parts or elements that might be used in combination to effect infringement, and also an interlocutory decree requiring the manufacturer to account for damages and profits arising from employing the invention in machines sold prior to the injunction, but it did not appear that the patentee had received any compensation for the infringement by use of those machines, *held*, that no license to use spare parts in them could be implied, and that sale of such parts, to be so used, was a violation of the injunction for which a remedial fine should have been inflicted on the manufacturer upon application of the patentee. P. 113.

265 Fed. 669, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court purging the petitioner of contempt of an injunction. The case is stated in the opinion. See 265 Fed. 669, herein affirmed, and also 262 Fed. 431.

Mr. Frederick S. Lyon, with whom *Mr. Leonard S. Lyon, Mr. William K. White* and *Mr. A. V. Andrews* were on the briefs, for petitioner.

Mr. G. Benton Wilson, with whom *Mr. F. W. Clements* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Wilson sued the Union Tool Company in the federal court for the Southern District of California, Southern Division, for infringement of a patent for underreamers. He obtained a decree for an injunction and an accounting, 237 Fed. 847, which was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, 249 Fed. 736; and a petition for writ of certiorari was denied by this court, 248 U. S. 559. Thereafter, a writ of injunction issued which forbade the manufacture and sale, not only of infringing machines, but also of parts or elements that might be used in combination to effect infringement.

Wilson claimed that there had been deliberate violation of the injunction both by the sale of infringing machines and by the sale of spare parts; and he moved in the District Court that the company and certain of its officers be punished for contempt or otherwise dealt with for violating it. The District Court found that, since the service of the injunction, the company had sold infringing machines; held it guilty of contempt in so doing; ordered that the company pay to the clerk of the court $5,000 as a fine, and that out of this sum $2,500 be paid to Wilson "as a reasonable portion of the expenses incurred" by him in the contempt proceeding; and further ordered that if the fine were not paid within twenty days, Double, the company's president, be committed to jail, to be there confined until it should be paid. The District Court also found that the company had sold, after the service of the injunction, spare parts to be used with machines or devices sold by the company prior thereto, and that these were of such a nature that when used in combination they would effect an infringement. But the court concluded, for reasons to be stated, that the sale of such spare parts should not subject the company to a fine, and purged it of contempt in that respect, without prejudice to the right of Wilson to renew his application.

To have this judgment entered in the contempt proceeding reviewed by the Court of Appeals, the company and Double sued out a writ of error; and thereafter Wilson sued out a cross writ of error. The two writs were considered and disposed of separately. On the original writ the judgment was modified by striking out all that related to Double; and it was reversed in so far as it "directed that $2,500 be paid to the clerk of the court as a punishment of the corporation." But in so far as the judgment directed payment to Wilson as compensation, it was affirmed. 262 Fed. 431. On the cross writ, which was heard and decided later, the Court of Appeals

overruled a motion to dismiss for want of jurisdiction; held the company guilty of contempt in selling the spare parts; held that the District Court had abused its discretion in purging the company of this contempt; reversed, in that respect, the judgment; and remanded it with directions to the District Court to impose such punishment as might seem proper. 265 Fed. 669. A motion of the company for leave to file a petition for mandamus to compel the Court of Appeals to vacate its judgment on the cross writ of error and to dismiss the latter was denied by this court. 254 U. S. 608. But a petition for a writ of certiorari was granted to review the reversal of the judgment in so far as it purged petitioner of contempt in selling the spare parts. 254 U. S. 624. And it is that alone which is now here for review.

The contention that the Court of Appeals was without jurisdiction of the cross writ of error is renewed here. It is argued that the judgment for contempt, so far as now sought to be reviewed, is remedial, not punitive; that being remedial it can be reviewed only on appeal and not on writ of error; that an appeal will not lie until after the final decree; and that no final decree had been entered, as the accounting was still in process. It is true that the part of the judgment for contempt now under review is remedial. But it does not follow that the Court of Appeals lacked jurisdiction to review it on the cross writ of error. The District Court entered a single order, part remedial, part punitive. Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review. *In re Merchants' Stock & Grain Co.*, 223 U. S. 639. If the company had acquiesced in the judgment entered, Wilson, having no right to initiate a review of the punitive part, could not have instituted any appellate proceeding until after final decree. *Matter of Christensen Engineering Co.*, 194

U. S. 458; *Doyle* v. *London Guarantee & Accident Co.,* 204 U. S. 599. See also *Alexander* v. *United States,* 201 U. S. 117, 122. But an order punishing one criminally for contempt, is a final judgment. The contemnor may obtain immediately a review by writ of error. *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 336–338. And the company availed itself of this right. When the order was thus brought before the Court of Appeals, it acquired, at the company's instance, jurisdiction to review that part which was civil as well as that which was criminal in its nature. In the exercise of that jurisdiction it granted, in respect to Double, relief which affected both the criminal and the civil parts of the order. If a cross writ of error had not been filed, Wilson could not have secured from the Court of Appeals relief in respect to that part of the order which was unfavorable to him. *Bolles* v. *Outing Co.,* 175 U. S. 262, 268. But a cross writ was duly filed; and that enabled the court to review the portion of the order, civil in its nature, which Wilson alleged to be erroneous; for the judgment in the contempt proceeding was a unit. The case resembles in some respects *Mayer* v. *Walsh,* 108 U. S. 17; *Walsh* v. *Mayer,* 111 U. S. 31, 37, 38. Compare *Field* v. *Barber Asphalt Co.,* 194 U. S. 618, 620, 621. The facts relating to the sale of spare parts were agreed; and the question before the court was merely as to their legal effect. That question could appropriately be considered on cross writ of error—even without resort to the power conferred by § 4 of the Act of September 6, 1916, c. 448, 39 Stat. 726. Cases like *Ex parte National Enameling Co.,* 201 U. S. 156, and *Farrar* v. *Churchill,* 135 U. S. 609, relied upon by the company, are not applicable.

The company contends also that the judgment of the District Court, being favorable to it in so far as it related to spare parts, was not subject to review by any appellate court, at any time, by any proceeding—although remedial

in its nature. The argument is that where the court of whose authority contempt is charged either finds that there was no contempt or purges the offender, a judicial power has been exercised which is discretionary and is not subject to review. But the fact that a remedial order was entered in a contempt proceeding is not in itself a reason why it should not be subject to correction by an appellate court. In *Worden* v. *Searls,* 121 U. S. 14, 26, such an order granting compensation was reversed by this court; and in the Court of Appeals like orders of the District Court denying compensation have been reviewed. *Enoch Morgan's Sons Co.* v. *Gibson,* 122 Fed. 420; *L. E. Waterman Co.* v. *Standard Drug Co.,* 202 Fed. 167. In the determination of the question whether an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. See *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 Fed. 774; *Gordon* v. *Turco-Halvah Co.,* 247 Fed. 487. Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts. See *Winchester Repeating Arms Co.* v. *Olmsted,* 203 Fed. 493, 494; *In re Sobol,* 242 Fed. 487, 489.

Minor objections of a procedural nature are also urged. It is said that while the infringement by sale of spare parts was a civil contempt, the Court of Appeals directed the District Court "to impose such punishment as may seem proper" and thus ordered criminal punishment. In view of the opinion and other proceedings, the direction must be understood as referring to compensation. Compare *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441. Then it is insisted that the writ of injunction, although properly attested by the clerk of the District Court, was void and of no effect because it bears teste of

the late Chief Justice of the United States, whereas by § 911 of the Revised Statutes it should have borne teste of the District Judge. Under that section writs from the Circuit Courts bore teste of the Chief Justice; and since the transfer of their jurisdiction to the District Courts writs from them may be properly tested by the Chief Justice. See Judicial Code, §§ 289, 291. But the company is in no position to make the objection. Knowing of the injunction, it would have been bound to obey it even if no writ had issued. *In re Lennon,* 166 U. S. 548, 554. Moreover, the objection to the teste of the writ is made, so far as appears, for the first time, in the brief filed by petitioner in this court. Compare *District of Columbia* v. *Brooke,* 214 U. S. 138, 147.

On the merits the contention is this: The interlocutory decree awards to Wilson, among other things, compensation by way of damages and profits, for employing the invention in any machine sold prior to the service of the injunction. A patentee, in demanding and receiving full compensation for the wrongful use of his invention in devices made and sold by a manufacturer adopts the sales as though made by himself, and therefore, necessarily licenses the use of the devices, and frees them from the monopoly of the patent. This license continues during the life of the machine; it does not end when repairs become necessary. Spare parts are needed for repairs. Those here in question were sold for use in, and repair of, machines marketed by the company before the service of the injunction. Therefore, it is argued, the sale of these parts is licensed and thus not a violation of the injunction. But to this argument which prevailed in the District Court, there are several answers; and, among them, this: It does not appear that Wilson has received any compensation whatever for the infringement by use of these machines. Compare *Birdsell* v. *Shaliol,* 112 U. S.

485, 487–489. There was, consequently, no implied license to use the spare parts in these machines. As such use, unless licensed, clearly constituted an infringement, the sale of the spare parts to be so used violated the injunction. And the sale having been made with full knowledge of all relevant facts, the Court of Appeals properly held that, so far as Wilson had sought remedial, as distinguished from punitive action, the District Court was not justified in purging the petitioner of contempt arising from the sale of spare parts.

Affirmed.

HEALD, EXECUTOR OF PETERS, *v.* DISTRICT OF COLUMBIA.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 268. Argued April 13, 1922.—Decided May 15, 1922.

1. The objections that the act of Congress taxing the intangible property of persons resident or engaged in business in the District of Columbia, (c. 160, § 9, 39 Stat. 1046), is unconstitutional because of its alleged application to intangible property, credits, etc., of non-residents and to state and municipal bonds, cannot be raised by persons who are residents and whose property taxed is within the District and does not include such bonds. P. 122.
2. Whether a clause of this act respecting the exemption of the stock of certain companies from the tax is void for uncertainty, *held* not open for decision in a suit where it was not shown that any tax was levied on the basis of it or that it subjected the plaintiff to injury or embarrassment. P. 123.
3. Congress has power to tax residents of the District of Columbia for support of the District Government and to cause the money to be paid into the Treasury of the United States and held, not as a separate fund for the District, but subject to the disposal of Congress, notwithstanding the fact that the persons taxed lack the suffrage and have politically no voice in the expenditure of the money. P. 124.

269 Fed. 1015; 50 App. D. C. 231, affirmed.

114. Argument for Plaintiff in Error.

ERROR to a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District for the defendant in an action to recover a tax. See also s. c. *Heald* v. *District of Columbia,* 254 U. S. 20.

Mr. Vernon E. West, with whom *Mr. A. S. Worthington* was on the briefs, for plaintiff in error.

The whole act being void, because it unlawfully taxes nonresidents, plaintiffs in error may question its validity. It would be most remarkable if they and others in a similar position must continue to pay taxes under a void statute until the question of its invalidity is raised by a nonresident. Congress clearly intended that the act should operate alike upon residents and nonresidents engaged in business here.

The court below relied upon *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; and *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134. But each of those cases relates to the constitutionality of state statutes. This court had before it only the question of constitutionality, and not the question of construction. It was not incumbent upon this court to determine whether the whole act must fall if part was void; provided, there was any possible legal construction by which the state court could separate the good from the bad. The reason for the rule applied by this court in regard to state statutes is fully set forth in *Hatch* v. *Reardon,* 204 U. S. 152, 160. *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, though involving a state statute, is peculiarly analogous to the case at bar. See *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Sully* v. *American National Bank,* 178 U. S. 289.

The law here involved is not a state statute, but an act of Congress relating to the District of Columbia which this court, as well as the courts below, has jurisdiction to

construe. *Smoot* v. *Heyl,* 227 U. S. 518; 12 Corpus Juris, 764; *State* v. *Bengsch,* 170 Mo. 81; *State* v. *Cumberland Club,* 136 Tenn. 84; *People* v. *McBride,* 234 Ill. 146.

In no case has this court refused to hold an act of Congress void on the ground that the party assailing the act was not affected by it in the particular complained of, except in those cases where the provisions of the act were found to be separable. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 417; *Employers' Liability Cases,* 207 U. S. 463; *Illinois Central R. R. Co.* v. *McKendree,* 203 U. S. 514; *United States* v. *Reese,* 92 U. S. 214; *Baldwin* v. *Franks,* 120 U. S. 678; *Trade-Mark Cases,* 100 U. S. 82.

The Act of 1917 contains three provisions which are beyond the power of Congress and render the whole act void. (a) The provision taxing nonresidents on intangible property; (b) the provision taxing them on their credits not arising out of their business in the District; and (c) the provision taxing state and municipal bonds.

The provisions of the act as to the tax on "shares of stock" are so vague that it is impossible to determine what shares are taxable and what are exempt; so that so much of the act as relates to them is void. Consequently the whole act falls.

Congress is without power to tax the inhabitants of the District of Columbia or to cause them to be taxed, for local purposes, so long as they are not represented in the taxing body.

It can not be disputed that when the colonies established their independence it was recognized by all of them that not only is taxation without representation tyranny, but that the right to be represented before he can be taxed is a fundamental right, the deprivation of which reduces the injured person or community to a state of slavery. It was deemed to be as important and fundamental as the right of trial by jury. It was, in substance,

the same as the right that private property shall not be taken for public use without just compensation.

These have been the rights of Englishmen for a thousand years. The Declaration of Independence discloses that these are among the rights to maintain which our forefathers drew the sword. And these rights existed to their fullest extent in the residents of Montgomery and Prince George's Counties when a part of each of those counties was transferred to the Federal District of the Constitution. They are today the rights of the inhabitants of this District, unless they have been voluntarily surrendered.

In so far as the cession itself is concerned, there is no room for argument. The act of cession passed by the Maryland legislature expressly provided: "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." Tindal's, The City of Washington, 31, 167.

A similar provision was embodied in the Virginia act of cession. Tindal, 32. These acts and the other acts of Virginia and Maryland and the proceedings under which the transfer of the jurisdiction to the United States was completed, are set forth in *Morris* v. *United States,* 174 U. S. 196.

If the residents of the ceded territory lost their right to be represented in any body that imposed taxes on them, they lost it by virtue of some express provision of the Constitution. In the creation of that instrument they were represented by the Virginia and Maryland delegates in the Convention of 1787, and they were represented in the conventions of their respective States when Virginia and Maryland ratified the Constitution.

The express provisions of the Constitution as to taxation are that Congress shall have power to lay and collect

taxes, and uniform duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States throughout the United States; and that no capitation, or other direct, tax, shall be laid, unless in proportion to the census.

We make no question that the people of this District are subject to taxation by Congress under these provisions of the Constitution, as well as under the amendment giving Congress the power to impose an income tax. As to the direct tax provision, it was so held in *Loughborough* v. *Blake*, 5 Wheat. 317. But obviously a different question arises as to taxation for local purposes in the District. That depends upon the proper interpretation of par. 16, § 8, Art. I, of the Constitution, giving Congress power to exercise exclusive legislation over the District and over forts, etc. There seems to be nothing in the recorded proceedings of the Constitutional Convention or in the debates in the Colonial Assemblies when the question of ratifying the Constitution was under discussion that throws any light upon the meaning given by the Convention to the words " exclusive legislation " in this clause of the Constitution. It was adopted without debate. But Madison (Federalist No. XLIII), in explaining the necessity for an independent seat of government, assumes that a State, ceding territory for this purpose, " will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; " that they " will have had their voice in the election of the government which is to exercise authority over them; " and that " a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them."

Our claim that the right of Congress to exercise exclusive legislation in this District does not include the power to tax, is sustained by the history of the events which led to the independence of the Colonies and the adoption of the Constitution.

114. Argument for Plaintiff in Error.

The great contention of the Colonists in their controversy with Parliament over the Stamp Act in 1765–6, was that the Parliament's power to legislate for the Colonies did not include the power of internal taxation—that legislation is one thing, and taxation another. 3 Bancroft's History of the United States (Centenary Ed.) pp. 480, 562; 4 History of Debates and Proceedings of Both Houses of Parliament, pp. 288–291; James Otis, Rights of the British Colonies, 3d ed., 1766, p. 55; 3 Hallam's Constitutional History of England (1861 ed.), pp. 34, 35, 36, 105. In every history of these pre-revolutionary times in America it is recorded that the Colonists everywhere resisted the efforts of Parliament to tax them on the principle laid down by their champions in Parliament that taxation is not legislation. When it became evident that the Colonies would resist by force of arms if necessary the enforcement of the Stamp Act, Pitt, in concluding a speech on the subject, advised its repeal, (4 History of Debates and Proceedings in Both Houses of Parliament, p. 297,) which was done, coupled with a resolution declaring that Parliament had the power of legislating for the Colonies in all cases whatsoever. It matters not that those who favored the Stamp Act still held that the words, "in all cases, whatsoever," included the power of taxation. It can not be questioned that Pitt's view was the American view on this subject. It is inconceivable that the people who from 1765 to 1783 were contending for the principle that the power to legislate does not include the power to tax should in 1787 have provided in the constitution they then framed that power to tax without representation should be conferred upon Congress when, as to the proposed federal district, it was given merely the power to legislate.

The contemporaneous construction of the "exclusive legislation" provision of the Constitution, continued for over seventy years, demonstrates that it was not held to

deprive the inhabitants of the District of their right to be represented in any body that should be empowered to tax them.

From the time of the cession till 1871, the inhabitants of the District taxed themselves through their elected representatives, except that in that part of the territory which was not included in the municipal corporations of Washington, Georgetown and Alexandria, they were taxed by what were substantially county commissions composed of justices of the peace appointed by the President. Acts of February 21, 1801, 2 Stat. 103; May 3, 1802, 2 Stat. 193; July 1, 1812, 2 Stat. 771.

From 1871 till 1874, they were taxed by a local legislature, one branch of which was elected by them and the other appointed by the President. Act of February 21, 1871, 16 Stat. 119.

From 1874 till 1878, Congress had under consideration various plans providing for a permanent form of government for the District and meanwhile Congress regulated taxation in the District. Act of June 20, 1874, 17 Stat. 116.

From 1878 till 1920, one-half of the expenses of the District Government were required to be paid out of the revenues of the District produced by laws enacted by Congress and the other one-half by the United States. Act of June 11, 1878, 18 Stat. 102.

Thus, till 1874 the people of the District were fully protected in their right to be represented in the body that taxed them; during the next four years they were waiting for Congress to decide on their form of government; and from that time till 1920 they were amply protected from excessive or unfair taxation by the fact that for every dollar taken from them in taxes the United States was required to appropriate a dollar from its treasury. Acquiescence in such taxation by the inhabitants of the District under these circumstances can not be considered as

binding them to continue to submit when the protection afforded them by the Act of 1878 is withdrawn.

The actual decisions of this court and the courts of the District of Columbia do not uphold the power of Congress to levy local taxes in the District. Distinguishing and explaining: *Loughborough* v. *Blake,* 5 Wheat. 317; *Gibbons* v. *District of Columbia,* 116 U. S. 404; *Welch* v. *Cook,* 97 U. S. 541; *Mattingly* v. *District of Columbia,* 97 U. S. 687; *Cohens* v. *Virginia,* 6 Wheat. 264; *Willard* v. *Presbury,* 14 Wall. 676; *Bauman* v. *Ross,* 167 U. S. 548; *Wilson* v. *Lambert,* 168 U. S. 611; *Parsons* v. *District of Columbia,* 170 U. S. 45.

We are not for a moment claiming that the inhabitants of this District can escape taxation unless they are given representation in Congress. To give us such representation would be the simplest way out; but it is not the only way. It is not taxation that we oppose but taxation without representation. Nor are we claiming that anything like a state government is essential, or even that municipal powers should be given us again. All that is required to make taxation legal in the District is that a body of some kind having the power to regulate taxation here shall be created and that we shall be represented in that body.

Even if the inhabitants of the District of Columbia are not protected by the great principle of the Revolution that "taxation without representation is tyranny," the Intangible Tax Law is invalid because under the statutes which were in force when it was enacted, and which are still in force, all money raised by District taxation is required to be paid into the Treasury of the United States to be used, not for local expenses, but as other Treasury funds are used, for the general expenses of the Government of the United States. See *Binns* v. *United States,* 194 U. S. 486.

Mr. F. H. Stephens for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

To aid in defraying the expenses of the District of Columbia Congress laid a tax of three-tenths of one per cent. on the value of the intangible property of persons resident, or engaged in business, within the District. Act of March 3, 1917, c. 160, § 9, 39 Stat. 1004, 1046. This tax was assessed upon such property held by Heald and others, as committee of Peters, an insane person. They and their ward were residents of the District; the property was located there; and none of it consisted of municipal bonds or was otherwise of a character exempt by law from taxation. The committee, asserting that the taxing act violated the Federal Constitution, paid the tax under protest, and brought this action in the Supreme Court of the District to recover the amount so paid. Judgment was there entered for the defendant. The case was then taken to the Court of Appeals of the District which sought by certificate to obtain from this court instructions as to the constitutionality of the act. The certificate was dismissed for want of jurisdiction. *Heald* v. *District of Columbia,* 254 U. S. 20. Thereupon the case was heard in the Court of Appeals and it affirmed the judgment of the lower court. 50 App. D. C. 231; 269 Fed. 1015. The case is now here on writ of error. Peters having died, his executors, of whom Heald is the survivor, were substituted as plaintiffs in error.

Plaintiff contends that the act is void (*a*) because it requires every non-resident of the District who engages in business therein to pay a tax on all his intangible property wherever situated or from whatever source derived; (*b*) because it requires a non-resident engaged in business within the District to pay a tax on all his credits or choses in action, whether due from residents or non-residents, including those which have not been reduced to concrete form; (*c*) because it taxes bonds of States and their municipalities. The District insists that such is not the

correct construction of the act, that it has not in fact been so construed or applied by the taxing officials, and that, even if it had been, the whole act would not thereby be rendered void, as these provisions are clearly severable from the rest of the act. Compare *Hatch* v. *Reardon,* 204 U. S. 152, 161; *Ratterman* v. *Western Union Telegraph Co.,* 127 U. S. 411; *Texas Co.* v. *Brown,* 258 U. S. 466. But these objections, even if otherwise well founded, would not entitle plaintiff to challenge the validity of the tax. The property taxed is located within the District; those who hold it and the owner are residents; and there is no state or municipal bond among the property taxed. It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him.[1] In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held. Compare *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 73; *Straus* v. *Foxworth,* 231 U. S. 162, 171; *Fairchild* v. *Hughes,* 258 U. S. 126.

Then it is contended that one clause of the act is void, because, in enumerating classes of property exempt from the tax on intangibles, it recites " the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege." The argument is that the meaning and application of this clause is so uncertain that the taxpayer is left without a guide in making his return. We have no occasion to inquire into the meaning or effect of this provision or

[1] *Supervisors* v. *Stanley,* 105 U. S. 305, 311; *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 453; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526, 530; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 149.

whether it is open to the criticism leveled against it; for this plaintiff would likewise not be entitled to raise this objection even if well founded; since it is not shown that any tax was levied on the basis of this clause or that it has subjected plaintiff either to injury or to embarrassment.

Finally it is earnestly contended that the act is void, because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by federal taxation. The objection that the tax is void because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District; but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage.[1]

Affirmed.

[1] Compare *Gibbons* v. *District of Columbia,* 116 U. S. 404; *Metropolitan R. R. Co.* v. *District of Columbia,* 132 U. S. 1, 8; *Shoemaker* v. *United States,* 147 U. S. 282; *Bauman* v. *Ross,* 167 U. S. 548; *Wilson* v. *Lambert,* 168 U. S. 611; *Parsons* v. *District of Columbia,* 170 U. S. 45, 50; *District of Columbia* v. *Brooke,* 214 U. S. 138.

PIERCE OIL CORPORATION ET AL. *v.* PHOENIX REFINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 172. Argued March 17, 1922.—Decided May 15, 1922.

Action of a State requiring a foreign corporation to operate its local, private oil pipe line as a common carrier does not deprive it of property without due process of law when done pursuant to constitutional and statutory provisions in force when the corporation entered the State and by it accepted in applying for and obtaining the privilege of doing local business. P. 127.

79 Okla. 36, affirmed.

ERROR to a judgment of the Supreme Court of Oklahoma affirming, on appeal, an order of the State Corporation Commission, requiring the plaintiff in error to operate its oil pipe line as a common carrier.

Mr. Preston C. West, with whom *Mr. George T. Priest, Mr. Wilbur F. Boyle, Mr. Henry S. Priest* and *Mr. A. A. Davidson* were on the brief, for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1913 the defendant in error, the Phoenix Refining Company (herein designated the Phoenix Company), a corporation organized under the laws of Oklahoma, erected an oil refinery at Sand Springs, in that State. In the same year the plaintiff in error, the Pierce Oil Corporation (herein designated the Pierce Company), a corporation organized under the laws of Virginia, erected a refinery at Sand Springs, and also constructed a pipe line, wholly within the State of Oklahoma, to the Cushing Oil Field, a distance of thirty-three miles.

Beginning in 1915, the Pierce Company transported oil for the Phoenix Company through its pipe line from the

Cushing Field to its refinery, under annual written contracts, prescribing rates and conditions, until in February, 1918, when it informed that company that it would not carry its oil on any terms after the 21st of the following March.

Thereupon the complaint in this case was filed with the Corporation Commission of Oklahoma, praying that the Pierce Company be declared to be a common carrier of oil and that it be ordered to transport oil for the Phoenix Company from the Cushing Field to its refinery at a charge to be fixed. The Pierce Company, in its answer, averred: that it had constructed its pipe line to supply its own refinery only, and that it was not, and had never held itself out to be, a common carrier of oil; that it had carried oil for the Phoenix Company as a matter of accommodation only; and that to subject it to the duties and responsibilities of a common carrier would result in the taking of its property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

After an elaborate hearing, the Corporation Commission held: that the Pierce Company had carried oil for the Phoenix Company and for various others for several years at rates agreed upon; that its pipe line was the only available and practicable line by which the Phoenix Company could procure oil from the Cushing Field for its refinery; that the Pierce Company, in competition with others, purchased oil in the Cushing Field, which it transported to its refinery at Sand Springs; and that it had a monopoly of the oil-carrying business between the Cushing Field and Sand Springs. As a result, it was held that the Pierce Company was a common carrier of oil, as defined in the Oklahoma laws, and it was ordered to carry such oil as the Phoenix Company was then producing in the Cushing Field and such other oil as the Pierce Company might have available space or capacity to transport

in its line, from the Cushing Field to Sand Springs. Because the evidence was not deemed sufficient no order was made as to rates.

On appeal, the State Supreme Court found that there was substantial evidence to support the order of the Corporation Commission and affirmed it, but it also held that the Pierce Company, having qualified and entered Oklahoma to do business long after the state constitution was adopted and after the statutes of the State, under which the order was made, were enacted, it would not be heard to contend that it was deprived of its property thereby without due process of law in the constitutional sense.— This last conclusion is sufficient to dispose of the case here.

The State of Oklahoma was admitted into the Union in 1907, with a constitution theretofore adopted by the people, which provided for a Corporation Commission, with large powers of regulation and supervision over oil pipe and other transportation companies doing business in the State (Article IX, §§ 15 to 35, inclusive), and in 1909 there were enacted various statutes, now collected in c. 53, Article II, of the Revised Laws of Oklahoma, 1910, applicable to oil pipe lines.

These statutes declared that, except as authorized therein, no corporation (domestic or foreign) should have the right to engage in the business of transporting crude petroleum through pipe lines within the State "for hire or otherwise" (§ 4304), and that every corporation engaged in such business under the state laws should "be deemed a common carrier thereof, as at common law" (§ 4309). It was also provided that before any corporation should be entitled to the provisions of the acts it must file with the State Corporation Commission an "authorized acceptance of the provisions of this article and the constitution of this State" and a plat showing the location and capacity of the company's pipe line. (§ 4311).

This constitution and these laws had been in effect for five years when the Pierce Company, by applying for and obtaining the privilege of conducting its business operations within the State, elected to respect and obey them, and therefore when it engaged in the business of transporting crude petroleum through pipe lines in the State it must necessarily be subject to the duties and obligations of "a common carrier thereof as at common law", and the order complained of required this only to a limited extent.

When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered (*National Council U. A. M.* v. *State Council,* 203 U. S. 151, 163; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 66; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 83), the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law must be pronounced futile to the point almost of being frivolous. "By accepting the privilege it voluntarily consented to be bound by the conditions" attached to it (216 U. S. 56, 66), and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the State, is unconstitutional. A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the *Pipe Line Cases,* 234 U. S. 548, 561, in a single sentence, saying: "So far as the statute contemplates future pipe lines and prescribes conditions upon which they may be established there can be no doubt that it is valid."

There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by delib-

erate election or by conduct inconsistent with the assertion of such a right. *Pierce* v. *Somerset Railway,* 171 U. S. 641, 648; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411.

The prior order of the Commission, exempting the Pierce Company from the obligations of a common carrier was made on an ex parte application and was expressly subject to revocation at any time, so that it was and is entirely idle to claim that it constituted any obstacle to the entry by the Commission of the order complained of in this case.

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

Affirmed.

EWERT *v.* BLUEJACKET, A WIDOW, ET AL.

BLUEJACKET, A WIDOW, ET AL. *v.* EWERT.

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

Nos. 173, 186. Argued March 17, 1922.—Decided May 15, 1922.

1. An attorney at law who is employed at the expense of the United States, by and under the direction of the Attorney General, as a special assistant, to assist in the institution and prosecution of suits to set aside deeds of allotted Indian lands, at an Indian Agency, his official duties requiring all of his time, is "a person employed in Indian affairs" within the meaning of Rev. Stats., § 2078, forbidding such persons to "have any interest or concern in any trade with the Indians, except for and on account of the United States." P. 135.
2. The section covers not only trade carried on with the Indians as a business, but also an individual purchase of an Indian's land allotment. P. 137.
3. A deed taken in violation of this section is void, passing the legal title only; and neither the state statute of limitations nor the doctrine of laches applies to a suit brought in the District Court against

the grantee by the Indian owners to set the transaction aside; and they are entitled to indemnity against mortgages made by the grantee as well as to a reconveyance. P. 137.

4. So *held* where the land bought by the attorney was not involved in the litigation about which he was employed, and was deeded to him, with the approval of the Secretary of the Interior, pursuant to a public advertised sale of the tract, conducted after appraisement and otherwise pursuant to the rules and regulations of the Department, under the act (32 Stat. 245, 275) authorizing sale of restricted allotments by the heirs of allottees, and after the proposed sale, as to interests of minor heirs, had been approved by the proper state court upon petition of their guardian.
5. An error made by the Interior Department in the interpretation of the statute cannot confer legal rights inconsistent with its express terms. P. 138.

265 Fed. 823, affirmed in part and reversed in part.

APPEAL from a decree of the Circuit Court of Appeals in part affirming and in part reversing a decree of the District Court dismissing the bill in a suit brought by the heirs of an Indian to set aside a deed of his restricted land allotment, which they had made to the appellant, with the approval of the Secretary of the Interior, pursuant to a public sale, under the act of Congress and departmental regulations governing such transactions. The facts are more fully stated in the opinion of the court below.

Mr. Arthur S. Thompson for Bluejacket et al.

Mr. Paul A. Ewert pro se. *Mr. Henry C. Lewis* and *Mr. W. H. Kornegay* were also on the briefs.

The history of § 2078, Rev. Stats., and the rules, regulations and practice of the Secretary of the Interior with regard to it, clearly show that the section was not intended and should not be construed to embrace transactions of the kind here involved.

Both before and after the purchase in question its legality was considered and approved by the Attorney General and the Secretary of the Interior.

It was a fundamental error to treat the sale as a transaction directly between Ewert and the Indians rather than as a sale made to him by the United States, acting as their guardian.

Ewert's employment was strictly legal and under the Department of Justice. He was not employed in Indian affairs, nor an "officer" of the Indian Department. *United States* v. *Germaine,* 99 U. S. 508.

The statute is highly penal and should be strictly construed, and it cannot have one construction for criminal, and another for civil, cases.

"Employed in Indian affairs" means "employed in the office of Indian affairs," within the meaning of the Revised Statutes.

It is at least not clear that Congress in revising § 14 of the Act of 1834, 4 Stat. 738, intended, by the expression "employed in Indian affairs," anything wider than the expression "employed in the Indian department," as used in the original act.

The broad construction contended for would bring the employees of every department of the Government within this section. Contrast the specific inhibition against any agent or employee of the Government having any interest in contracts respecting supplies, found in 1st Supp. Rev. Stats., p. 67, § 10.

Special assistants to the Attorney General are a means provided by Congress for meeting emergencies in the service which cannot be foreseen or do not warrant a recurring and individual annual appropriation, such as is made for the regular and permanent staff. They may be employed for one day or indefinitely, in one kind of service or another. Their compensation is wholly a matter for the Attorney General. Their services not only terminate at his pleasure, but with the conclusion or suspension of the particular work for which they are employed.

Because of these characteristics, which place them upon a plane with other persons who are sporadically and ephemerally employed by the heads of departments to perform various kinds of service, commonly called "piece work," these attorneys are held not to come within the various statutes, which, for one reason or another, restrict officers and employees in commercial transactions and private services. And the reasons are quite obvious: On the one hand an impairment of the service by the prohibited acts could not well be predicated of the fleeting and precarious duration of their services. On the other, it would often be difficult to secure such services if Congress were so to restrict them, for the gain would often not compensate for the restraints. Citing letters of the Attorney General to Charles R. Bosworth, May 8, 1917, and to Robert W. Childs, December 28, 1914. These opinions are necessarily a construction of the act under which appellant was employed. See also 26 Ops. Atty. Gen. 247; *United States* v. *Rosenthal,* 121 Fed. 862; *United States* v. *Virginia-Carolina Chemical Co.,* 163 Fed. 66.

There is absolutely no proof of Ewert's work in "Indian affairs." There is not a single word of testimony showing that Ewert ever did in fact institute a single suit to set aside the deeds concerning which he was employed. Outside of the record, the appellant admits that there were, at the time of his appointment, already pending, eight suits theretofore filed by the United States, having for their purpose the setting aside of certain deeds to certain Indian lands, however, not Quapaw Indian lands, made by the United States marshal for Indian Territory under the direction of the Territorial United States Court for Indian Territory, in certain partition proceedings. The suits were instituted by the Government. The Indians were never consulted. The lands were located in the former reservations of the Shawnee, Ottawa and Seneca

Indians. They were not located in the reservation of the Quapaw Indians, out of which Charles Bluejacket received his allotment.

The point here desired to be directed to the attention of the court is that, under the terms of Ewert's employment, he was not in fact performing any services or engaged in Indian affairs of any kind, in so far as they affected the tribe of Indians known as Quapaw Indians, of which Charles Bluejacket was an allottee.

The court erred in not holding that the approval by the Secretary of the Interior, the Attorney General and the Commissioner were departmental constructions in appellant's favor of all controlling statutes, and in not following that construction, and in not holding that § 2078 does not apply to real estate transactions.

The removal of the restrictions by the terms of the statute, and the selling of the land with the approval of the Secretary of the Interior, had the effect of taking the transaction out of the law prohibiting trade with Indians.

In holding that the deed to Ewert is void the court fixes an additional penalty not provided in the statute and not intended by the lawmaking power. *Dunlap* v. *Mercer,* 156 Fed. 545; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.

The conveyance cannot be impugned by the grantor and his heirs. The sovereign alone can object.

Mr. Justice Clarke delivered the opinion of the court.

We have here cross appeals in a suit to have declared invalid a deed to Paul A. Ewert for restricted lands inherited by the widow and adult and minor heirs of Charles Bluejacket, a full-blood Quapaw Indian, and for an accounting for rents and royalties derived from such lands.

On October 23, 1908, Ewert was appointed a special assistant to the Attorney General of the United States to

" assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency," and by the terms of his appointment his official residence was fixed at Miami, Oklahoma. He testifies that he took the oath of office on the 10th of November, 1908, and about December 1st opened an office at Miami. In his answer he alleges that he made his first bid for the land involved on December 21, 1908, within a month after his arrival at his post; that a second bid was made by him on January 25, 1909, and a third on February 22, 1909, all of which were rejected because less than the appraisement. On March 29, 1909, he made a bid of $5,000 for the land, which was accepted. The deed he received was dated April 8, 1909, and was approved by the Secretary of the Interior on July 26th following.

Charles Bluejacket, the ancestor of the vendors, was a full-blood Quapaw Indian and as such received a patent for the lands involved, dated September 26, 1896, which provided—pursuant to 28 Stat. 907—that the land should be " inalienable for a period of twenty-five years " from and after the date of the patent. Thus the restraint on alienation did not expire until September 26, 1921, and it ran with the land, binding the heirs precisely as it bound the ancestor. *United States* v. *Noble,* 237 U. S. 74, 80.

Congress provided, in 1902 (32 Stat. 245, 275), that adult heirs of a deceased Indian might sell and convey full title to inherited lands free from restrictions, but only by conveyances approved by the Secretary of the Interior, and that the interests of minor heirs might also be so sold and conveyed upon petition of a guardian, on order of a proper court and when the sale was approved by the Secretary of the Interior. Under this statute the lands in controversy were sold in the public manner required by the rules of the Department of the Interior and for the

purposes of this decision all required action is assumed to have been, in form, properly taken.

The ground upon which the validity of the conveyance to Ewert is assailed is that Rev. Stats., § 2078, rendered it unlawful for him to become a purchaser of Indian lands while holding the position which he did as a Special Assistant to the Attorney General "to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency" and that, therefore, the deed to him was void.

Revised Statutes, § 2078, reads: "No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

The District Court held that Ewert was not so employed in Indian affairs as to come within the scope and condemnation of the statute and dismissed the bill. On appeal, the Circuit Court of Appeals held that he came within the statute and reversed the decree of the District Court as to the minor heirs but affirmed it as to the adult heirs on the ground that they were guilty of such laches in delaying bringing suit from the date of the deed in 1909 to 1916 that their cause of action was barred. The case is here for construction of this act of Congress.

It is argued that when the land was purchased by Ewert he was not "employed in Indian affairs" within the meaning of Rev. Stats., § 2078, which, it is contended, includes only "Officers of Indian Affairs," provided for in Rev. Stats., Title XXVIII, and its amendments.

The section is derived from the Act of June 30, 1834, c. 162, § 14, 4 Stat. 738, which declared that "No person employed in the Indian department shall have any interest or concern in any trade with the Indians," etc. The substitution of "employed in Indian affairs," used in the

section of the Revised Statutes for "employed in the Indian department," used in the prior act, was plainly intended to enlarge the scope of the provision so that it should include all persons employed in Indian affairs, even though they might not be on the roll of the Indian department which is really only a bureau of the Interior Department.

The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these "Wards of the Nation." *United States* v. *Hutto, No. 1,* 256 U. S. 524, 528.

Since the Act of June 22, 1870, c. 150, 16 Stat. 164, carried into Rev. Stats., § 189, no head of any department of the Government has been permitted to employ legal counsel at the expense of the United States, but whenever such counsel is desired a call must be made upon the Department of Justice, by which it is furnished. In this case, as we have seen, Ewert was specially employed and detailed by the Attorney General, not only to devote himself to Indian affairs but specifically to institute and prosecute suits relating to lands of the Quapaw Indians, with which we are here concerned, and he himself testifies that during his employment he devoted all of his time to such official duties. He was thus employed to give, and he testifies that at the time of this purchase he was giving, all of his time to the affairs, not of the Indians in general, but to matters relating specifically to the titles of the lands of the Quapaw allottees. If he had been employed by the Secretary of the Interior or by the Commissioner of Indian Affairs to perform the same service no refinement could have suggested the inapplicability to him of the statute, and the fact that under the form of departmental organi-

zation of the government provided for by statute he was under the general direction of the Department of Justice at the time can make no difference.

We fully agree with the Circuit Court of Appeals that Ewert was employed in Indian affairs within the meaning and intendment of the act when he purchased the land.

It is next contended that the " trade with the Indians " in which persons employed in Indian affairs were prohibited by the section from engaging must be confined to trade with them when conducted as a business or occupation—to merchants or dealers supplying the Indians with the necessities or conveniences of life. Having regard to the purpose of the statute, as we have stated it, we think that no such narrow interpretation can be given to the section. Congress can not have intended to prohibit the use of official position and influence for the purpose of overreaching the Indians in the selling to them of clothing or groceries and to permit their use in stripping them of their homes and lands. In *United States* v. *Douglas,* 190 Fed. 482, the Circuit Court of Appeals for the Eighth Circuit declined to allow precisely such a construction as it is contended should be here given to the section and ruled that the purchase of cattle by an industrial teacher of Indians came within its terms. This decision was rendered over ten years ago and if it had been deemed an erroneous construction of the act, Congress would no doubt have long since modified it. Again we agree with the Circuit Court of Appeals that the land was acquired by Ewert in trade with the Indians, within the meaning of the section.

The Circuit Court of Appeals upon the construction of the statute, with which we thus agree, held the sale to Ewert invalid as to the minor Indian heirs, but, while properly regarding the limitation statutes of Oklahoma as inapplicable, held the adult heirs were barred by laches in failing for seven years to institute suit after delivery of the deed to the land. In this the court fell into error.

"The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer." *Waskey* v. *Hammer,* 223 U. S. 85, 94, and cases cited. The qualifications of this rule suggested in the decisions are as inapplicable to this case as they were to the *Waskey Case.* The mischief sought to be prevented by the statute is grave and it not only prohibits such purchases but it renders the persons making them liable to the penalty of the large fine of $5,000 and removal from office. Any error by the department in the interpretation of the statute can not confer legal rights inconsistent with its express terms. *Prosser* v. *Finn,* 208 U. S. 67.

The purchase by Ewert being prohibited by the statute was void. *Waskey* v. *Hammer, supra.* He still holds the legal title to the land and the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions. *Galliher* v. *Cadwell,* 145 U. S. 368, 372; *Halstead* v. *Grinnan,* 152 U. S. 412, 417, and *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 500.

It is alleged in the petition, and not denied, that Ewert encumbered the lands involved with a mortgage and against it indemnification is prayed for, which should be granted if the lien still subsists.

It results that the decree of the Circuit Court of Appeals will be affirmed as to the minor heirs and that as to the adult heirs it must be reversed and the cause remanded to the District Court for an accounting and for further proceedings in conformity with this opinion.

Affirmed in part.
Reversed in part and remanded.

KENDALL, ADMINISTRATOR OF REDEAGLE, ET AL. *v.* EWERT.

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

No. 157. Argued March 13, 1922.—Decided May 15, 1922.

1. A deed made by an Indian to one who took it as agent for another employed at the time as a special assistant to the Attorney General in suits to set aside Indian conveyances, *held* void, under Rev. Stats., § 2078, following *Ewert* v. *Bluejacket*, *ante*, 129. P. 141.
2. Upon an appeal from a decree of the Circuit Court of Appeals, dismissing an appeal from the District Court upon the ground that the parties had entered into a valid stipulation for the final dismissal of the suit, this court, finding the stipulation invalid, may dispose of the entire cause as justice may require. P. 142.
3. The inference of incapacity for business arising from the fact that a man is generally regarded in his community as a common drunkard can only be overcome by clear evidence of his ability on the particular occasion, when a transaction in which he was plainly overreached is in question. P. 146.
4. *Held*, upon the evidence, that a stipulation to dismiss this suit, and a quit-claim deed, both affecting valuable property rights of an Indian, were executed by him when incompetent, due to his addiction to drink, and should be set aside. P. 148.
5. An Indian's deed of his restricted allotment which is invalid because of his mental incompetency when he made it is not validated by its subsequent approval by the Assistant Secretary of the Interior, presumably given without knowledge of the Indian's condition when the deed was executed. P. 148.
6. The equitable doctrine of relation is not applied to sustain an inequitable title. P. 148.
7. Rents and royalties accrued from a restricted allotment of land made to an Indian are personal property passing to his administrator upon his death for payment of taxes and charges of administration and for distribution under the state law, when no act of Congress controls. P. 149.
8. A suit begun by an Indian allottee to set aside a conveyance of his allotment and for an accounting of rents and royalties, may be revived after his death and maintained by his administrator in respect of the rents and royalties and the costs and expenses of

the litigation, after the land has been duly conveyed to the defendant by the allottee's heirs. P. 149.

9. Where conveyances were set aside because of the grantor's incompetency, *held* that the grantee must give indemnification for a mortgage by which he had encumbered the title in the interim, if it remained a subsisting lien. P. 150.

264 Fed. 1021, reversed.

APPEAL from a decree of the Circuit Court of Appeals dismissing an appeal from a decree of the District Court which dismissed a bill seeking to hold the appellee as trustee for the original plaintiff, Redeagle, in respect of an Indian allotment of mining land, and of rents and royalties derived from it. The dismissal in the court below was based on a stipulation made by Redeagle with the appellee that the suit should be dismissed with prejudice, which the court below upheld against the contention that Redeagle, being a drunkard, was without capacity to make it.

Mr. Arthur S. Thompson for appellants.

Mr. Paul A. Ewert pro se. *Mr. Henry C. Lewis* and *Mr. William R. Andrews* were also on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals, dismissing an appeal from a decree by the District Court which dismissed the petition, in a suit in which it was prayed that appellee, Paul A. Ewert, should be decreed to hold in trust for George Redeagle the title to 100 acres of restricted and very valuable Indian lands, which Redeagle, a full-blood Quapaw Indian, had, in form, deeded, in 1909, to Franklin M. Smith, who, a year later, conveyed the same to Ewert. It was alleged that Smith in bidding upon the land acted as the agent of Ewert who, it was averred, was legally incapable of purchasing it because he was employed at the time by the Government in Indian affairs.

Ewert is the same person who was appellant and appellee in Nos. 173 and 186, respectively (the *Bluejacket Case*), this day decided, *ante,* 129, and the validity of the deed in this case is assailed, as was the one involved in those appeals, on the ground that Ewert was not competent to make such a purchase under Rev. Stats., § 2078, which reads:

"No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

The facts in the two cases are very similar, except that in this case the evidence is clear that, regarding himself as prohibited from making the purchase and desiring to conceal his relation to it, Ewert procured Smith to bid on the land, to take the deed for it in his own name and then, a year later, to deed it to him. The deed to Smith was for the consideration of $1,300 but the quit-claim deed from Smith to Ewert was for the recited consideration of $2,000. Ewert admitted in his answer that he purchased the land through Smith, as his agent, but when pressed for a reason for the difference in the considerations, his reply was evasive and indefinite. The restriction on the land expressed in the patent and required by 28 Stat. 907, did not expire until September 26, 1921.

Here as in the other case Ewert, appointed Special Assistant to the Attorney General in October, 1908, "to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency," is found in the following February bidding upon and purchasing this Quapaw Indian land.

In the *Bluejacket Case* we have held that, assuming the sale to have been made in the public manner required by the rules of the department, all required action to have been, in form, properly taken, and the deed therein to

have been approved by the Secretary of the Interior, nevertheless it was void because Ewert was prohibited by Rev. Stats., § 2078, from then becoming the purchaser of such Indian lands, and the construction therein given to the statute must rule this case and render void the deeds herein relied upon to give him title.

But this case presents several additional features.

After the District Court decided in favor of Ewert and dismissed the petition, he paid $700, on July 5, 1918, to procure from Redeagle, a stipulation to dismiss the action *with* prejudice, and for the same consideration and at the same time took from him a quit-claim deed for the land. Before hearing on appeal, by Redeagle, in the Circuit Court of Appeals, Ewert filed a motion to dismiss the appeal, based on this stipulation to dismiss the case, and the appellant, in turn, moved the court to cancel the stipulation and strike it from the files because, as he averred, it was procured by fraud and without notice to his counsel.

When these motions to dismiss were presented to the Circuit Court of Appeals that court ordered that "this cause be . . . referred back to the District Court . . . with directions to investigate the circumstances of the stipulation for dismissal of the suit . . . and to report to this court its findings and evidence whether in fact and law said stipulation is a final settlement of the case. This cause and the motion to dismiss will stand continued in this court pending the receipt of the report from said District Court."

Both the Circuit Court of Appeals and the District Judge treated this order as one of reference, merely, to the District Judge (not to the District Court), to take testimony and report his findings of fact as to the validity of the stipulation, and pursuant thereto the District Judge took testimony and transmitted the same to the Circuit Court of Appeals with his finding that the stipulation was a final settlement of the issues involved in the case, and

thereafter that court dismissed the appeal, reciting in its decree that its conclusion was based on the finding of the District Judge, and upon the reading and consideration of the evidence on which that finding was based.

While the appeal to this court is thus only from this decree of dismissal by the Circuit Court of Appeals, it is plain that, if given effect, that decree would make an end of the entire controversy and would confirm title in Ewert to restricted Indian lands such as we have held in the *Bluejacket Case* he was not competent to acquire, and it therefore is a final decree the appeal from which brings not only the validity of the stipulation for dismissal but the entire cause here for such disposition as the justice of the case may require. Rev. Stats., § 701. *Ballew* v. *United States,* 160 U. S. 187, 199, 200; *Chappell* v. *United States,* 160 U. S. 499, 509; *Camp* v. *Gress,* 250 U. S. 308, 318; *Cole* v. *Ralph,* 252 U. S. 286, 290.

On the reference by the Circuit Court of Appeals to the District Judge various letters by Ewert to Redeagle were introduced which are of great significance.

The decree dismissing the petition was not entered by the District Court until March 4, 1918, but two months before that, on January 3, 1918, Ewert wrote to his adversary, Redeagle, sending a copy " of the opinion rendered by the court " (which was really only a short letter by the judge to counsel stating that the case would be dismissed and directing that a decree be drawn) saying that he did so thinking that perhaps his, Redeagle's, counsel might keep him in ignorance of the holding that " you have no case."

On July 1, 1918, Ewert wrote Redeagle: that the decree of the District Court had not been appealed from; that the time for appeal, if not already past, soon would be (although two months remained for appeal); and that he wished him to " thoroughly understand his rights." And then, showing that he had been in treaty for settlement

with him, he adds: if you sign the stipulation for dismissal " that ends the case forever " and I am paying you this $700 with the distinct understanding that it does " end the case forever," and he suggests that in order that it may do him some good, Redeagle should deposit the money in a bank. He adds: " If you cash it and get all the money, you probably will get drunk and lose it and then you will come back and say that somebody has been trying to cheat you. . . . I have instructed my clerk that under no circumstances should she have any dealings with you when you are intoxicated. I just now met you down in the lobby of this building in an intoxicated condition and you wanted to come to the office and I told you that I would have nothing to do with you while you were intoxicated. I have advised my clerk to the same effect, and if you are intoxicated when you come into this office I want you to state it, *if it can not be observed;* if you have been drinking any when you come into the office *I want you to tell my clerk that fact* and she will have no business relations with you."

On the next day, July 2, 1918, Ewert again writes Redeagle, that he had met him in the corridor on the day before, that when he, Redeagle, wished to talk settlement of the case, he told him he would not talk business with him when he had been drinking. He tells him that he is leaving home to be gone six weeks, and that he has left a check for $700 in his office with proper papers for him to sign if he will come to the office " sober and in your right mind." He again suggested that " instead of having this check cashed and getting drunk and losing the money " he should deposit the money in some bank for " in that way you won't be liable to lose the money." He concludes the letter by urging Redeagle to come to his office at an early day, that he bring with him whomsoever he pleases, if they are reliable and " sober " persons, that he will not settle this case with his attorneys and that he must make settlement soon or the offer would be withdrawn.

Three days later, on July 5th, Redeagle went to Ewert's office with a neighbor and there executed the stipulation for dismissal, and also a quit-claim deed for the land, and received $700. He paid the neighbor $100 for taking him to Ewert's office, put $50 in his pocket, left the balance on deposit in the bank and proceeded to go upon a protracted spree.

The clerk who delivered the check and the two witnesses to the paper say that Redeagle appeared to be sober when he executed them and to fully understand what he was doing; indeed the clerk says, "I should say he was more sober that morning than I had ever seen him."

A number of witnesses were heard by the District Judge. Several said that Redeagle had had some education in his youth, but that he had been drinking heavily for many years and had become so incapable of transacting business that they refused to have business relations with him. Others testified that when sober he was competent to do business.

The District Judge announced that he adopted as the basis of his finding of fact the evidence of the Indian agent who had testified. Among other things, this agent said that while he did not think Redeagle mentally weak "he was a drunkard." "He was like all drunkards, he wasn't fit to do business when drunk." He said when he was sober, he knew what he was doing but he had been drinking a number of years and it was injuring him; that he was improvident but "I don't think just because he was a drunkard he ought to be protected."

The District Court, in stating the effect of the evidence, said: "I am inclined to adopt the evidence of the Indian agent that he was an intelligent Quapaw Indian, but that he was profligate and dissipated and that he finally became a drunkard, and that he was such during the year 1918. Now as to the legal effect of that, I will let you brief that."

The neighbor who went with Redeagle to Ewert's office to execute the stipulation testified that Redeagle came to him the day before and offered him $50 to take him in his automobile to Ewert's office, a distance of twenty miles, that he declined, but finally agreed to take him for $100, which was paid him from the $700 received on settlement. On this and much other evidence the District Judge found that Redeagle was sober when he signed the stipulation for dismissal, that he knew its purpose and effect, and should be held bound by its terms, and the Circuit Court of Appeals concurred in this conclusion.

Without further discussion of the evidence, it is sufficient to say that, while the witnesses differ as to whether Redeagle had deteriorated to the point of being incompetent to do business when temporarily sober, they all agree, and the District Judge agrees with them, that long before the stipulation for dismissal was signed, he had come to be generally regarded as a common, an habitual, drunkard, and we think the Circuit Court of Appeals failed to give the weight to this fact which it deserves.

That habitual drunkards are not competent to properly transact business is so widely recognized in the law that in many States statutes provide for placing them under a guardian or committee, with authority to put restraint upon them and to preserve their property, not less for themselves than for those dependent upon them. A typical statute makes "All laws relating to guardians for lunatics, idiots and imbeciles, and their wards . . . applicable to the guardians" for drunkards. (Ohio General Code, § 11011.)

The extent to which one must have fallen below the standard of ordinary business capacity before he will be generally recognized in a community as a common drunkard is so notorious that we do not hesitate to say that evidence of competency entirely clear should be required to sustain a transaction in which such a person has

plainly, as in this case, been overreached by a person dealing with him who is competent and aggressive. Men so reduced will sacrifice their property, as they have sacrificed themselves, to the craving for strong drink; and Ewert's letters show that he knew perfectly well that the Indian with whom he was dealing had reached that unfortunate stage of decay. They show him refusing to have business dealings with Redeagle three days before the paper was signed because he had been drinking, but that at the same time he was eager to obtain from him a stipulation to dismiss the case, if only he could secure it under circumstances such that he could make plausible proof that he was temporarily sober. His letters, impressing upon Redeagle that his case was lost, that his lawyers were untrustworthy, and intimating that they had deserted him, joined with repeated offers of a sum of money sufficient to enable him to gratify, as he must have thought for a long time to come, the craving which had mastered him, if he would only sign away claims which he was repeatedly assured were valueless, could not possibly have been more cunningly devised than they were to constitute an irresistible temptation to such a demoralized inebriate.

But whatever doubt we might otherwise have had as to the correctness of the conclusion of the Circuit Court of Appeals is removed by evidence which was not before that court and which is presented to and urged upon our attention by Ewert himself in support of a motion to dismiss on the ground that the case had been settled after the appeal was taken. Redeagle died in November, 1918, and this evidence, which we may consider (*Dakota County* v. *Glidden,* 113 U. S. 222; *Elwell* v. *Fosdick,* 134 U. S. 500, 513; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503, 508) consists of three quit-claim deeds from his children for their interest, in the land in controversy and in the royalties for minerals mined there-

from. For each of these three deeds Ewert paid $6,000 in November and December, 1921. The difference between the $700 accepted by Redeagle and the $18,000 paid for the same property to his presumably competent heirs is most persuasive evidence of the condition of incapacity of Redeagle at the time the stipulation was obtained from him, even though he may have been temporarily sober when he signed the paper.

Upon a full review of the evidence as it is now before us, we do not hesitate to conclude that Redeagle was not competent to contract as, in form, he did in the stipulation to dismiss and that it must, therefore, be decreed to be void, notwithstanding the fact that at the time Ewert was not in the employ of the Government.

But, it is argued, the quit-claim deed for the land executed at the same time as this stipulation, on July 5, 1918, was approved by the Assistant Secretary of the Interior on January 27, 1922, as appears by the copy filed with the clerk of this court, and that the doctrine of relation makes this deed effective from its date.

Of this it would be enough to say that Redeagle was no more competent to make this deed than he was to make the stipulation which we have just held to be void, but we may add that the doctrine of relation is a legal fiction, resorted to for the purpose of accomplishing justice, "to prevent a just and equitable title from being interrupted by claims which have no foundation in equity." *Lykins* v. *McGrath,* 184 U. S. 169, 171; *Pickering* v. *Lomax,* 145 U. S. 310; *Lomax* v. *Pickering,* 173 U. S. 26; *Peyton* v. *Desmond,* 129 Fed. 1, 11. Obviously such a doctrine cannot be resorted to to give validity to a deed obtained under conditions such as we are considering,—it cannot take root in such a soil. We cannot know what disclosure of the conditions under which it was executed was made to the Department when the deed was approved, but we do not doubt that if a full disclosure had been made approval

would not have been given, and the deed must be decreed to be void.

After Redeagle died in November, 1918, this suit, revived in the names of the administrator of his estate and of his three heirs, was prosecuted to the decree of dismissal in the Circuit Court of Appeals in June, 1920, and the appeal to this court was allowed in August of that year. More than two years later, in 1922, a motion to dismiss the appeal was filed, based on the claimed settlement with the three heirs to which reference has been made in this opinion, and it is now contended that this appeal should be dismissed for the reason that there is no party remaining competent to prosecute it in this court.

It is argued that the land involved continued under restriction until September 26, 1921, that neither it nor the royalties issuing therefrom could be encumbered until that date, and that both passed to the heirs so freed from charges of any kind that there was no property or estate for an administrator to administer and no function for him to perform.

With this we cannot agree.

The petition in the case prayed for recovery of the land and also for an accounting for rents and profits. That Redeagle or his heirs could institute such a suit is not disputed and to maintain it he must employ counsel and create court costs which should be paid. The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these when accrued were clearly personal property (*United States* v. *Noble,* 237 U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, and for other administration charges and for distribution. There being no congressional legislation providing for the administration of such intestate property, the state law is applicable

and we think the administrator is a competent party to assert the right of the estate, whatever it may be, to rents or royalties derived from the land during Redeagle's lifetime. If Ewert has succeeded to the rights of the heirs he will, of course, receive their distributive shares.

It is alleged in the petition, and not denied, that Ewert encumbered the lands involved with a mortgage, and against this indemnification is prayed for, which should be granted if it continues a subsisting lien.

It results that the decree of the Circuit Court of Appeals must be reversed and the cause remanded to the District Court with directions to enter a decree: canceling the deeds, of Redeagle to Smith of March 10, 1909, of Smith to Ewert, dated April 23, 1910, and of Redeagle to Ewert, dated July 5, 1918; providing for an accounting for rents and profits and royalties, and for indemnification from any subsisting lien of any mortgage by Ewert upon the land; and for further proceedings in conformity with this opinion.

Reversed and remanded.

RAINIER BREWING COMPANY *v.* GREAT NORTHERN PACIFIC STEAMSHIP COMPANY.

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

No. 267. Argued April 21, 1922.—Decided May 15, 1922.

1. Under Criminal Code, § 240, and the Webb-Kenyon Act, c. 90, 37 Stat. 699, a railroad company could carry intoxicating liquor into a State only when labeled as required by § 240 and by the state law. P. 152.

2 Under the law of Washington (2 Remington's Codes & Stats., 1915, §§ 6262-1 to 6262-22,) which allowed intoxicating liquors to be brought in only in packages each containing a strictly limited quantity and bearing a permit from the State showing origin and destination of the shipment and the name of the shipper, who must also be the ultimate consignee, and which made it the carrier's

duty to cancel the permit before delivery, a railroad company was not allowed to transport such packages in carload lots billed to a transfer company at the place of destination and deliver them to the transfer company for distribution and delivery there to the several permittees. P. 154.

270 Fed. 94, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment rendered by the District Court for the steamship company in its action to recover from plaintiff in error, as consignor, the difference between the carload and less than carload rates on a shipment of many separate packages of beer, paid by the steamship company to the Northern Pacific Railway Company, which, as connecting carrier, transported the packages into the State of Washington and delivered them to the respective consignees.

Mr. S. J. Wettrick for plaintiff in error.

Mr. Charles A. Hart, with whom *Mr. Charles H. Carey* and *Mr. James B. Kerr* were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1917 the plaintiff in error shipped two carloads of beer from San Francisco, consigned to the American Transfer Company at Seattle, Washington, which contained 2,565 separate packages or cases addressed to separate individuals. The shipment moved by water to Flavel, Oregon, thence by a line of railway to Portland, Oregon, and thence by the Northern Pacific Railway to Seattle. It was billed in carload lots and was given a through carload rate at point of origin, which was paid.

When the cars reached Portland the Northern Pacific Company refused to accept them, claiming that it could not lawfully carry intoxicating liquors in carload lots into the State of Washington, under the laws of the United States and of that State. Thereupon the liquor

was re-billed, each package or case separately, and the railroad company carried it to Seattle and delivered it to the individual consignees.

This suit is by the steamship company to recover the difference between the carload and the less than carload rate for the shipment. The case was tried on stipulated facts and, a jury being waived, the District Court rendered judgment for the plaintiff which was affirmed by the Circuit Court of Appeals. The parties agree that only one question is presented for decision, viz: Could the railroad company have lawfully transported the beer to Seattle and have delivered it to the Transfer Company, the consignee named in the bill of lading, in carload lots?

To answer this question involves the construction and application of § 240 of the Federal Criminal Code, of the Webb-Kenyon Act (37 Stat. 699, c. 90), and of several sections of c. 1–A of Title XLVII of the Laws of Washington entitled "Prohibition and Regulation," (Remington's Codes and Statutes of Washington, 1915, vol. II, §§ 6262–1 to 6262–22, inclusive).

Section 240 of the Federal Criminal Code provides:

"Whoever shall knowingly ship . . . from one State . . . into any other State . . . any package of or package containing any . . . intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars . . ."

The Webb-Kenyon Act prohibited the "shipment or transportation, in any manner or by any means whatsoever," of any intoxicating liquors of any kind from one State to another State to be received or in any manner used in violation of any law of any such latter State (37 Stat. 699, c. 90). With these laws in force at the time, the railroad company could carry the beer into Washington only when labeled as required by § 240, *supra,* and in

the manner allowed by the laws of that State (*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311), which we shall briefly consider.

Section 6262–29 of the state law, cited *supra,* limited the amount of liquor which any person, other than a common carrier, could bring into the State at one time to not more than twelve quarts of beer or one-half gallon of other liquor and even this amount could lawfully be imported only under a permit issued by a county auditor. Only one such permit could be issued to any one person in any twenty-day period (§ 6262–16).

"Any person desiring to ship or transport any intoxicating liquor" in the State must secure a permit which could be obtained only by an application to the county auditor, in which must be given under oath the name and age of the applicant, the name of the person (or corporation) from whom and the places from and to which the shipment was to be made (§ 6262–15). "Such permit shall be printed upon some shade of red paper," read the law, and must be substantially in the following form:

"STATE OF WASHINGTON }
COUNTY OF } ss.

....., residing at ....., is hereby permitted to ship or transport from ....., in the state of....., to ....., in the county of ....., state of Washington, intoxicating liquor, to wit: ..... (insert kind and quantity, not exceeding in quantity one-half gallon of intoxicating liquor other than beer, or twelve quarts of beer or twenty-four pints of beer). This permit can only be used for one shipment and will be void after thirty days from the date of issue.

Dated this ..... day of ..... 19.....

.....,
County Auditor."

The law further required that the permit should be conspicuously affixed to each package or parcel containing

liquor brought into the State, and when so affixed it authorized any railroad company to transport not to exceed in one package or parcel the limited amount specified. It was further declared to be unlawful for any railroad company to knowingly transport such liquor in the State without having the required permit conspicuously attached to each parcel containing it and the carrier was required to so cancel the permit that it could not be used again. It was made unlawful for any person to receive such liquor which did not have the required permit attached thereto and properly canceled. (§§ 6262–15 and 6262–18). Each package must be "clearly and plainly marked in large letters: 'This Package Contains Intoxicating Liquor'." (§ 6262–20.)

This statement of the applicable law shows that the purpose of the legislation was to make the transportation of intoxicating liquors in the State of Washington as difficult, conspicuous and expensive as possible. Only an individual could qualify to ship or receive it and it was intended that it should move only in a single package of strictly limited quantity, with a permit attached, showing its origin, destination and the name of the shipper who must also be the ultimate consignee. A carrier could lawfully receive it for transportation only when the required permit was attached and it was made its legal duty to deface and cancel such permit before delivery so that it could not again be used. It is stipulated that all of the statutory requirements as to packing, permits and markings were complied with as to the packages here involved, but it is argued that when so prepared for shipment the statute permitted the beer to be carried not only by a railroad company, but also by "any person, firm or corporation operating any . . . vehicle for the transportation of goods" and that, therefore, the railroad company could have discharged all of its obligations under the law by making bulk delivery of the carload lots to the Transfer Company for distribution and delivery to the permittees,

who were the ultimate and real consignees, trusting to that company to make only legal deliveries and to cancel all permits as required by the statute.

With this contention we cannot agree.

The line of the railroad company extended to Seattle, the destination of the beer, and the state statute rendered the permittee the ultimate and real consignee. Under the general law of carriers, it was the duty of the railroad company to make delivery to the consignees, either at its station or at their residences or places of business, conformably to local custom, and the requirement of the statute that the delivering carrier must deface and cancel the permit on each package, added to the imperative character of this obligation. Delivery under the terms of the original bill of lading would have been to the Transfer Company, not as a carrier authorized by law to transport the beer on its way to destination, but to it as a terminal consignee and as such it could not possibly have qualified under the state law. No further transportation was required, only delivery remained.

The markings of the packages, required by both the federal and state law, advised the railroad company of the character of their contents and as to the real consignees and that they resided in Seattle and we think, therefore, that it was clearly its duty to refuse to carry the beer in carload bulk shipments for delivery to the Transfer Company, and that it was within its legal rights in insisting that the traffic be billed in a form which would render convenient such inspection as was necessary to insure conformity to the law in the markings of packages, and such as would render it possible for the company to make delivery to consignees with the permits canceled as the statute required.

It results that the judgment of the Circuit Court of Appeals must be

Affirmed.

CONTINENTAL INSURANCE COMPANY ET AL. *v.* UNITED STATES, READING COMPANY, ET AL.

PROSSER ET AL., AS A COMMITTEE REPRESENTING HOLDERS OF COMMON STOCK OF THE READING COMPANY, *v.* UNITED STATES, READING COMPANY, ET AL.

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

Nos. 609, 610. Argued January 18, 19, 1922; restored to docket for reargument February 27, 1922; reargued April 10, 11, 1922.—Decided May 29, 1922.

1. Upon an appeal under the Expedition Act of February 11, 1903, as modified by Jud. Code, § 291, from a decree entered under a mandate of this court directing the dissolution of a combination in restraint of interstate trade, this court has jurisdiction, of its own motion and independently of the assignments of error, to determine whether the mandate has been properly complied with and to require such compliance. P. 165.
2. A plan decreed by the District Court (summarized in the opinion, *post,* 166,) for dissolving the combination adjudged unlawful in *United States* v. *Reading Co.,* 253 U. S. 26, *approved,* in so far as it provides: for merging the Philadelphia & Reading Railway Company in the Reading Company, shorn of corporate capacity to do other than a railroad business; for separating the Central Railroad Company of New Jersey from the Reading Company by sale or disposition of the shares of the former held by the latter (p. 175); for separating the Lehigh & Wilkes-Barre Coal Company by sale of its stock held by the Central Railroad Company of New Jersey (p. 175); and for separating the Reading Company from the Philadelphia & Reading Coal & Iron Company by transfer of all the stock of the latter (held by the former) to a new coal company, to be organized by trustees of the court, the stock of which shall be issued under conditions assuring that those who acquire it shall not be interested in the Reading Company;—but *disapproved,* in so far as it leaves the capital stock and properties of the Philadelphia & Reading Coal & Iron Company subject to the lien of an out-

standing general mortgage covering also much of the property of the Reading Railway Company, payment of which, as between these two, is assumed by the Reading Company, and in so far as it provides that the Philadelphia & Reading Coal & Iron Company shall give a new mortgage of all its property to secure bonds to be delivered by it to the Reading Company in the adjustment of their financial relations. P. 167.

3. The court has power under the Sherman Anti-Trust Act, in dissolving a combination of two corporations, to disregard the letter and legal effect of a general mortgage of their properties and of the bonds secured thereby, in order to achieve the purpose of the act. P. 171. *United States* v. *Southern Pacific Co., post*, 214.
4. In this case, the general mortgage of the Reading Company and the Philadelphia & Reading Coal & Iron Company gave notice on its face of the unlawful union and purpose of which it was the necessary instrument, and those who took the bonds thus secured, although they may have done so innocently, relying on legal advice and surrendering valid underlying liens created before the Sherman Act, hold them subject to the judicial power to free the two properties from the consolidating tendency of the mortgage by relieving one of them from the lien and substituting a judicial equivalent in protection of the bondholders. P. 171.
5. The decree in this case should modify the liability under the general mortgage and bonds so that the obligation of each mortgagor company upon the bonds, and the lien upon its property, shall be reduced to an amount proportionate to the ratio of the value of its property subject to the mortgage to the value of all the property so mortgaged, and should make specific provisions for foreclosure of the resulting separate liens in case of default. P. 173.
6. Any injury to the security caused by this modification of the terms of the debt and mortgage may be compensated by such payment to the bondholders, by either or both mortgagor companies, as may seem equitable and convenient. P. 174.
7. Authority is given the District Court to amend the plan of dissolution for the purpose of leaving the Reading Company properly financed, and to make such detailed changes as, after full hearing of all the parties, it may find practically necessary in following the general outlines of the modifications here made. P. 174.
8. The decree should provide not only that all stockholders of the new coal company, upon receiving and registering their stock, shall make affidavits that they are not owners or the agents or representatives of owners of stock in the Reading Company, but also

should require the merged Reading Company to adopt a by-law, effective until the further order of the court, permitting registration of transfers of its stock only in the names of persons who make affidavit that they are not stockholders of the new or old coal companies and have not been and are not holders of proxies to vote shares therein. P. 175.

9. The plan of dissolution provides that the stock of the new coal company shall be disposed of primarily by sale to the preferred and common stockholders of the Reading Company, share and share alike, of assignable certificates exchangeable for the new coal company's shares by holders who prove at the time that they are not stockholders or representing stockholders of the Reading Company or in any agreement in its interest for the control of the coal company. *Held:*

(*a*) That the so-called sale is in effect a distribution of forbidden surplus assets of the Reading Company to its stockholders, small payments being required for the purpose of providing the company with additional capital for the operation of its railway system. P. 176.

(*b*) That the distribution as between the preferred and common stockholders must be determined by the organization agreement of the Reading Company defining their rights and must be *pro rata*, whether under that agreement the net profits of any past year, after paying preferred shareholders their full percentage, may be divided among the common stockholders or not, since the declaring of any dividend is left to the honest discretion of the board of directors, and undivided profits are to be regarded as capital assets and distributed on liquidation, the board not having applied them as dividends. P. 177.

10. It is a general rule that stockholders, common and preferred, share alike in the assets of a liquidating corporation, if the preference be only as to dividends. P. 181.

11. Whether, under the federal Commodities Clause and the Constitution of Pennsylvania, it will be proper and lawful that the Reading Company, becoming reorganized as a railroad corporation, continue to own stock of the Reading Iron Company, an iron manufacturing concern, will be determined, and the plan of dissolution modified accordingly, by the District Court. P. 181.

273 Fed. 848, affirmed with modifications.

This case presents the questions, first whether a decree of the District Court entered under a mandate from this

court in *United States* v. *Reading Co.*, 253 U. S. 26, is in accordance therewith, and second, whether it does equity to the appellants.

The original suit was instituted by the United States to dissolve the relation existing between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, all corporations of Pennsylvania, the Central Railroad Company of New Jersey, a corporation of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, a corporation of Pennsylvania, as a combination to restrain and monopolize interstate commerce in anthracite coal, and to violate the Commodities Clause of the Act of June 29, 1906, c. 3591, 34 Stat. 585.

This court found that by a scheme of reorganization, adopted in December, 1895, the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company combined to deliver into the complete control of the board of directors of a holding company, the Reading Company, all of the property of much the largest single coal company operating in the Schuylkill field, and almost one thousand miles of railway over which its coal must find its access to interstate markets, and that this constituted a combination unduly to restrain and monopolize interstate commerce in anthracite coal; that the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company had thereafter but one stockholder, the Reading Company, and that thus the Reading Company served to pool the property, the activities and the profits of the three companies. The court further found that through the acquisition by the Reading Company of a majority of the stock of the Central Railroad Company of New Jersey which itself owned 90 per cent. of the stock in the Lehigh & Wilkes-Barre Coal Company, the illegal power of the combination was greatly increased, and that the relation of common control through

stock ownership of the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company, and that of the Central Railroad Company of New Jersey and the Lehigh Valley & Wilkes-Barre Coal Company were violations of the commodities clause, requiring dissolution. The court, therefore, remanded the case to the District Court directing a decree in conformity to the opinion dissolving the whole combination of the four companies with the Reading Company and such disposition of the shares of stocks and bonds and other property of the Reading Company as might be necessary to establish the entire independence of each company from the others, to the end that the affairs of all of them might be conducted in harmony with law.

For convenience the Philadelphia & Reading Railway Company will be called the Reading Railway Company, the Philadelphia & Reading Coal & Iron Company the Reading Coal Company, the Central Railroad Company of New Jersey the New Jersey Railroad Company, and the Lehigh & Wilkes-Barre Coal Company the Wilkes-Barre Coal Company.

The situation at the time the District Court was directed to enter its decree was as follows: The Reading Company, the holding company, had a special charter under the laws of Pennsylvania granted prior to the adoption of the constitution of that State of 1874, with unusually broad powers. It was not engaged directly in operating a railroad and was not subject to regulation by federal or state authorities having jurisdiction over common carriers. It owned the entire capital stock of the Reading Railway Company, being $42,481,700 par value, and $20,000,000 of its bonds; $8,000,000, par value, being the entire capital stock of the Reading Coal Company; the real estate, rolling stock and floating equipment used upon or in connection with the Reading Railway System; shares of stock and bonds of other railroads and terminal companies, con-

stituting a part of the Reading Railway System; $14,504,000, par value, being more than a majority, of the stock of the New Jersey Railroad Company, all of which was pledged except forty shares under a collateral trust mortgage to secure $23,000,000 worth of bonds. These were not all its holdings, but they are all that are important here.

On January 5, 1897, the Reading Company and the Reading Coal Company jointly gave a mortgage to the Central, now the Central Union Trust Company of New York, trustee, hereafter to be referred to as the general mortgage. The security under this mortgage was all the property of the Reading Coal Company and all of its capital stock, together with all of the capital stock of the Reading Railway Company and all the railroad equipment and certain real estate essential to the operation of the Reading Railway Company, which was held by the Reading Company, together with certain bonds of the Railway Company. The bonds now outstanding under this mortgage amount in round figures to $93,000,000.

A combination of the Reading Railway Company and the Reading Coal Company had been maintained for years and the property of the Reading Coal Company had been greatly enlarged by purchases and improvements through money advanced by the Reading Railway Company, resulting in an indebtedness of the Reading Coal Company to the Reading Railway Company which ultimately amounted to about $70,000,000. In 1896, when the Reading Company became the holding company under the then formed combination, this indebtedness of the Coal Company to the Railway Company appeared as a credit on the books of the Reading Company, and a debit on the books of the Coal Company, but it is quite clear that they were mere bookkeeping entries and that it had been agreed that they should be canceled. They are canceled in the proposed plan.

Under the plan embodied in the decree of the District Court, the Reading Company is as between it and the Reading Coal Company to assume the whole liability under the general mortgage, and agrees to save the Coal Company and its property harmless therefrom. The Reading Company is to receive from the Reading Coal Company $10,000,000 in cash or current assets, and $25,000,000 in 4 per cent. bonds of the Reading Coal Company, secured by mortgage on its properties. The Reading Company is to transfer its interest, subject to the lien of the general mortgage, in all the stock of the present Reading Coal Company, amounting to eight million dollars in par value but actually worth many times that amount, including the right to vote and receive dividends thereon, to a new Reading Coal Company, a corporation to be created under the supervision of the District Court, and over which that court is to retain control so as to prevent its being used to thwart the decree.

The new Coal Company agrees to issue as its total capital stock 1,400,000 shares without par value, to a trustee or trustees appointed by the District Court, who are to transfer to the Reading Company assignable certificates of interest in the stock of the new Coal Company, for distribution to its stockholders. The certificates are to be exchangeable for such stock only when accompanied by an affidavit, stating among other things that the holder is not an owner of any stock of the Reading Company and is not acting for or on behalf of any stockholder of the Reading Company, or in concert, agreement or understanding with any other person, firm or corporation for the control of the Coal Company in the interest of the Reading Company, but in his own behalf in good faith.

The certificates of interest are to be offered for so-called sale by the Reading Company to its stockholders, preferred and common, share and share alike, for $2.00 for each share of the Reading Company. Such stockholders

can not, however, continue as stockholders of the Reading Company and become stockholders of the new Coal Company during the conversion period, but each must dispose of his certificates of interest in the new Coal Company or of his stock in the Reading Company. If, after July 1, 1924, any of the certificates shall remain outstanding, the court in its discretion and after a hearing may order the shares covered by such certificates to be sold and the proceeds distributed to the owners of such certificates. The Attorney General is given access to the transfer books of both companies to enforce compliance with the order. This secures to the Reading Company in cash $5,600,000.

Second: The Reading Company will merge into itself the Reading Railway Company and all the railway property of the Reading Railway Company is to be made subject to the direct lien of the general mortgage. The existing charter of the Reading Company authorizes such a merger. The Reading Company is to accept the Pennsylvania constitution of 1874, and to proceed under the Pennsylvania Act of 1856 to surrender those of its franchises which are inappropriate for a railroad corporation of Pennsylvania. It will thus become a railway company subject in all respects to the regulation of the state and federal authorities as a common carrier.

Third: The Reading Company is to transfer to trustees appointed by the District Court, subject to the lien of the collateral trust mortgage already mentioned, all of its interest in the stock of the New Jersey Railroad Company. The final disposition of this stock is to be deferred in view of the possible groupings of railroads by the Interstate Commerce Commission under the Transportation Act of 1920, but is to be subject to an order of sale by the court in its discretion before that time. The trustees are directed to select directors and secure a management of the New Jersey Railroad Company entirely independent of

the Reading Company, which shall discharge its duties under the supervision of the court.

Fourth: The stock of the Wilkes-Barre Coal Company, held by the New Jersey Railroad Company is by the decree to be sold to persons not stockholders of the New Jersey Railroad Company, the Reading Company, the Reading Railway Company, or the new Reading Coal Company, and who shall qualify as purchasers of the same by an affidavit like the one already mentioned. It appears that this provision of the decree has already been carried out because not appealed from, and that the stock of the Wilkes-Barre Coal Company has been sold, though there is pending an application to set the sale aside.

The appeals in this case were taken by the Insurance Companies, who own 8,400 shares of the common stock of the Reading Company, less than one per cent. of the entire common stock, and by the so-called Prosser Committee, also interveners, who represent 407,728 shares of the common stock, which is somewhat less than 30 per cent. of the total common stock, and less than 15 per cent. of the entire capital stock of the Company. Their appeals are based on the claim that the right to subscribe for the certificates of interest in the stock of the new Coal Company belong to the common stockholders of the Reading Company and to them alone, to the exclusion of the preferred stockholders.

After the first argument of these appeals, the court directed a second argument upon the questions (1) whether the plan adopted by the District Court was in conformity with this court's mandate, in establishing the entire independence of the companies found in unlawful combination from each other, (2) whether there was any legal or practical difficulty in selling the Reading Coal Company's stock free from the lien of the general mortgage, and (3) what was the basis of the adjustment of the indebtedness between the Reading Company and the new and old Reading Coal Companies. [257 U. S. 622.]

Mr. R. C. Leffingwell, with whom *Mr. Charles Heebner, Mr. Wm. Clarke Mason, Mr. L. D. Adkins* and *Mr. A. I. Henderson* were on the brief, for the Reading Company.[1]

Mr. John M. Perry, with whom *Mr. Arthur H. Van Brunt* was on the brief, for Central Union Trust Company of New York.

Mr. Alfred A. Cook, with whom *Mr. Frederick F. Greenman* and *Mr. Robert Szold* were on the brief, for appellants in No. 609.

Mr. George W. Wickersham, with whom *Mr. Edwin P. Grosvenor* was on the brief, for Iselin et al., a committee representing preferred stockholders.

Mr. Joseph M. Hartfield, with whom *Mr. Roberts Walker, Mr. J. DuPratt White* and *Mr. Allen McCarty* were on the briefs, for appellants in No. 610.

Mr. Solicitor General Beck, with whom *Mr. Attorney General Daugherty, Mr. Assistant to the Attorney General Goff* and *Mr. Abram F. Myers,* Special Assistant to the Attorney General, were on the brief, for the United States.

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

The appeals which brought this case here were taken under the Act of Congress approved February 11, 1903, c. 544, 32 Stat. 823, as modified by § 291 of the Judicial Code. Ordinarily the scope of our review of the decree of

[1]At the former hearing, arguments were made, on behalf of Joseph E. Widener, appellee, and on behalf of William B. Kurtz et al., appellees, by *Messrs. Ellis Ames Ballard* and *Thomas Raeburn White,* respectively. No argument was made by the *Solicitor General* or on behalf of the Central Union Trust Company. For the order restoring the case for reargument, see 257 U. S. 622.

the District Court would be limited to the assignments of error of the appellants, but in this case, as the decree which is before us was entered under a mandate of this court, we have jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion.

The plan of dissolution of the bond between the four companies under the control of the holding company is, shortly, as follows:

1. It merges the Reading Railway Company in the Reading Company and shears the latter of corporate capacity to do other than a railroad business.

2. It turns over to trustees of the court for sale or disposition in accord with the plan of groupings by the Interstate Commerce Commission to be adopted under the Transportation Act the majority stock of the New Jersey Railroad Company.

3. It separates the Wilkes-Barre Coal Company from the New Jersey Railroad Company by directing the sale of that stock to persons who do not own stock in any of the other companies.

4. It separates the Reading Company from the Reading Coal Company by a transfer of all the stock in the latter company to a new coal company to be organized by trustees of the court, and directs a distribution to the stockholders of the Reading Company, in proportion to their respective holdings of stock in the latter company, of valuable rights, evidenced by so-called certificates of interest, to dispose of the stock in the new Coal Company. The effect of the decree is to require them either to sell these certificates to others not stockholders in the Read-

ing Company, or to sell their stock in the Reading Company before themselves becoming stockholders in the new Coal Company, or doing neither, and receiving no interest in the interval, to let the court sell the new stock after July 1, 1924, for their account.

The difficulty in the separation of the interests of the Reading Company and the Reading Coal Company is that the lien of the general mortgage covers much of the property of the Reading Company and all of the stock and property of the Coal Company and is not redeemable until 1997. The plan requires the Reading Company to assume the whole liability of the general mortgage and to save the old and new Coal Companies harmless therefrom in consideration of $10,000,000 cash or current assets and $25,000,000 in bonds secured by mortgage on all its property by the Reading Coal Company, redeemable at the same time as the general mortgage. This is on the assumption in which all agree that the respective liabilities of the Reading Company and the Coal Company under the lien of the mortgage as between themselves should be regarded as something less than three to one.

The doubt whether the plan is adequate to secure the object of this court has been prompted by the failure to take out from under the lien of the general mortgage the capital stock and the properties of the Reading Coal Company and the giving of a new mortgage by the Reading Coal Company on all its property to secure bonds to be delivered by it to the Reading Company. The query is whether this would not leave in the Reading Company some possible measure of future control over the Coal Company and enable the Reading Company later on to reëstablish in effect the combination which, this court decided, must be ended.

It is further questioned whether the interest which the new Coal Company, with its properties still subject to the lien of the general mortgage, will have in preserving the

solvency of the Reading Company, would not create a constant motive on its part to favor the Reading Company with its tonnage and discriminate against other carriers reaching its mines. It is pointed out, too, that the interest of the Reading Company in the continuing ability of the Coal Company to avoid default on its proposed mortgage for $25,000,000 to secure bonds to be given to the Reading Company, would prompt a community of operation between the two companies which it was the object of this court to end.

All these difficulties, it is said, could be removed if all of the properties and stock of the Coal Company were sold outright and the purchase money applied to the satisfaction *pro tanto* of the general mortgage by depositing with the trustee cash or current securities equal to one-third of the amount of the general mortgage debt, as the fair ratio of the Coal Company's contribution to the security of that company, the remainder of the proceeds of sale to go to the Reading Company for its proper disposition as assets of its own.

When the mandate went down, the District Court invited the Reading Company to propose a plan for the dissolution of the illegal combination for submission to all the parties in interest, including, of course, the Government. The first form of plan contemplated that the release of the stock and properties of the Reading Coal Company from the lien of the general mortgage should be secured by the Reading Company's paying to each bondholder, in consideration of his release, a cash premium of ten per cent. of the par value of the bonds he held. This did not meet with the favor of the bondholders or of their trustee. The common stockholders of the Reading Company also objected. The Solicitor General in his discussion of the plan put the case thus:

" The Attorney General, therefore, was confronted with these alternatives: (1) To insist upon the court ordering

the release of the stock and properties of the Reading Coal Company from the lien of the general mortgage without the consent and over the protest of the trustee and the bondholders; or (2) To assent to a modification of the plan which, while placing in different hands the stock control of the Reading Company and the Reading Coal Company and providing effective safeguards against future inter-corporate relations, would leave the stock and properties of the latter pledged under the general mortgage.

"The following considerations appeared to make the latter course the wiser as well as the more expedient:

"(1) The attitude of the trustee and bondholders made it clear that the former course would meet with an opposition which certainly would have resulted in another appeal to this court with consequent delay in effecting a dissolution."

The fourth reason was stated as follows:

"(4) Finally, and most important, the country at that time was in the midst of a serious financial and industrial depression accompanying the transition from the artificial stimulations of war to normal conditions of peace. The condition was regarded as critical. Grave apprehension was felt that if the Government should insist upon the disruption of the general mortgage public confidence in the restoration of prosperity might be adversely affected. It seemed the course of wisdom, therefore, to avoid the possibility of contributing further to an already threatening situation if it could be done without sacrifice to the effectiveness of the dissolution. The Government was not averse to any necessary surgery, but it seemed wise not to amputate any more than was necessary to secure the great policy of the Sherman law. In this it followed the admonition of this court in the *Standard Oil* and *Tobacco Cases* that innocent interests, as the present holders of the bonds in question were, should be spared unnecessary injury."

It is asserted further by the Reading Company, and not denied, that, when this decree was entered by the District Court, the monetary situation was such that it would have been impossible to secure a purchaser of the Reading Coal Company properties at any fair price, that indeed the transaction could not have been financed at all.

The considerations influencing the District Court and the Government against a drastic readjustment of the interests of the bondholders under the general mortgage and the holdings of the two offending companies were of manifest weight in the then business and monetary situation. Even now this court would hesitate to order a sale of this kind of property worth probably one hundred million dollars with confident hope of realizing an adequate amount with the necessary restrictions as to the purchaser. We agree with the Attorney General in his disinclination to insist upon such a sale under the circumstances. Since the time of settling the decree, however, a change for the better has come in the financial situation. We think that this justifies us now in making some modifications in the plan which were not presented to the parties or considered by the court, possibly because they might have been unwise in the critical conditions then existing. They involve a departure from the contract provisions of the general mortgage and the bonds it secures.

The petition of the trustee under the general mortgage urges that a court of equity ought not by its decree, summarily to wrench the Coal Company's property from under the pledge of the mortgage, or to vary its terms in view of the circumstances. It points out that neither the trustee nor the bondholders were made parties to the original bill to set aside the combination and monopoly, and that the trustee was made a party to the proceeding only after the mandate of this court went down. The petition avers the innocence of any wrongdoing on the part of the bondholders, and alleges that, of the $106,-

000,000 of bonds issued, $50,000,000 were issued at or about the date of the mortgage in 1896, $36,000,000 were issued between 1897 and 1920 to take up and in exchange for underlying bonds that were liens prior to reorganization and for the most part prior to the passage of the Sherman Act, and $20,000,000 were issued between 1898 and 1911 for betterments. It further alleges that for twenty years after this mortgage was executed, its validity, as far as the bondholders are concerned, has not been questioned by the Government and these bonds have passed into the hands of numerous and widely scattered holders, that few of them, if any, are or were identified at all with the management of the Reading Company or Coal Company, and many of the bonds are held by fiduciaries.

The power of the court under the Sherman Anti-Trust Law to disregard the letter and legal effect of the bonds and general mortgage under the circumstances of this case, in order to achieve the purpose of the law, we can not question. The principles laid down and followed in the case of *United States* v. *Southern Pacific Co.*, decided today, *post*, 214, leave no doubt upon this point. Indeed, the case which we there cite, *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614, is a stronger instance of the power of Congress in regulating interstate commerce to disregard contracts than is needed in this case, because there it was enforced as to a contract made before the regulation. It may be conceded, as averred, that the bondholders in this case were innocent of any actual sense of wrongdoing, that they relied on the advice of eminent counsel in assuming that the union of the Railroad and the Coal Companies under the control of the holding company was not a violation of the Sherman Law, and that some of them surrendered bonds secured by underlying liens of unquestioned valid-

ity created before the enactment of the Sherman Law. Nevertheless, spread all over the face of the general mortgage, was the information and notice of the union of the railway and coal properties for the very purpose which is the head and front of the offending under the Anti-Trust Law and which requires this court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce. It was the advantage of the legally improper relation between the railway and coal interests which made the security so attractive. In one of the phases of a case, reported as *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295, the Court of Appeals of the Sixth Circuit was obliged to consider on an intervening petition, the question of the power of the court under the Sherman Act to deal with a mortgage whose lien if held to be inviolable interfered with the effective dissolution of the offending combination of a railway company and a coal company. The opinion is not reported, but we have been furnished a certified copy of the memorandum opinion and its language is so pertinent that we quote it as expressing our view:

"One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the Anti-Trust Law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. Otherwise the mortgage will stand as the ready means of restoring—or at least tending to restore—

those conditions which the court is endeavoring to destroy. It may well be true that a railroad and a coal company under common ownership and management are worth more as security under a mortgage than when independent, and that their effective separation does impair the mortgage security, but this can not make the law helpless."

We have no desire to vary the security of the bondholders more than seems necessary to effect fully the purpose of the law, and wish to recognize their equities as against the two companies and the stockholders, as will later appear.

We think that the plan should be changed in accord with the following suggestions. The District Court should, after a hearing of all interested parties, determine the respective values of the properties of the merged Reading Company and the Coal Company which are subject to lien of the general mortgage. Then the decree should direct that the liability of each on the bonds and the pledge under the mortgage shall be modified as between the mortgagee and the mortgagors, so that the liability of the Reading Company on the bonds outstanding, and the lien of the mortgage upon that company's property to secure them, shall be reduced to an amount proportionate to the ratio of the value of its pledged property to the value of all the property pledged including that of the Coal Company. The obligation of the Coal Company upon such bonds and the lien upon its property to secure them should be reduced in corresponding proportion. The amount that each company is to pay as interest should be similarly fixed, and specific provisions for foreclosure of these separate liens on default and requisite machinery and other necessary changes to carry out the result will be made by the District Court in its discretion. By this arrangement the interests and joint obligations of the Reading Company and the Coal Company will be completely severed and the purpose of this court carried out.

The Reading Company's first plan contemplated the securing of a voluntary release of the Coal Company's property by the bondholders through payment of ten per cent. of the par value of his bonds to each bondholder; but the proposal did not meet with favor. We leave it to the District Court to determine what, if any, injury to the security this modification of the terms of the debt and mortgage may cause and to compensate for it by such a payment to the bondholders by either or both companies as may seem equitable and convenient.

The changes involved in these suggestions may interfere with, or make inapplicable, the provisions of the present plan looking to a proper working capital for the Reading Company. Authority is therefore given to the District Court to amend the plan in any way which seems wise to leave the Reading Company properly financed to meet its obligations to the public.

It does not seem necessary to change the general form of that feature of the plan by which, through the distribution of certificates of interest to the stockholders of the old Reading Company in the stock of the new Coal Company, the stock relations of the old Reading Company and the present Coal Company are to be ended, though we would not limit the power of the District Court in this regard. It may be found necessary to increase the price of two dollars per share in the Reading Company which the recipients of the certificates of interest in the stock of the new Coal Company are to pay therefor, in order to reserve more cash to the Reading Company in that transaction; but this the District Court can determine. The adopted plan was nicely adjusted to secure a practical working basis for both companies, and we would not embarrass the District Court, after a full hearing of all the parties, in the detailed changes which it may find practically necessary to adopt in following the general outlines of our modification of the plan.

We think it not unreasonable to accept the suggestion made at the bar, namely, that not only shall the stockholders of the Coal Company upon receiving and registering their stock be required to make affidavit that they have no stock ownership in the Reading Company and are not acting for, or representing, anyone who has, but also that the merged Reading Company shall be required to adopt a by-law effective till the further order of the court permitting registration of transfers of shares of its capital stock in the names only of persons who shall make affidavit that they are not stockholders, registered or actual in either the new or the old Coal Company, and have not been and are not holders of proxies to vote shares of stock therein.

As to the New Jersey Railroad Company and the Wilkes-Barre Coal Company, we have heard no criticism and the provisions as to them are approved. By the decree, the new Coal Company, its officers and directors are enjoined from voting the Coal Company stock so as to form a combination between the Coal Company and the Reading Company. The Reading Company and all persons acting for or in its interest are perpetually enjoined from acquiring, receiving, holding, voting, or in any manner acting as the owner of any shares of the new Coal Company; and the new Coal Company and all persons acting for it are enjoined from acquiring, or voting, any of the shares of the Reading Company. The Coal Company will be permanently enjoined from issuing to the Reading Company, and the Reading Company from receiving, any stock, bonds, or other evidences of corporate indebtedness of the Coal Company. On default the trustee of the mortgage is required to vote the Coal Company stock so as not to bring about a recurrence of the conditions condemned in this cause, and if it shall be necessary to sell the properties they are to be sold to different interests. The Attorney General and his successors in office

are given by the decree full opportunity to keep a watch upon the relations between the two companies and to appeal to the court for prompt enforcement of the injunctions of the decree as they may be advised. The court retains large control of the decree with power to assure its continued efficacy by the summary remedy of contempt. With these restrictive provisions and the modifications of the plan outlined above, we think that the independence of the four companies will be fully achieved.

We come now to the issue upon which these appeals were brought here. It concerns the respective rights of the common stockholders and the preferred stockholders in the assets of the Reading Company. They all, under the plan, will receive the benefit of the difference between the real value of the privilege of disposing of their distributive certificates of interest in stock in the new Coal Company, and the payment of $2.00 or such other sum as may be fixed, per share held by them of the Reading Company stock. Such difference has already been the subject of sale and quotation on the market in New York and has varied from $11 to $20. This might have been expected in view of the disparity between par of the capital stock of the Reading Coal Company and the far greater actual value of its properties. The disparity shows that while the transfer of certificates of interest in the new Coal Company stock is denominated a sale, it is only a distribution of the surplus or assets of the Reading Company to its stockholders made necessary by the decree of this court in taking the Reading Company out of the coal business and restricting it to that of owning and operating a railroad system. The Reading Company by merger with the Reading Railway Company is made to change its character. Under the plan it must comply with the Act of May 3, 1909, Penn. Laws, 408, by which, in merging with the Reading Railroad Company, it becomes a new corporation. *Pennsylvania Utilities Co.* v. *Public Service Commission,*

69 Pa. Super. Ct. 612; *Lauman* v. *Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 45; *Clearwater* v. *Meredith*, 1 Wall. 25; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U. S. 1; *Shields* v. *Ohio*, 95 U. S. 319.

What is to be done is in fact and law a liquidation of the assets of the old Reading Company. Its stockholders receive their distribution in kind by retention of the stock they held in the old Reading Company as stock in the reduced new Reading Company, purged of its offense against the law, together with the distributive values of that which the old Reading Company has been compelled to get rid of, *i. e.*, the ownership of the stock of the Coal Company. The distribution of certificates of interest in the new Coal Company shares was evidently given the form of a sale to enable the new Reading Company to realize out of it $5,600,000 in cash to give it additional working capital enough properly to operate the Reading Railway System. But this does not change its real nature as a mere distribution of forbidden assets in kind to stockholders.

The rights of the common and preferred stockholders of the Reading Company *inter sese* are to be determined by the organization agreement of 1896. At that time, under a special charter of a corporation known as the Excelsior Enterprise Company granted by the Pennsylvania Legislature in 1871, the Reading Company, by change of name, came into being. The capital stock was increased to $140,000,000 divided into 2,800,000 shares of the par value of $50 each. Half of these were preferred, $28,000,000 first preferred, and $42,000,000 second preferred. The other half or $70,000,000 were common, and the rights of the preferred and common stock were fixed by agreement. Each share of stock, whether common or preferred, had a vote. The agreement provided that the preferred stock should be entitled to non-cumulative dividends "at the

rate of, but not exceeding, four per cent per annum, in each and every fiscal year, in preference and priority to any payment in or for such fiscal year, of any dividend on other stock; but only from undivided net profits of the Company when and as determined by the Board of Directors, and only if and when the Board shall declare dividends therefrom. If, after providing for the payment of full dividends for any fiscal year on the First Preferred Stock, there shall remain any surplus undivided net profits, the Board out of such surplus may declare and pay dividends for such year upon the Second Preferred Stock. If, from the business of any particular fiscal year, excluding undivided net profits remaining from previous years, after providing out of the net profits of such particular fiscal year for the payment of the full dividends for such fiscal year on the First and Second Preferred Stock, there shall remain surplus net profits, the Board of Directors may declare, and out of such surplus net profits of such year may pay, dividends upon any other stock of the Company. But no dividends shall in any year be paid upon any such other stock out of net profits of any previous fiscal year in which the full dividends shall not have been paid on the First and Second Preferred Stock."

The company was given the right at any time to redeem either or both classes of its preferred stock at par in cash, if such redemption should then be allowed by law and after payment of dividends of 4 per cent. for two successive years on the first preferred stock, to convert the second preferred stock not exceeding $42,000,000, par value, one-half into first preferred stock, and one-half into common stock, and to increase its first preferred and common stock to the extent necessary to effect such conversion. The company never exercised the right to convert or redeem the preferred stock.

It will be observed that the preferred stock and the common stock with 1,400,000 shares of each were thus

given an equality of voting power which could not be changed without the consent of the company, and that it has not been changed either by conversion or redemption. This would seem to have been designed to preserve an equilibrium of control in which reasonable dividends out of profits when they accrued in sufficient amount would be voted to the common stockholders on the one hand, and proper additions would be made out of earnings to the capital of the company to increase its future profit-earning capacity and create a greater security for a constant payment of dividends to preferred stockholders. Of course there would not be block voting of the two classes of stock but the division did tend to secure a fair representation of both interests in the board of directors.

The effect of the agreement as to dividends upon the preferred and common stock seems to us clear. It emphasizes that dividends are to be paid only out of undivided profits and when and as determined by the board of directors and only if and when the board shall declare them. It leaves to the board to determine in its discretion whether the undivided profits shall be put in surplus working capital or in dividends. The limitations on the discretion of the board are that the first and second preferred can not receive more than four per cent. in any fiscal year, and that neither the second preferred nor the common stock can receive any dividend until the first preferred dividend has been paid in full each year and the common stock receives nothing until the second preferred dividend is thus paid. The words describing the condition upon which the power of the board to declare dividends on the common stock can be exercised, show that each year's profits are to be considered by themselves in the distribution of dividends between the stock.

Appellants, however, rely on the final words of the clause to show that it is intended that net profits in any past year can be thereafter allowed to the common stock

if in that past year the preferred stock had been paid full dividends. We do not find it necessary to decide that the board of directors has not such power; but if so, the power is not one the exercise of which can be compelled in the absence of fraud or breach of trust. The failure of the board to exercise it, and the application of the earnings to surplus determine such earnings to be assets as of the time of the compulsory winding up and liquidation of the corporation. The power to declare dividends not exercised can have no more effect upon the rights of the preferred stockholders to share in the existing assets of the corporation when liquidated than the failure of the company to convert preferred stock into common, or to redeem the preferred stock at par. The proper interpretation of the agreement is that, after the declaration of dividends for any current year, the undivided earnings are to be regarded as capital assets and to be distributed on liquidation, unless the board of directors has meantime applied them as dividends. If the argument of appellants were carried to its logical result, all the net earnings of the Reading Company in twenty-five years no matter how invested or applied to increasing the earning capital, must in a liquidation be treated as undistributed profits to go entirely to the common stock without any action of the board of directors. This is impossible.

The record discloses that in 1904, when the Reading Company made its application to the New York Stock Exchange to have its stock listed, it contained the following statement:

"The Preferred and Common stocks have equal voting power and in liquidation or dissolution of the corporation will share equally in *pro rata* distribution of assets."

Coming as this must have come from the representatives of both the preferred and common stockholders, it is significant evidence of what they then thought of their

respective rights and has the additional weight of a representation to future purchasers of the two classes of stock as to the kind of interests they were buying in the company.

Our conclusion that the claim on behalf of the common stockholders is invalid is based on the construction of the words of the agreement itself and hardly needs authority to sustain it. It is, however, in accord with the general common-law rule that stockholders common and preferred share alike in the assets of a liquidating corporation, if the preference is only as to dividends. *Hamlin* v. *Toledo, St. L. & K. C. R. R. Co.,* 78 Fed. 664, 672, opinion by Mr. Justice Lurton, then Circuit Judge; *Toledo, St. L. & K. C. R. R. Co.* v. *Continental Trust Co.,* 95 Fed. 497, 531; *Guaranty Trust Co.* v. *Galveston City R. R. Co.,* 107 Fed. 311, 318; *Birch* v. *Cropper,* L. R. 39 Ch. D. 1; 14 App. Cas. 525; *In re Accrington Corporation Steam Tramways Co.* [1909], 2 Ch. 40; *Lloyd* v. *Pennsylvania Electric Vehicle Co.,* 75 N. J. Eq. 263; *Jones* v. *Concord & Montreal R. R. Co.,* 67 N. H. 119, 234; *Drewry Hughes Co.* v. *Throckmorton,* 120 Va. 859. This is the rule in Pennsylvania. *North American Mining Co.* v. *Clarke,* 40 Pa. St. 432. The cases in which a different conclusion has been reached are where the contract or law determining the rights of the preferred stockholders has an express or clearly implied restriction as to the share which they may take in the assets on liquidation. *Niles* v. *Ludlow Valve Mfg. Co.,* 196 Fed. 994; *Russell* v. *American Gas Co.,* 152 App. Div. 136.

Counsel for one of the appellants has called attention to the fact, not appearing in any assignment of error, that among the assets of the old Reading Company which the new Reading Company will continue to hold is one million dollars par value and of much greater actual value in the stock of the Reading Iron Company, an iron manufacturing company, and that under the constitution of Penn-

sylvania it will be unlawful for the new Reading Company as a railroad company to continue to own it. Questions as to the propriety and legality of this holding of the old Reading Company did not arise when the case was before this court originally and do not arise on the record before us now in any such way as to enable us to say whether the federal commodities clause or the constitution of Pennsylvania will thus be violated in carrying out the plan by which the Reading Company is to become a railroad company. This must be determined by the District Court in further hearings and consideration at the time the final decree comes to be settled in accordance with our mandate, when it will have authority to modify the plan in this respect to satisfy the requirements of law.

The decree of the District Court is affirmed with modifications already indicated and the case is remanded for further proceedings in conformity to this opinion

Affirmed with modifications.

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

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. *v.* DAVIS, AS AGENT, &c. (LOS ANGELES & SALT LAKE RAILWAY COMPANY).

CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALIFORNIA.

No. 224. Submitted April 28, 1922.—Decided May 29, 1922.

An engine was sent from exclusive employment in interstate commerce to the general repair shops of the railway company, December 19th, for general overhauling, the repairs, which involved partial dismantling, were completed on the 25th of the following February, and the engine, after a trial, was returned to service, in interstate commerce a week later. *Held* that an employee, injured

in the work on February 1st, was not then employed in interstate commerce, and that his action for the injury was under the state law, and not the Federal Employers' Liability Act. P. 185. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.

50 Cal. App. 161, reversed.

CERTIORARI to a judgment of the court below reversing, for want of jurisdiction, an award of compensation for personal injuries, made by the petitioner Commission in favor of the petitioner Burton against the respondent.

Mr. Warren H. Pillsbury for petitioners.

Mr. A. S. Halsted, Mr. Alexander Britton and *Mr. Charles H. Bates* for respondent. *Mr. Fred E. Pettit, Jr.*, and *Mr. E. E. Bennett* were also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

O. J. Burton, one of the petitioners, received injuries while working in the general repair shops of the Railway Company upon an engine that had been employed in interstate commerce and which was destined to be so employed again, and the question is whether redress for the injury must be sought through the Workmen's Compensation Act of California (c. 586, California Statutes 1917) or under the provisions of the Federal Employers' Liability Act (35 Stat. 65).

The proceedings were instituted by Burton by an application to the Industrial Accident Commission of the State which set forth the facts of his injury, and prayed compensatory relief. Payne and the Railway Company answered, setting up the defense of interstate commerce and the federal act, and that the accident was caused by Burton's misconduct. The Commission awarded relief. On petition for review by Payne and the Railway Company, the District Court of Appeal granted a certiorari and reversed the award of the Commission.

The court, after stating the facts, expressed the view that "the sole question presented for" its consideration was whether "the engine at the time of the accident, [was] engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act (35 Stat. 65)" and concluded, after a review of cases, that Burton's work was "so intimately connected with interstate commerce as practically to be a part of it, and therefore," the Commission "had no jurisdiction".

The facts are not in dispute. It was stipulated that while Burton was drilling and tapping the boiler of the engine a piece of steel lodged in his left eye; that this was in the course of his employment and caused thereby, and occurred while he was performing service growing out of and incidental to the same.

We may assume, though the fact is contested, that the engine was sent from exclusive employment in interstate commerce to the repair shops. It was sent there for general overhauling December 19, 1918, and was, to a certain extent, stripped and dismantled. It was estimated that the work upon it would be finished January 30, 1919, but it was not actually completed until February 25, 1919. The accident occurred on February 1st of that year. After the repairs were finished the engine was given a trial trip and finally put into service in interstate commerce.

For its conclusion and judgment, the court reviewed a number of cases,[1] and considered that the principle they

[1] *New York Central & Hudson River R. R. Co.* v. *Carr,* 238 U. S. 260; *Louisville & Nashville R. R. Co.* v. *Parker,* 242 U. S. 13; *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170; *New York Central R. R. Co.* v. *Porter,* 249 U. S. 168; *Philadelphia, Baltimore & Washington R. R. Co.* v. *Smith,* 250 U. S. 101; *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.,* 229 U. S. 146; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.,* 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington,* 241 U. S. 177; *Minneapolis & St. Louis R. R. Co.* v. *Winters,* 242 U. S. 353, and some California cases and federal reports.

established was simple; that its application had been rendered difficult by diversity of decisions in the federal and state courts, and that this court had fixed no rule by which the conflict could be resolved but had remitted the decision of each case to its particular facts. Such action is not unusual, and it is not very tangible to our perception how any other can obtain when the facts in the case are in dispute. Propositions of law are easily pronounced, but when invoked, circumstances necessarily justify or repel their application in the instance and the judgment to be rendered.

And there is no relief from those conditions in the present case and our inquiry necessarily must be whether, considering the facts, the cases that have been decided have tangible concurrence enough to determine the present controversy.

We may say of them at once that a precise ruling, one that enables an instant and undisputed application, has not been attempted to be laid down. The test of the employment and the application of the Federal Employers' Liability Act (in determining its application we determine between it and the California act) is, "was the employé at the time of the injury engaged in interstate transportation or in work so closly related to it as to be practically a part of it?" *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556. This test was followed in *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177, and *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U. S. 259.

Shanks v. *Delaware, Lackawanna & Western R. R. Co.* is particularly applicable to the present case. It illustrates the test by a contrast of examples and by it, and the cases that have followed it, the ruling of the District Court of Appeal must be judged. The ruling is, as we have said, that Burton's work was so near to interstate commerce as to be a part of it.

The court, we are prompted to say, had precedents in *Northern Pacific Ry. Co.* v. *Maerkl,* 198 Fed. 1, and *Law* v. *Illinois Central R. R. Co.,* 208 Fed. 869, and it was natural to regard them as persuasive as they were decisions of Circuit Courts of Appeal. Both were ably reasoned cases. They differed, however, in their facts. In the first case, Maerkl received injuries while employed as a car carpenter in repairing a refrigerator car at the railroad shops. In the second case, Law was "a boiler maker's helper" and at the time of his injury was helping to repair a freight engine, used by the railroad company in interstate commerce. It was held in both cases that the work of repair was in interstate commerce.

The facts in the *Maerkl Case,* it may be said, do not identify it with the case at bar. The refrigerator car was not intended for use in interstate commerce only. Its use was for that or "intrastate commerce as occasion might arise." The facts in the *Law Case* do identify it with the case at bar. The period of repairs in it was 21 days, and it was cited as a precedent in *Chicago, Kalamazoo & Saginaw Ry. Co.* v. *Kindlesparker,* 234 Fed. 1, in which the duration of repairs, also upon an engine, was 79 days. The court expressed the view that the difference between that case and the *Law Case* was "in point of time, not in principle," and that the engine at the time of the repairs was an instrument of interstate commerce, and that Kindlesparker's work "thereon was a part of such commerce." The court seems to have been of the view, and, indeed, expressed it, referring to the *Law Case,* that the test of the work was the instrument upon which it was performed, not the time of withdrawal of the instrument from use. This court reversed the case. 246 U. S. 657.

There are other federal cases in which the decisions are diverse.[1] And there are state cases of which the same comment may be made.

[1] *Hudson & Manhattan R. R. Co.* v. *Iorio,* 239 Fed. 855; *Director General of Railroads* v. *Bennett,* 268 Fed. 767.

We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges and road bed and equipment in actual use, may be said to have definite character and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations; the relations of a work shop, its employments and employees having cause in the movements that constitute commerce but not being immediate to it.

And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. "It was not interrupted in an interstate haul to be repaired and go on." *Minneapolis & St. Louis R. R. Co.* v. *Winters,* 242 U. S. 353, 356; *Chicago, Kalamazoo & Saginaw Ry. Co.* v. *Kindlesparker,* 246 U. S. 657.

Further discussion is unnecessary though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimation from degrees and of this, life and law are replete with examples.

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

MORRISDALE COAL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 65. Argued January 6, 9, 1922.—Decided May 29, 1922.

Pursuant to regulations made under the "Lever Act" of August 10, 1917, c. 53, § 25, 40 Stat. 284, which authorized the President, for the efficient prosecution of the late war, to fix the price of coal and regulate the distribution of it among dealers and consumers, claimant's coal was sold by it to private buyers at a price fixed by the Government which was less than the claimant had previously contracted to sell it for to others. *Held,* that there

was no taking by the Government and no contract to be implied that it would indemnify claimant for the loss. P. 189.
55 Ct. Clms. 310, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition upon demurrer.

Mr. Gibbs L. Baker, with whom *Mr. Karl Knox Gartner* was on the brief, for appellant.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition upon demurrer. The petition alleges that the claimant had outstanding contracts calling for more than the actual production of its mines for the months of June and following through November, 1918, at a price of $4.50 per gross ton; that the Fuel Administration appointed by the President during the war " requisitioned and compelled petitioner to divert 12,823.89 tons of coal " during the period mentioned; that the price received for this coal was $3.304 per gross ton, and that the claimant thereby suffered a loss of $15,337.37, for which loss it asks judgment against the United States.

The petition does not allege or mean that the United States took the coal to its own use. The meaning attributed to it by the claimant is merely that the Fuel Administration fixed the price on coal of this quality at $3.304 per gross ton and issued orders from time to time directing coal to such employments as best would promote the prosecution of the war. The Fuel Administration acted under a delegation from the President of the power conferred upon him by the Act of August 10, 1917, c. 53, § 25, 40 Stat. 276, 284, to fix the price of coal and to regulate dis-

tribution of it among dealers and consumers; the price so fixed not to invalidate contracts previously made in good faith in which prices are fixed. 40 Stat. 286. The claimant does not argue that this section provides compensation for obedience to orders made in pursuance of the same; it agrees, and rightly, that its remedy, if any, is under § 145 of the Judicial Code giving the Court of Claims jurisdiction of claims upon any contract, express or implied, with the Government. It contends that upon the facts stated a contract on the part of the Government must be implied, both from the statute and by virtue of the Fifth Amendment on the ground that its property was taken for public use.

We see no ground for the claim. The claimant in consequence of the regulation mentioned sold some of its coal to other parties at a less price than what otherwise it would have got. That is all. It now seeks to hold the Government answerable for making a rule that it saw fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker. The statute provides remedies against the Government in other cases, but the claimant argues that this case does not fall within them, and it did not follow the steps precribed for them. The petition does not even allege that the price the claimant got was not a fair one but only that if the Government had not issued the regulation it would have got more under its contract. Considerably more than that is needed before a promise of indemnity from the Government can be implied. See *American Smelting & Refining Co.* v. *United States, ante,* 75.

Judgment affirmed.

PINE HILL COAL COMPANY, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 101. Argued January 20, 1922.—Decided May 29, 1922.

1. Section 25 of the "Lever Act" of August 10, 1917, c. 53, 40 Stat. 284, authorized the fixing of all prices of coal and the regulation of its distribution among dealers and consumers during the war, and the taking over by the President, for just compensation, of plants and businesses of producers and dealers who neglected to conform to such prices or regulations, and further provided that "if the prices so fixed," or the compensation as determined under the act in case of requisition, were not satisfactory to the persons entitled to receive them, they should be paid seventy-five per centum "of the amount so determined" and be "entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation". *Held,* that the prices last referred to are only those to be paid by the Government, and that the act cannot be construed as an undertaking by the United States to indemnify producers who sold to third parties where the prices fixed were unjust and unreasonable. P. 195.
2. A construction of a statute which would make the Government liable, in great sums, for losses resulting to individuals from obedience to its regulations, cannot be based upon the vicissitudes attending the passage of the bill nor be adopted unless expressed in the plainest language. P. 196.

55 Ct. Clms. 433, affirmed.

APPEAL from a judgment sustaining a demurrer to a petition setting up a claim to indemnity for losses resulting from sales of coal at prices fixed by the Government.

Mr. Henry S. Drinker, Jr., with whom *Mr. Thomas Reath, Jr., Mr. Percy C. Madeira, Jr., Mr. Douglas M. Moffat* and *Mr. William A. Glasgow, Jr.,* were on the brief, for appellant.

The purpose of the act was to stimulate maximum production.

Congress was face to face with a serious problem concerning fuel regulation, and that problem must be understood and appreciated before the solution provided in the Lever Act can be properly construed. If prices were fixed too high, the householder and manufacturer would have been justly aroused, and the public would have had to bear an unnecessary increase in the then rapidly mounting cost of the war. If prices were fixed too low, there was the probability either that the high cost operators would be forced to close their coal mines, thus endangering the supply of coal for war purposes, or else that they might apply to the courts to enjoin the low prices as confiscatory, and before the matter could have been finally settled the war would have been over and the whole purpose of regulation unaccomplished.

An additional difficulty in the fixing of fair prices was the fact that the cost of mining necessarily varied not only as between different regions, but as between different operators in the same locality, and what might be a fair price for one would not be for another.

The best solution of this problem obviously was for the Government to fix the price of coal at an average figure low enough to stimulate its use in manufacture, and at the same time to guarantee to any particular producer of coal who was required to sell his product at the fixed price, that, if the latter were not sufficient to cover his actual cost of production plus a fair profit, the United States would make up the difference.

It is, we submit, exactly the solution which Congress intended to adopt and did in fact adopt in § 25 of the Lever Act.

Our position may be summarized as follows:

(1) It is entirely reasonable to suppose that Congress would have intended to prevent interference with a war-time regulation of prices by making a guaranty to those for whom the prices fixed were not fair.

(2) From the wording of par. 4, § 25, of the Lever Act, it is plain that some remedy was intended to be given to the seller on sales made to others than the United States because: the words "prices so fixed" in par. 4 refer to the precedent authority in par. 1 to fix prices on sales other than to the United States; and these words cannot refer to the fixing of prices on sales to the United States authorized in the subsequent par. 6, because the remedy for the abuse of the authority in par. 6 is fully and completely covered by the subsequent par. 8, which refers explicitly to par. 6.

(3) Since some remedy was intended to be given the seller on sales between producer and consumer, and since it would be absurd to suppose that Congress intended to make up the difference between 75% of the price fixed and a reasonable price, the only possible conclusion is that the producer was to receive the whole of the price from his purchaser, and have a right to sue the United States for the difference between that and a reasonable price.

(4) An examination of this provision as it passed the Senate shows conclusively that such a right was then given, and the report of the conference committee shows that the only change intended to be made by the committee in this provision concerned sales to the United States and that no change was contemplated as applied to sales from producer to consumer.

(5) The wording is obscure as it stands, and cannot be made entirely clear without either eliminating or inserting certain words. The construction for which we contend does less violence to the structure of the paragraph, and is more consistent with the other portions of the section and with the general intent of Congress than any other possible construction.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This case like *Morrisdale Coal Co.* v. *United States, ante,* 188, is a claim based upon the action of the Fuel Administration under the Act of August 10, 1917, c. 53, § 25, 40 Stat. 276, 284, fixing prices for coal. The allegations and arguments however are different. The transactions of the claimant from and including September, 1917, through January, 1919, are set forth in detail. They embrace large sales at government prices and smaller sales at other than those prices. It is alleged that the prices fixed for the claimant's coal were unjust and unreasonable and did not afford just compensation, and that as a result of keeping to them, as the claimant did, the receipts were actually less than the cost of production. On these facts the petition sets up a contract of indemnity on the part of the United States arising out of the language to be quoted from § 25. It was dismissed on demurrer by the Court of Claims.

The paragraph of § 25 that is relied upon follows paragraphs giving authority to the President personally or through the Federal Trade Commission to fix the price of coal and coke, to regulate the method of distribution among dealers and consumers during the war, and if a producer or dealer neglects to conform to such prices or regulations &c., to take over the plant and business, paying a just compensation. The paragraph in question reads: "That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this Act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so

determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code." The latter section of the Judicial Code is the one that gives jurisdiction to the Court of Claims and the former that which gives a limited concurrent jurisdiction to the District Courts.

It is obvious that the words as they stand cannot be applied to sales by producers to third persons; for it would be absurd to suppose that the United States undertook to pay not only such additional sum as might be awarded but also the last twenty-five per centum of the price as fixed, leaving the buyer to retain that amount. The claimant admits this, but insists that however read the paragraph cannot be followed without correction. It argues that the opening words, "if the prices so fixed", necessarily apply to prices in general as fixed by the power just given in the section. Therefore, it says, there should be interpolated in the provision that the seller shall be paid seventy-five per centum the words "the prices so fixed or"; and in like manner that the provision for recovery should read that he shall recover such sum as added to "the said prices or" said seventy-five per centum will be just. It points out that while seeking to stimulate production in aid of the war the Government could not fix very high prices without arousing householders and manufacturers, or very low ones without endangering the supply and incurring the charge of confiscation. It is said that the natural way out of the difficulty was for the Government to guarantee a just return, and that by so doing it avoided doubts as to the constitutionality of the statute. There is offered a critical and refined scrutiny of the history of the amendment that introduced the claim. The argument is that the section that became § 25, when originally offered

as an amendment, clearly provided for payment in all cases, that a modification was introduced for payment of only seventy-five per centum upon takings by the United States, but that it was not intended to change the general scope of the relief. Other makeweights are thrown in to which we think it unnecessary to advert.

It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage. Here we have as against the arguments of the claimant the fundamental and necessarily governing consideration that rightly prevailed below. A liability in any case is not to be imposed upon a government without clear words. But liability for a regulation, for the consequences of a law, on the part of the legislating power, is most unusual, and where, as here, the liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed. The general words " the prices so fixed " taken by themselves no doubt would include prices to private purchasers, but the specific provision as to paying seventy-five per centum prevails over them on the usual principles of construction and excludes a reference to any prices except those paid by the Government. It is said that those prices are provided for elsewhere, but the claimant's argument presses the consideration that the law had to be hastily passed, and unnecessary reduplication is far more easy to admit than an enormous charge upon the United States that can be fastened upon it only by inserting into a statute words that are not there.

Judgment affirmed.

Counsel for Parties.

SANTA FE PACIFIC RAILROAD COMPANY *v.* FALL, SECRETARY OF THE INTERIOR.

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

Nos. 108, 109. Argued January 24, 1922.—Decided May 29, 1922.

The Act of April 28, 1904, c. 1810, § 1, 33 Stat. 556, provided that sections of land in New Mexico granted the Atlantic & Pacific Railroad Company might, in specified circumstances, be relinquished at the request of the Secretary of the Interior by the grantee or its successors, and entitled them to select in lieu, and have patented, "other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior". Held,—

(1) That a relinquishment of lands at the Secretary's request effected a contract binding the Government to convey such vacant lands within the Territory as the company should select, provided only they were of equal quality with the lands relinquished. P. 199.

(2) That the equality must be determined according to the conditions existing at the time of selection. P. 200.

(3) That where the Secretary undertook to cancel selections because of higher values of the selected lands, revealed by investigations made long after the selections, it was an abuse of his discretion under the act which should be restrained. P. 199.

267 Fed. 653, 656; 50 App. D. C. 95, 98, reversed.

APPEALS from decrees of the Court of Appeals of the District of Columbia which affirmed decrees of the Supreme Court of the District, dismissing appellant's bills to enjoin the Secretary of the Interior from canceling selections of public land.

Mr. F. W. Clements, with whom *Mr. Alexander Britton* was on the briefs, for appellant.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the briefs, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are two bills in equity brought in respect of different parcels of land but seeking the same kind of relief against the Secretary of the Interior, and raising the same question of law. The facts are simple. Under the land grant to its predecessor, the Atlantic & Pacific Railroad Company, the Santa Fe Pacific Railroad Company was the owner of coal lands in New Mexico. By the Act of April 28, 1904, c. 1810, § 1, 33 Stat. 556, the first named road and its successors "may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States," any sections of their land grant in New Mexico any portion of which was and had been occupied by a settler as a homestead for not less than twenty-five years; "and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior." Under this act at the request of the Secretary of the Interior the Railroad Company relinquished specified tracts of coal land, and on May 1, 1911, selected other tracts also of coal land. After the selections, questions were raised as to the value of the selected lands, and ultimately, after some years, the selections were rejected on the ground of the greater value of the latter lands as shown by investigations since the choice. Thereupon the Railroad Company brought these bills to enjoin the Secretary of the Interior from canceling its selections and from taking further action except to issue patents to the Company for the selected lands. The bills were dismissed on motion by the Courts below. 50 App. D. C. 95, 98; 267 Fed. 653, 656.

The Government argues that there was no jurisdiction over the bills because the question whether the lands selected were of the same quality as those relinquished rested wholly in the judgment of the Secretary. But the

position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute when he took into account facts not known at the time of the selection, and we are of opinion that the Company is entitled to bring that question into court.

We are of opinion also that the Company's position is right. At first sight the words of the statute entitling the Company to have patented other sections of equal quality "as may be agreed upon with the Secretary of the Interior" might be taken to sustain the decision below, but upon consideration they seem to us not to have that effect. The moment that lands were relinquished at the request of the Secretary a contract was made and the Government was bound to convey to the Company such vacant lands within the Territory as the Company should select provided only that they were of equal quality. In theory of law the obligation was immediate when the selection was made, if it complied with the condition. It is true that the Secretary had to be satisfied upon that point, but his discretion was not arbitrary; it went only to the quality of the lands. If, as Chief Justice Shaw put it, a piepoudre Court could have been summoned and the matter determined forthwith, the Secretary would have been bound to act on the facts as they then appeared and could not have elected to wait for better days. At that time, May 1, 1911, the only relevant classification in the statutes, we believe, was of coal lands within fifteen miles of a railroad, valued at not less than twenty dollars per acre, and those more than fifteen miles from one, valued at not less than ten dollars per acre. Rev. Stats., § 2347. The Department through the Geological Survey had classified further and had valued the products in all the lands concerned at not less than twenty dollars per acre. These were all the elements for decision when the selection was made and if the Secretary had been required to proceed at once, as the statute evidently contemplated

that he would, § 2, he would have been bound to agree to the Company's choice. Indeed in the first case he did agree to it, and did not attempt to revoke his decision until more than two years later on the ground of subsequently discovered facts. It is established in the parallel cases of *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367, and *Wyoming* v. *United States*, 255 U. S. 489, 496, that the validity of the selection must be determined according to the conditions existing at the time when it was made. These decisions were later than that in the Court below and show without the need of further argument that the decrees must be reversed.

Decrees reversed.

FEDERAL BASEBALL CLUB OF BALTIMORE, INC. *v.* NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, ET AL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 204. Argued April 19, 1922.—Decided May 29, 1922.

1. The business of providing public baseball games for profit between clubs of professional baseball players in a league and between clubs of rival leagues, although necessarily involving the constantly repeated traveling of the players from one State to another, provided for, controlled and disciplined by the organizations employing them, is not interstate commerce. P. 208.
2. *Held* that an action for triple damages under the Anti-Trust Acts could not be maintained by a baseball club against baseball leagues and their constituent clubs, joined with individuals, for an alleged conspiracy to monopolize the baseball business resulting injuriously to the plaintiff. P. 209.

269 Fed. 681; 50 App. D. C. 165, affirmed.

ERROR to a judgment of the Court of Appeals of the District of Columbia reversing a judgment for triple damages under the Anti-Trust Acts recovered by the

plaintiff in error in the Supreme Court of the District and directing that judgment be entered for the defendants.

Mr. Charles A. Douglas and *Mr. William L. Marbury,* with whom *Mr. L. Edwin Goldman* and *Mr. William L. Rawls* were on the briefs, for plaintiff in error.

Defendants are voluntary associations and corporations engaged upon a vast scale, involving the investment of millions of dollars, in the business of providing, by the transportation from State to State of baseball teams and their necessary attendants and equipment, exhibitions of professional baseball. The court is not concerned with whether the mere playing of baseball, that is the act of the individual player, upon a baseball field in a particular city, is by itself interstate commerce. That act, it is true, is related to the business of the defendants, but it can no more be said to be the business than can any other single act in any other business forming a part of interstate commerce.

The question with which the court is here concerned is whether the business in which the defendants were engaged when the wrongs complained of occurred, taken as an entirety, was interstate commerce, or more accurately, whether the monopoly which they had established or attempted to establish was a monopoly of any part of interstate commerce.

At the foundation of the business of one of these leagues—in its primary conception—is a circuit embracing seven different States. No single club in that circuit could operate without the other members of the circuit, and accordingly in the very beginning of its business the matter of interstate relationship is not only important but predominant and indispensable.

Each game symbolizes a contest of skill between the two cities that have been brought together by means of interstate communication and travel. Each team of each

club in the league carries with it, and it is essential to the profit of the enterprise that it should carry with it, its representative character; it symbolizes the great city that it represents to those assembled to witness the contest.

In addition to this representative city and state aspect, there is also the element of intersectional rivalry. Experience has shown that the game is most largely patronized when clubs are so located as to provide a contest for supremacy between the Eastern and Western sections of the country.

It is necessary to distinguish between baseball as a sport, that is, where it is played merely as a means of physical exercise and diversion, and this business of providing exhibitions of professional baseball. The business of Organized Baseball represents and has represented for many years, an investment of colossal wealth. Defendants who dominate Organized Baseball are not engaged in a sport. They are engaged in a money-making business enterprise in which all of the features of any large commercial undertaking are to be found. When the teams of the National or American Leagues or of any other league are sent around the circuit of the league, they go at the direction of employers whose business it is to send them, and whose profits are made as a result of that business operation.

When the profit-making aspect of the business is examined, it will be found that the interstate element is still further magnified. The vast investment of capital which has been made in it is required, among other things, in order to provide a place at which the teams in the league may play their contests. Each club has a ball park, with stands erected upon them, sometimes, as in the case of a major league club, costing several millions of dollars. Every club in the league earns its profit not only by the drawing capacity of its team at home, but also by that of the teams of the clubs which its team

visits in the various cities in the league. The gate receipts in all of the cities in which the clubs are located are divided according to a definite proportion, fixed by agreement between the club of the city in which the game is played and the club employing the visiting team.

In no other business that can now be recalled is there such a close interrelationship and interdependence between persons in one State and persons in another. The personality, so to speak, of each club in a league is actually projected over state lines and becomes mingled with that of the clubs in all the other States. The continuous interstate activity of each is essential to all the others. The clubs of each league constitute a business unit embracing territorially a number of different States. While each club has, of course, a local legal *habitat,* yet from a practical business standpoint it is primarily an ambulatory organization.

It is difficult to perceive the relevancy of any discussion about an article of commerce in this case. Commerce may be carried on in one of its forms by traffic in articles of merchandise, but there are countless forms in which it may be carried on without traffic in such articles. *Gibbons* v. *Ogden,* 9 Wheat. 189.

It is also difficult to discern the relevancy of the contention that personal effort is not an article of commerce. Personal effort, while it may not be an article of commerce, is often commerce itself, but we are not concerned with any such question here. It may be passed by saying that it has been adjudicated by this court in the *Hoke Case,* 227 U. S. 308, that interstate commerce may be created by the mere act of a person in allowing himself to be transported from one State to another, without any personal effort; and further that it is very difficult to see how *International Textbook Co.* v. *Pigg,* 217 U. S. 91, could have been decided as it was, except upon the

principle that the mere exchange of instruction and information, which is about as purely a matter of personal effort as anything that can be imagined, may be a subject of interstate commerce.

If transactions in interstate commerce were to be judged by their isolated ultimate results, as the defendants seek to separate the act of a player in throwing a ball upon a ball field from all the steps which are taken to bring the ball player in the due course of business from other States, of course their interstate character could be plausibly argued away. By such a process of reasoning the American Tobacco Company, for instance, might have removed its gigantic monopoly from the operation of the Sherman Act. See *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 68; *Swift & Co.* v. *United States*, 196 U. S. 375.

In the business now under consideration throughout the playing season the ball teams, their attendants and paraphernalia, are in constant revolution around a preestablished circuit. Their movement is only interrupted to the extent of permitting exhibitions of baseball to be given in the various cities. When exhibitions in one city are completed the clubs resume, according to the agreement made, and plan of business long established, their course of travel on to another city, and thus on and on until the schedule of exhibitions is completed. The interruption in interstate movement is nothing like as great as that in the *Swift Case, supra.* The constant movement of the teams from State to State during a period of over five months each year, is under a single direction and control and in pursuance of one object.

See *Champion* v. *Ames*, 188 U. S. 321; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S. 274; *Western Union Telegraph Co.* v. *Foster*,

247 U. S. 105. See particularly *Marienelli* v. *United Booking Offices,* 227 Fed. 165, where the question was presented as to whether a company engaged in booking vaudeville performers for a circuit embracing theatres in cities in different States was engaged in interstate commerce within the Sherman Act. Also, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 235 Fed. 401.

It is common knowledge that baseball is the preëminent American sport. Millions of people follow the daily reports of the results of the games in the press, and in the large cities gather in the afternoons around the newspaper offices to see the bulletin reports of the scores. Not only so, but vast numbers of people travel from one city to another for the purpose of witnessing the games. Telegraph facilities are installed at all the ball parks in the Major Leagues, and in those of the more important Minor Leagues, where reports of the games are sent out and are received throughout the country.

Each league contracts for a uniform type of baseball, which is used in tremendous numbers and shipped by the manufacturer from time to time as they are needed by the various clubs.

These incidents, while in themselves not determinative of the question of whether or not the business is interstate in character, yet, when considered in connection with its main features, emphasize the truth of what has before been said, that there is scarcely any business which can be named in which the element of interstate commerce is as predominant as that in which defendants are engaged.

The agreement and combination entered into and maintained by defendants whereby the entire business in the United States of providing exhibitions of professional baseball was brought under the control of defendants and their confederates in Organized Baseball, amounted in law to a conspiracy in restraint of trade

among the several States and a monopoly or an attempt to monopolize a part of commerce among the several States within the meaning of the Sherman Act.

There is no testimony in this case legally sufficient to show that the plaintiff has waived its right to recover damages under the Sherman Act.

Mr. George Wharton Pepper, with whom *Mr. Benjamin S. Minor* and *Mr. Samuel M. Clement, Jr.,* were on the brief, for defendants in error.

Organized Baseball is not interstate commerce and does not constitute an attempt to monopolize within the Sherman Act.

Personal effort, not related to production, is not a subject of commerce; and the attempt to secure all the skilled service needed for professional baseball contests is not an attempt to monopolize commerce or any part of it. Clayton Act, § 6; *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *Metropolitan Opera Co.* v. *Hammerstein,* 147 N. Y. S. 532; *In re Duff,* 4 Fed. 519; *In re Oriental Society,* 104 Fed. 975; *People* v. *Klaw,* 106 N. Y. S. 341. The Department of Justice has ruled that the business conducted by Organized Baseball was not in violation of the Sherman Act; and also that the business of presenting theatrical entertainments is not commerce. Distinguishing: *International Textbook Co.* v. *Pigg,* 217 U. S. 91; and *Marienelli* v. *United Booking Offices,* 227 Fed. 165. The only case in which the question whether Organized Baseball is within the Sherman Act has been directly passed upon is that of *American Baseball Club of Chicago* v. *Chase,* 149 N. Y. S. 6, in which the court answered the question in the negative.

Congress has not imposed a penalty upon the transportation of players for baseball purposes, and therefore *Hoke* v. *United States,* 227 U. S. 308, is not in point. While Congress may regulate the movement of persons in

interstate commerce, when it has not regulated movement as such, the doing of an act essentially local is not converted into an interstate act merely because people came from another State to do it.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit for threefold damages brought by the plaintiff in error under the Anti-Trust Acts of July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, and of October 15, 1914, c. 323, § 4, 38 Stat. 730, 731. The defendants are The National League of Professional Base Ball Clubs and The American League of Professional Base Ball Clubs, unincorporated associations, composed respectively of groups of eight incorporated base ball clubs, joined as defendants; the presidents of the two Leagues and a third person, constituting what is known as the National Commission, having considerable powers in carrying out an agreement between the two Leagues; and three other persons having powers in the Federal League of Professional Base Ball Clubs, the relation of which to this case will be explained. It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.

The plaintiff is a base ball club incorporated in Maryland, and with seven other corporations was a member of the Federal League of Professional Base Ball Clubs, a corporation under the laws of Indiana, that attempted to compete with the combined defendants. It alleges that the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy. Great damage to the plaintiff is alleged. The

plaintiff obtained a verdict for $80,000 in the Supreme Court and a judgment for treble the amount was entered, but the Court of Appeals, after an elaborate discussion, held that the defendants were not within the Sherman Act. The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants. 50 App. D. C. 165; 269 Fed. 681, 688. It is not argued that the plaintiff waived any rights by its course. *Thomsen* v. *Cayser*, 243 U. S. 66.

The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in or-

der to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper* v. *California,* 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

Judgment affirmed.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* LIEBING.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 215. Argued April 21, 24, 1922.—Decided May 29, 1922.

1. A law of the State where a life insurance policy was executed, directing temporary continuance of the full insurance by application of a proportion of the net value in case of default in payment of premiums, controls the parties' later loan agreement, made in the

same State on security of the policy, and stipulating for cancelation of the policy in case of default in repaying the loan. P. 213.

2. Where a life insurance policy, executed in Missouri, contained a positive promise by the insurance company to lend upon security of the policy within the limits of its cash surrender value, and a loan agreement was made and consummated through an application delivered to the insurance company's Missouri agency, its transmission to and approval at the company's home office in New York, discharge there of a past due premium and issuance of a receipt therefor, transmission of the receipt and the company's check for the balance of the loan to the company's Missouri agent, and their delivery in Missouri by such agent to the insured, who cashed the check; *held*, that the agreement was made in Missouri and governed by the Missouri law. P. 214. *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357, distinguished.

226 S. W. 897, affirmed.

ERROR to a judgment against the plaintiff in error recovered in an action upon a life insurance policy.

Mr. Wm. Marshall Bullitt, with whom *Mr. Frederick L. Allen*, *Mr. John H. Holliday*, *Mr. Frederic D. McKenney*, *Mr. S. W. Fordyce*, *Mr. Thomas W. White* and *Mr. W. H. Woodward* were on the briefs, for plaintiff in error.

The loan agreement was a New York contract and was not subject to the laws of Missouri; and the policy was properly canceled under the terms of the loan agreement and in strict compliance with the laws of New York.

The policy was a Missouri contract. *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551; *Northwestern Life Insurance Co.* v. *McCue*, 223 U. S. 234; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357.

Blees had the constitutional right, while remaining in Missouri, to make a valid contract, i. e., the loan agreement, outside the State; and Missouri could neither prevent the contract nor modify its terms, even though some acts pursuant to such already existing contract were per-

formed in Missouri. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357.

The loan agreement was a New York contract. *New York Life Insurance Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357.

It was in New York and in New York alone, that the company acted on the loan agreement (physically there present) by approving and accepting it and thereby creating a contractual relation; that the loan was made; that out of such loan the premium was paid and the policy thereby made obligatory for another year, and the premium receipt signed; that a check for the cash balance was drawn on a New York bank and signed; that the loan agreement was physically and continuously kept from the moment it became a binding contract until this time; that the loan was to be repaid; and that the contract was physically present at its date. As each of those steps was taken, and to be taken, in New York and nowhere else, it cannot possibly be a Missouri contract, simply because a receipt (mere evidence of a past part payment in New York) and a check on a New York bank were sent by the Mutual Life from New York to be physically delivered to Blees in Missouri. They were, as in the *Allgeyer Case, supra,* mere collateral acts performed pursuant to a valid contract previously made outside of Missouri.

If a Missouri court can hold, as here, that the mere preliminary act of writing the proposal in Missouri, and its delivery to a local agent, plus the final act of physically receiving in Missouri a portion of the proceeds of a loan previously made in New York, makes it a Missouri contract, then, could not a New York court hold, with equal force, that, as the acceptance took place in New York, as the loan was made in New York, as the money was applied to the past due premium and interest there, and as a check was mailed from New

York for the cash balance, it was a New York contract? And yet a loan agreement cannot be, at one and the same time, both a Missouri contract and a New York contract. Whether a particular contract is of one State or the other depends on certain principles which have been laid down by the courts, and are not difficult of application here, because this court has in the *Head* and *Dodge Cases* decided the precise question.

Mr. James J. O'Donohoe for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to recover upon a policy insuring the life of one Blees, issued to him and subsequently assigned by him to his wife, now Mrs. Liebing, the plaintiff (defendant in error). The contract was made on September 29, 1901, by the defendant (the plaintiff in error), in Missouri, by a delivery of the policy to Blees in Macon, Missouri, where he lived. Three annual premiums were paid. After the fourth was due, within the time allowed, Blees and his wife signed an application for a loan of $9,550 and sent it with the policy to the defendant's agency at St. Louis, by which it was forwarded to New York. The application followed the terms of the policy, which agreed that after it had been in force three years the company would lend amounts within the cash surrender value, upon certain conditions, the policy being assigned as security. Following these terms the application deducted from the cash to be received the fourth annual premium and an adjustment of interest, leaving the balance to be paid $4,790.50. The loan was to be for one year and the application authorized the company upon default to cancel the policy and apply the customary cash surrender consideration to the payment of the loan. The application was approved in New York and a check for $4,790.50 to the order of Mr. and Mrs. Blees, with a receipt for the fourth premium, was

sent from New York to the company's manager in St. Louis and by him forwarded to a local agent who delivered the documents to Blees. The check was endorsed and paid. A year later when repayment was due it was not made. Thereupon on December 4, 1905, the company canceled the policy and applied the surrender value to the loan, which was of equal amount, leaving a deficit of $74.57 interest. Blees died on September 8, 1906, and upon inquiry from Mrs. Blees the company notified her of what had been done. Its action had been in accordance with the terms of its contract and the law of New York. But some years later, Mrs. Blees, now Mrs. Liebing, brought the present action relying upon the Revised Statutes of Missouri, 1899, § 7897, set forth and considered in *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357, and, after a previous decision the other way, she recovered by the final judgment of the Supreme Court of the State. 226 S. W. 897.

The Missouri statute provided that such policies as the present, after three annual payments, should not become void for nonpayment of premiums, but that three-fourths of the net value of the policy after deducting certain liabilities should be taken as a premium for temporary insurance for the full amount written in the policy. It is not disputed that if this statute governs the case, the plaintiff stood as having a policy for the original amount at the death of Mr. Blees. In *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357, it was held that when the later transaction was consummated in New York, Missouri could not prohibit a citizen within her borders from executing it. But if the later contract was made in Missouri, then by the present and earlier decisions notwithstanding any contrary agreement the statute does govern the case. See 246 U. S. 366.

The policy now sued upon contained a positive promise to make the loan if asked, whereas in the one last men-

tioned it might be held that some discretion was reserved to the company. For here the language is " the company will . . . loan amounts within the limits of the cash surrender value ", &c., whereas there it was " cash loans can be obtained." On this distinction the Missouri court seems to have held that as soon as the application was delivered to a representative of the company in Missouri the offer in the policy was accepted and the new contract complete, and therefore subject to Missouri law. If, however, the application should be regarded as only an offer the effective acceptance of it did not take place until the check was delivered to Blees, which again was in Missouri where he lived. In whichever way regarded the facts lead to the same conclusion, and although the circumstances may present some temptation to seek a different one by ingenuity, the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act.

Judgment affirmed.

UNITED STATES *v.* SOUTHERN PACIFIC COMPANY ET AL.

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

No. 5. Argued April 18, 19, 20, 1921; restored to docket for reargument January 9, 1922; reargued April 11, 12, 13, 1922.—Decided May 29, 1922.

1. A combination whereby one railroad system, through stock purchases, acquires control of the whole or a vital part of another, with the effect of materially reducing free and normal competition in interstate trade between the two, violates the Sherman Anti-Trust Act. P. 229.
2. Inasmuch as the Central Pacific Railway System with its eastern connections, and the Southern Pacific Railway System, are normally competitors for railway traffic moving between California

and the Atlantic seaboard and intermediate places, the acquisition in 1899 by the Southern Pacific Company, owning the Southern Pacific System, of a controlling part of the stock of the Central Pacific Railway Company, owner of the Central Pacific lines, constituted a combination made unlawful by the Sherman Act. P. 229. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61.

3. The principle of *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, and of the previous cases upon which it rested, does not depend upon the existence of competition when the combination is formed. P. 230.
4. The history of the two railroad systems here involved, considered and *held* not to justify the stock purchase in question upon the theory that there was a prior practical consolidation of them, antedating the Sherman Act, through their physical relations and community of stock-ownership and control. P. 232.
5. In view of the important rights and franchises conferred upon the Central Pacific Railroad Company by the United States, a ninety-nine year lease of its railroad made by it in 1885 to its competitor, the Southern Pacific Company, was beyond its corporate capacity, in the absence of any act of Congress authorizing or approving it. P. 233.
6. Approval of this lease is not to be inferred from the fact that Congress had opportunity to learn of it through reports of committees or otherwise. P. 234.
7. The fact that a combination or contract in restraint or monopoly of interstate trade was entered into before the date of the Sherman Act does not exempt it from the operation of that statute. P. 234.
8. Under the Act of July 7, 1898, c. 571, 30 Stat. 659, which constituted the Secretaries of the Treasury and Interior and the Attorney General a commission with full power to settle the debt of the Central Pacific Railroad Company to the United States, subject to the approval of the President and to terms laid down in the act, a plan was approved and reported to Congress whereby the company's notes were to be delivered to the Government and be secured by bonds to be issued under a first mortgage on all its lines. Execution of the plan upon the part of the railroad (then under lease to the Southern Pacific Company) accompanied a reorganization involving creation of the Central Pacific Railway Company, its succession to the property of the Central Pacific Railroad Company, issuance by the new company of mortgage bonds secured by the property and guaranteed by the Southern Pacific Company,

part of which were delivered to the Government as the collateral called for by the settlement agreement, and acquisition by the Southern Pacific Company of a controlling part of the new company's stock. The guaranty, not mentioned in the settlement agreement, was referred to in the Attorney General's report of the settlement to Congress, and Congress later passed acts authorizing the Secretary of the Treasury to dispose of any notes in his possession touching the indebtedness of the Central Pacific Railroad Company and to settle claims of that road and of the Southern Pacific, for transportation services, by credits on the Central Pacific notes. The notes were paid primarily by checks of the Southern Pacific.

Held that the commission's acceptance of the guaranty was neither in intention nor in effect a condonation of the violation of the Sherman Act committed in the acquisition of the stock, and that the settlement did not estop the Government from prosecuting under that statute. P. 235.

9. The decree in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, does not conclude the Government on the issues here involved, since the Central Pacific Railway Company was not a party in that suit up to the final decree in this court, and the subject-matter of that case and the questions decided in it differ from the subject-matter here and the questions here presented for decision. P. 240.

10. Delay of fourteen years in instituting this suit to set aside the control gained by the Southern Pacific through purchase of Central Pacific stock in 1899 was not laches, in view of the time consumed by the intervening prosecution to set aside the control gained by the Union Pacific Railroad Company through purchase of Southern Pacific stock in 1901. P. 240.

11. Whether the leases to the Southern Pacific Company and its acquisition of Central Pacific stock were in and of themselves violative of the Pacific Railroads Act of 1862 and supplemental legislation—*not decided*. P. 241.

12. The decree to be entered should sever the control by the Southern Pacific of the Central Pacific by stock-ownership or lease, protect, as far as compatible the mortgage of the Central Union Trust Company, and insure both railroads proper access to San Francisco Bay, over the several terminals, lines and cut-offs leading thereto, constructed or acquired during the unified control of the two systems; and similar provision should be made respecting lines extending from San Francisco Bay to Sacramento and Portland, Oregon. P. 241.

214. Argument for the United States.

13. In framing the decree the District Court may bring in additional parties. P. 241.
239 Fed. 998, reversed.

APPEAL from a decree of the District Court dismissing, upon final hearing, a suit brought by the United States for relief against an alleged unlawful combination between the two railroad companies. The facts are stated in the opinion, *post*, 224.

Mr. Edward F. McClennen, Special Assistant to the Attorney General, and *Mr. Solicitor General Beck,* with whom *Mr. James W. Orr,* Special Assistant to the Attorney General, was on the brief, for the United States.[1]

In February, 1899, when this combination was formed, the Central Pacific Railroad and the Southern Pacific Railroad were existing railroads naturally competitive for an enormous volume of interstate traffic, and the combination between them unreasonably, directly, substantially, and wholly prevented and destroyed competition between them, and continues to do so; and the combination artificially created a monopoly to the public injury.

The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, but to exert together in normal, voluntary coöperation all the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad; and the systematic and preconcerted discrimination which the Southern Pacific Company, in operating the franchise of the Central Pacific Railroad, has practiced against the Union Pacific Rail-

[1]At the former hearing *Mr. McClennen* argued the case on behalf of the United States. *Mr. Solicitor General Frierson* and *Mr. Orr* also were on the brief.

road in favor of the Southern Pacific Railroad is a violation of those laws; and this combination between the Southern Pacific Railroad and the Central Pacific Railroad, furnishing the incentive of self-interest to discriminate against the Central Pacific Railroad and the Union Pacific Railroad in favor of the Southern Pacific Railroad, and so to violate those laws, imposed on the Central Pacific Railroad an unreasonable and unlawful restraint to the injury of the public and to the defeat of the purpose of those laws, which was to create and develop three separate, competitive systems of railroad to the Pacific Coast, with all the advantages that would come to the public from three railroads which were competitive.

The payment by the Central Pacific Railroad Company of its debt to the United States, and the transactions leading thereto, did not exempt the Southern Pacific Company from the provisions of the Sherman Act, or permit that company to make a combination which otherwise would be one in restraint of trade; because, (1) the settlement commission did not seek any guaranty by the Southern Pacific Company; (2) the contract of settlement did not require such a guaranty; (3) the United States received only payment of a debt already due and adequately secured; (4) neither the commission, nor the President, nor the Congress, purported to give this company a special indulgence to make a combination in restraint of trade, prohibited as a crime by general law to all other corporations; and, (5) such a special indulgence or advance pardon is beyond the constitutional power of the commission, the President, and the Congress.

The Central Pacific Railroad and the Southern Pacific Railroad were never, prior to February 20, 1899, a single railroad or system, but, on the contrary, were always two distinct railroads; (1) separately projected by separate and unrelated groups of men; (2) separately aided by gifts of public lands and loans of the public credit under

acts of Congress to promote these two separate competitive systems of railroad between the Atlantic Ocean and the Central United States on the east, and the Pacific Ocean on the west, and enacted prior to 1867 and before any person interested in the one railroad was interested in the other; (3) separately owned by separate corporations organized by separate groups of men; (4) separately constructed at the expense of and for these separate corporations; (5) separately leased by these separate corporations under separate leases, making the amount of rent dependent on the net earnings of the separate railroads; (6) separately controlled by boards of directors, some of whom were always diverse, and a majority of whom were diverse in all but five years between 1865 and 1899; and (7) separately stock-owned, always to a substantial extent, and from 1883 to 1899 to the extent of more than a majority of the capital stock in each separate corporation, held by widely scattered stockholders in the United States and Europe.

The Southern Pacific Company on February 20, 1899, had no contractual, or property, or vested interest, direct or indirect, in the Central Pacific Railroad; because, (1) the purported lease of February 17, 1885, by the Central Pacific Railroad Company was void for lack of power in that company to make it, both under the laws of California and under the laws of the United States, the sovereignty from which it derived its franchises; (2) in 1893 this lease was canceled and the new purported lease then given was equally void for the same reason; and (3) the leasehold interest was subject to immediate destruction by the foreclosure of the underlying lien of the United States.

Even if the Southern Pacific Company had had some control over the Central Pacific Railroad before the Sherman Act was passed, this would not render lawful a com-

bination for the increase and perpetuation of that control, formed after this act was passed.

In the case of *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, the court did not adjudge expressly or by inference that it was not unlawful for the Southern Pacific Company to hold the stock of the Central Pacific Railway Company. The court made no decision on this question; indispensable parties for such a decision were absent; and the effect of a decision in such a case is limited to what was actually decided.

The United States is not estopped by any inconsistent position taken in the *Union Pacific Case,* nor barred by absence of complaint of this restraint of trade in the *Union Pacific Case.*

The petition is not barred by laches. There has been no unreasonable delay or laches in bringing the suit at bar. Laches by a sovereign is not a defense to a petition to enforce a criminal law.

The lapse of more than five years since the formation of this combination is not a bar. This is not an indictment, information, suit, or prosecution for penalty or forfeiture. The occurrence of an offense more than five years ago does not bar a proceeding to prevent the continuance of it hereafter.

Mr. Garrett W. McEnerney and *Mr. Joseph P. Blair,* with whom *Mr. William F. Herrin* was on the briefs, for appellees.

This case does not involve any combination of competitive units, or any combination at all; for the Southern Pacific and Central Pacific lines were projected and built and have been operated since their origin as one property.

At the time of the passage of the Sherman Act, the Southern Pacific and Central Pacific lines were owned by a single proprietor, although the Central Pacific lines were held under a ninety-nine year lease made February

17, 1885, instead of in fee; but "it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee." *Waskey* v. *Chambers,* 224 U. S. 565.

The Act of July 7, 1898, 30 Stat. 652, 659, creating the commission for the settlement of the Central Pacific debt, contemplated as natural, if not inevitable, the agreement subsequently made, and it invested the commission with full authority to agree to the plan which was adopted for the payment of the indebtedness, including the provision by which the Southern Pacific Company acquired the stock of the Central Pacific Company.

In any event, the Government is estopped by its conduct to question the legality of the unified control of the Central Pacific and the Southern Pacific lines.

The present status of the Southern Pacific-Central Pacific lines was confirmed by the Acts of March 3, 1899, 30 Stat. 1245, and March 3, 1901, 31 Stat. 1023.

It is established by the opinion and decree in *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, that, up to the time of the Union Pacific merger in 1901, "sharp, well-defined and vigorous" competition existed between the Ogden and El Paso routes, notwithstanding the ownership of the Central Pacific by the Southern Pacific; and it is here in proof that the competitive conditions of 1901 and before were restored after the unmerger in 1913.

It is thus apparent that we may draw upon the three departments of the Government of the United States for support in our position that the Southern Pacific may and does lawfully control and operate the Central Pacific and that no violation of the Anti-Trust Act is involved in such control and operation.

Irrespective of the considerations already dealt with, and considering the matter as an open question, traffic conditions between the El Paso and Ogden routes are such that the control of the Central Pacific line by the Southern Pacific Company does not constitute an undue restraint of commerce.

The Government, by reason of the position taken and claims urged by it in the *Union Pacific Case,* is estopped from questioning the validity of the ownership and control of the Central Pacific Railway Company by the Southern Pacific Company.

The final decree in *United States* v. *Union Pacific R. R. Co.,* is a bar to all relief sought by the Government in this case.

No violation of the Pacific Railroad Laws is presented in this case.

The construction which the Government attempts to put upon the Pacific Railroad Laws is inconsistent with the position which has always been taken by the three departments of the Government concerning the control of the Central Pacific by the Southern Pacific.

Even though a violation of the Pacific Railroad Laws were proved in the case, the remedy would not be dismemberment, but would be injunction of restraint or command to comply with the provisions of the acts.

There is no evidence whatever of any attempts at monopoly or monopolistic practices.

It is impossible to dismember the Southern Pacific-Central Pacific System without substantial deterioration in the public service.

It is not necessary here to consider whether properties which had been operated together as one from their origin continuously down to July 2, 1890, under, say, tenures at will, could or could not thereafter be legally unified by purchase, lease, etc., because, at the time of the passage of the Anti-Trust Act, the properties here involved were owned by a single proprietor, although the tenure under which a part of the properties was owned was a ninety-nine year term and not a fee.

Considering that these lines were operated as one from their origin, and that, on July 2, 1890, the Central Pacific lines were held under a ninety-nine year term expiring

April 1, 1984, it is clear that the lease of December 7, 1893, which cut down the term three months, viz: to January 1, 1984, is entirely lawful.

If the lease of December 7, 1893, were invalid as one executed after the passage of the Anti-Trust Act, the Southern Pacific Company would nevertheless be treated at law and in equity as the holder of the ninety-nine year term which it acquired under the lease of February 17, 1885, notwithstanding the provision of cancelation contained in the lease of December 7, 1893.

The Anti-Trust Act did not make unlawful the operation by a single proprietor of lines owned by him at the date of the passage of the act which were not then competitive but which could be made competitive if divorced.

The argument for the Government in this case overlooks the value and importance to the Government of the guaranty of the bonds by the Southern Pacific Company in 1899.

Both sides seem to be agreed, although for different reasons, that the Government cannot be said to have been an accomplice in the violation of its own laws: the appellees contending that no laws were violated, and counsel for the Government asserting either that: the Government did not know the facts; or was unconscious of the law; or, in final analysis, had no power through its own officers to violate its own laws.

The argument that the ninety-nine year lease of the Central Pacific lines to the Southern Pacific Company, dated February 17, 1885, was or is invalid, is without merit.

This case does not come within any rule or supposed rule dealing with the prevention of competition coming into existence.

The purely theoretical nature of the present suit is shown by the complete absence of complaint on the part of shippers or the public generally.

In its last analysis, the relief here sought is experimental and not judicial in its nature. The Government does not seek the destruction of a new and unlawfully created condition which took the place of an old and natural one; it seeks the destruction of an old and natural condition in order that it may create by a new and untried experiment a condition which has no prototype.

The price paid in 1899 by the Southern Pacific Company for Central Pacific shares was not excessive.

Neither the Northern Division of the Southern Pacific Railroad nor its Coast Line opened in 1901 bears upon the issues here involved.

In considering the estoppels against the Government arising out of the settlement of 1899, it is of no consequence whether the provisions thereof which were designed to protect the Government were in the first instance suggested by Mr. Speyer or by the Government itself.

The powers of the Commission under the Act of July 7, 1898, were limited in those particulars only which are expressed in the act. In respect of matters not so limited the commission had what the act gave it, "full power" in the matter.

Because of the thirty years' de facto unification of the properties, this case is in a class apart.

Testimony contained in the report of the Pacific Railroad Commission is not competent evidence of facts therein narrated.

Mr. Perry D. Trafford and *Mr. James Gore King* filed a brief on behalf of the Union (now Central Union) Trust Company of New York, appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The United States on February 11, 1914, filed its bill in the District Court of the United States for the District of

Utah against the Southern Pacific Company, the Central Pacific Railway Company, the Union Trust Company of New York, and the directors and officials of the Southern Pacific Company. The charge of the petition is that the defendants restrain or attempt to monopolize, and do monopolize trade and commerce in violation of the Act of July 2, 1890, c. 647, 26 Stat. 209, known as the Sherman Act, and have also violated the provisions of the Act of Congress of July 1, 1862, c. 120, 12 Stat. 489. The prayer of the petition is that the lines of the Southern Pacific Company and those of the Central Pacific Railway Company be decreed to constitute competitive systems, and that the ownership acquired by the Southern Pacific Company of all or a controlling interest in the capital stock of the Central Pacific Railway Company, and its lease, control and operation of the lines thereof be declared violative of the Sherman Act; and that the Southern Pacific Company be required to dispose of such capital stock, and cancel and relinquish its lease, control, management and operation thereof; and that the control of the Central Pacific Railway Company by the Southern Pacific be decreed to be in violation of the Act of Congress of July 1, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;" and also violative of the act, supplemental to the Act of 1862, the Act of July 2, 1864, c. 216, 13 Stat. 356, and the Act of June 20, 1874, c. 331, 18 Stat. 111, the Government maintaining that the effect of such acts is to require the Central Pacific to maintain physical connection with the Union Pacific to make a through line to the coast, and to furnish equal advantages and facilities as to rates, time, and transportation over such through line.

An answer was filed by the defendants, much testimony was taken, and a decree was entered dismissing the peti-

tion, one of the three Circuit Judges who heard the case dissenting. 239 Fed. 998.

The Central Pacific Railroad Company of California was incorporated under the laws of California in 1861 for the purposes of constructing a railroad from Sacramento to the eastern boundary of California. In 1862 and 1864 Congress by proper legislation incorporated the Union Pacific Railroad Company to build from the Missouri River westward, and authorized the Central Pacific to build eastwardly from the Pacific Coast, at or near San Francisco, to a common meeting-point with the Union Pacific. These acts of Congress authorized the issue of first mortgage bonds, and also second mortgage bonds, and made a land grant of public lands for each linear mile of railroad construction. These acts provided that these two railroads should be operated as one continuous line, and that neither should discriminate in favor of or against the other. Leland Stanford, Charles Crocker, C. P. Huntington and Mark Hopkins acquired a large part of the capital stock of the Central Pacific Company. The Central Pacific assigned to the Western Pacific a portion of the construction, namely, that from Sacramento to San Jose, this with the approval of Congress. C. 88, § 2, 13 Stat. 504.

The Pacific Railroads were constructed from 1864 to 1869 from the Missouri River to the Pacific Coast; from Omaha to Ogden by the Union Pacific; from Ogden to Sacramento by the Central Pacific; from Sacramento to San Jose by the Western Pacific, afterwards consolidated with the Central Pacific. These are denominated in the defendants' brief as the "bond-aided lines." What they call the non-bond-aided lines of the Central Pacific system are those from Niles to Oakland, from Lathrop to Goshen, and from Roseville to Redding, which were constructed in the State of California from the years 1869 to 1872. In 1870 the Central Pacific absorbed in consolida-

tion the Western Pacific, which built from Sacramento to San Jose; the Alameda Company which built from Niles to Oakland; the San Joaquin, which built from Lathrop to Goshen; and the California and Oregon Company which built from Roseville north en route to the Oregon line.

The Southern Pacific Railroad Company was incorporated in 1865 under the laws of California for the purpose of constructing a railroad from San Francisco Bay by the way of San Diego to the eastern boundary of California. In 1866 Congress passed an act to incorporate the Atlantic & Pacific Railroad Company to construct a railroad near the 35th parallel of latitude from Springfield, Missouri, to the Pacific Ocean. This act authorized the Southern Pacific to connect with the Atlantic & Pacific near the eastern boundary of California, and both companies were granted public lands. In 1867 the Southern Pacific changed its route to the eastward so as not to go as far south as originally contemplated; this act was ratified by Congress and the legislature of California in 1870.

In 1871 Congress incorporated the Texas Pacific Railroad Company to build a line of railroad near the 32d parallel of latitude from Marshall, Texas, by the way of El Paso to the Pacific Ocean at San Diego, and to connect on the east with other railroads, and on the west with the Southern Pacific Railroad. The Southern Pacific was authorized to construct a railroad from Tehachapi Pass to a junction of the Texas Pacific Railroad at the eastern boundary of California. Land grants were made to both companies. In 1872 the Central Pacific had extended its lines to Goshen.

About 1870 the promoters of the Central Pacific obtained control of the Southern Pacific, and subsequently the latter was constructed from Goshen through Tehachapi Pass, with one fork to a junction with the Atlantic & Pacific at The Needles (near 35th parallel) on the Colorado River at the eastern boundary of the State, and the

other fork to the southeastern corner of the State (near 32d parallel), thence across Arizona and New Mexico to a junction in Texas with the Texas & Pacific, thence to a connection at El Paso with the Galveston, Harrisburg & San Antonio Railroad. The sections of the Southern line were leased for a series of years to the Central. In 1881 the Southern Pacific made a junction with the Atchison, Topeka & Santa Fe at Demming, New Mexico. In 1882 the Southern made a junction with the Texas & Pacific at Sierra Blanca, Texas. In 1883 the direct line of the Southern connection with the Galveston, Harrisburg & San Antonio and its eastern connections was completed through to New Orleans. The same year it made its junction with the Atlantic & Pacific at The Needles.

The section from Mojave to Needles was leased to the Santa Fe in 1883, and sold to it in 1911. From 1883 to 1885 the Central Pacific was the lessee owner of a system of leases, and the system was known as the "Central Pacific Railroad and Leased Lines." In February, 1885, after the formation of the Southern Pacific Company (of Kentucky) that road became the lessee. We shall have occasion to deal more particularly with that lease later.

Without familiarity with the geography of the region described and the location of the points named, this description means little. The outstanding facts, and those essential to be considered in the view which we take of this branch of the case, are: The Central Pacific Railroad extends from the Bay of San Francisco to Ogden, Utah, with a branch extending north from Roseville in central California to the northern boundary of California; and to Kirk in Oregon; and a branch extending south from Lathrop in central California to Goshen, California; and a branch extending south from Hazen in Nevada to Mojave in California; and a branch from Fernley in Nevada to Susanville, California; and a short line in Oregon from Oakridge to Natron. At Ogden, the Central Pacific con-

nects with the Union Pacific, extending to Omaha, Nebraska, and to Kansas City, Missouri; connecting at Ogden with the Denver & Rio Grande Railroad, and with other connecting roads eastwardly to the Missouri River; and from the Missouri River to the central and eastern parts of the United States.

The Southern Pacific system extends from San Francisco Bay by way of El Paso to Galveston, Texas, and to New Orleans, there connecting with steamship lines to New York City controlled by the Southern Pacific. At El Paso it connects with the Rock Island which runs to Omaha and Chicago; at New Orleans, it connects with roads extending to points in the central and eastern parts of the United States. It owns branches in Texas, Arizona, New Mexico, Oregon and many in California.

The Central Pacific with its eastern connection at Ogden forms one great system of transportation between the east and the west, and the Southern Pacific with its roads and connections, and steamboat lines, forms another great transcontinental system for transportation from coast to coast. The Central Pacific constitutes some 800 miles of the transcontinental line of which it is a part. The Southern Pacific system has practically its own line of railroads and steamboat connections to New York via Galveston and New Orleans.

Under principles settled in the *Union Pacific Case,* 226 U. S. 61, 86, the acquisition by the Southern Pacific Company of the stock of the Central Pacific Railway Company in 1899, unless justified by the special circumstances relied upon, to be hereinafter considered, constituted a combination in restraint of trade because it fetters the free and normal flow of competition in interstate traffic and tends to monopolization. In the *Union Pacific Case* this court held that the acquisition by the Union Pacific, which constituted about 1,000 miles of the transcontinental system, to which we have referred, of enough stock in the Southern

Pacific to dominate and control it, was violative of the Sherman Act. This case differs from that not at all in principle. These two great systems are normally competitive for the carrying trade in some parts from the east and middle west to the coast, and for the traffic moving to and from central and northern California, including a great volume of ocean-borne traffic which lands on the coast destined across the continent to the Atlantic Seaboard and intermediate western and eastern points, or is destined from the latter points to foreign ports via San Francisco or other Pacific Coast points.

Counsel for the defendants, evidently realizing this situation, make elaborate argument to distinguish the *Union Pacific Case.* The claim is made that the decision there rested only on the fact that a then existing competition was restrained through the purchase by the Union Pacific of the control of the Southern Pacific in 1901; but the principle of that decision and of the previous cases upon which it rested was broader than the mere effect upon existing competition between the two systems.

Such combinations, not the result of normal and natural growth and development, but springing from the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive, constitute "a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 327. This principle was restated and applied in *United States* v. *Union Pacific R. R. Co., supra;* it was reiterated and approved by the court as recently as the October Term, 1919, *United States* v. *Reading Co.,* 253 U. S. 26, 57, 58, 59.

These cases, collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such

acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade.

In the instant case we are not dealing with the principle in the abstract. The proof is ample that the policy of the Southern Pacific system has been to favor transportation on its line by securing for itself, whenever practicable, the carriage of freight which would normally move eastward or westward over the shorter line of the Central Pacific Railroad and its connections, for its own much longer and wholly owned southern route. This course was limited by an arbitrary rule during the time the Union Pacific dominated the Southern Pacific from the stock purchase in 1901 until the so-called " unmerger " in 1913, as a result of the decision of this court in the *Union Pacific Case.* The compelling motive of this course of conduct is obvious. The Southern Pacific owns and controls the southerly route, and receives 100% of the compensation for freight transported by its road and water lines. Over the Central Pacific route it receives but a fraction of the freight because the Union Pacific with its eastern connections takes up the carrying from Ogden to the east. Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines. While many practices, formerly in vogue, are eliminated by the legislation of Congress regulating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control.

It is conceded in the brief of counsel for the defendants that " it is true of all such systems that, other things being equal, freight is preferentially solicited for the 100% haul."

We reach the conclusion that the stock ownership in the Central Pacific acquired by the Southern Pacific is violative of the Sherman Act within the principles settled by this court, certainly since the decision in the *Northern Securities Case,* in 1904; and that such stock ownership must be divested from the Southern Pacific Company unless the special circumstances and defenses set up and relied upon by the defendants are to prevail.

In the opinion of the majority of the judges sitting in the District Court it was set forth that these companies, the Southern Pacific and the Central Pacific, constituted practically a single system of railroads. This was held to be particularly true of so much of the systems as are in California and Oregon. It was said that the roads of the Central Pacific System appear on the map as natural links and parts of the Southern Pacific System, and that the spurs, branches and tributary feeders of the Central Pacific belong to the Southern Pacific. It was maintained that the construction and control of these systems had substantially united them before the acts complained of which are alleged to be violative of the Sherman Act. True, the Central Pacific was incorporated by, and for a portion of the time under consideration its stock was owned by, Messrs. Stanford, Hopkins, Huntington and Crocker. Perhaps as early as 1870 the same group gained control of and continued to dominate the policy of the Southern Pacific. The roads were always separate and distinct corporations; they were so recognized in the acts of Congress making land grants to them, authorizing their construction and operation from one State or Territory to another, and otherwise conferring rights on them which only Congress could confer. For a good part of the time the roads had boards of directors not consisting of the same persons. At times the majority of the stock was separately held. In the Central Pacific when the lease of 1885 to the Southern Pacific was made only one-fourth

of the stock was held by the group to which we have referred. It had been sold and was widely owned in the United States and Europe. The dominating control was maintained from the fact that the stock had not been transferred by its true owners on the company's books, and much of it was held in the name of employees who were used in voting it by the original promoters, their successors and survivors.

We cannot accept the theory of prior practical consolidation as a justification for a violation of the Sherman Act resulting from the stock control acquired in 1899.

Much stress is placed on the lease in February, 1885, of the Central Pacific to the Southern Pacific for a term of 99 years. In 1884 the Southern Pacific, a holding company, was organized as a corporation of the State of Kentucky. The organization of this company which acquired the stocks of the Southern Pacific System, and became the lessee of the Central Pacific, was the result of a meeting in New York of Messrs. Stanford, Huntington, Crocker, and Timothy Hopkins, the successor of Mark Hopkins. The plan was then discussed, and the necessary measures directed to carry it into execution.

The lease of 1885 is set up in the answer and relied upon as showing an existing legal acquisition before the transfer of the Central Pacific stock in 1899. This lease made February 17, 1885, was modified in January, 1888, and on December 7, 1893, a lease was entered into which recited that the agreements of lease between the same parties, the Southern Pacific and the Central Pacific, dated February 17, 1885, and January 1, 1888, respectively, should be canceled except in so far as they relate to the operation of the demised premises prior to January 1, 1894, and to the adjustment of accounts in respect to such operation.

It is contended by the Government that this lease in itself constituted a combination in restraint of interstate

commerce. However this may be, this court has repeatedly recognized the fact that the Central Pacific was a corporation receiving much of its authority and power from acts of Congress. *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1. In *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91, it was held by this court that on the return for taxation by the Central Pacific Railroad Company of the value of its franchise and roadway, roadbed and rails within the State of California, the same might be taxed under the laws of that State. This conclusion was reached against the elaborately stated and strongly expressed dissents of Mr. Justice Field and Mr. Justice Harlan. In the prevailing opinion, delivered by Mr. Chief Justice Fuller, it was recognized (p. 123) that important franchises conferred upon the Central Pacific were of federal creation, including that of constructing a railroad from the Pacific Ocean to Ogden in the then Territory of Utah.

It is true, as is argued at length by counsel for the defendants, that Congress had opportunity by the reports of its committees, and otherwise, to learn of this lease; but we are referred to no legislation passed by Congress authorizing or approving of it. In our view the lease for 99 years by the Central Pacific to a rival and competitive company could not legally be made without authorization by federal legislation. In the absence of such action the Central Pacific had not the corporate capacity to make the lease. *Pennsylvania R. R. Co.* v. *St. Louis, Alton & Terre Haute R. R. Co.*, 118 U. S. 290; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24. Moreover, it is authoritatively settled by decisions of this court that no previous contracts or combinations can prevent the application of the Sherman Act to compel the discontinuation of illegal combinations. After Congress exercises its authority to regulate interstate commerce conduct becomes illegal which has the effect of contracts,

conspiracies, or combinations to restrain the freedom of interstate trade, or to monopolize the same in whole or in part. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 228. The principle has often been declared and applied in this court. It is stated and the previous cases reviewed in *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert,* 224 U. S. 603, 613, 614.

We find nothing in these leases to the Southern Pacific Company which justifies the continued control of the Central Pacific by the Southern Pacific after the Sherman Act became effective.

We come now to the settlement of the Central Pacific debt, in 1899, which the court below held to be a practical construction of the Sherman Act, and to warrant the conclusion that the Southern Pacific control of the Central Pacific was not within its condemnation. After hearings and reports, and attempted legislation, Congress passed the act to create a commission to settle the indebtedness of the Central Pacific and Western Pacific Railroads to the United States. This act was passed July 7, 1898, c. 571, 30 Stat. 659, and constituted the Secretary of the Treasury, the Secretary of the Interior and the Attorney General a commission with full power to settle the indebtedness to the Government growing out of the issue of bonds in aid of construction of the Central Pacific and Western Pacific bond-aided roads, upon such terms and in such a manner as might be agreed upon between them and the owners of said roads. The act also provided that the settlement should not be binding until approved by the President of the United States; that the commission should not agree to accept a less sum than the full amount of principal and interest and all amounts necessary to reimburse the United States for moneys paid, for interest, or otherwise. It provided that the rate of interest upon instalments should be not less than 3% per annum, pay-

able semi-annually, with such security as the commission might deem expedient; that the final discharge of the indebtedness should not be postponed beyond ten years; that the whole amount, principal and interest, should be paid in equal semi-annual instalments within that period; that any settlement made should provide that if a default were made in the payment of either principal or interest, the whole sum and all instalments should immediately become due and payable; and that unless the settlement authorized should be perfected within one year the President of the United States should at once proceed to foreclose all liens held by the United States against the railroad companies to collect the indebtedness sought to be settled under the act, and that nothing therein contained should be held to waive or release any right, lien or cause of action held by the United States.

Under this act a settlement was effected as of date February 1, 1899. The Central Pacific's debt to the United States for government aid in the construction of lines between Sacramento and Ogden, and Sacramento and San Jose, amounted to $58,812,715.48; one-half of this amount was accrued interest. It was secured by a statutory lien on the bond-aided lines, subject to prior first mortgages. The Central Pacific's bonded debt amounted to $57,471,000, largely secured by first mortgages on its various lines of railroad. The outstanding stock was $67,275,500.

Messrs. Speyer & Company, New York bankers, undertook to formulate the plan, and the agreement of settlement was signed by the commissioners in behalf of the United States, the Central Pacific Railroad Company and Messrs. Speyer & Company. It was approved by the President. By the agreement of settlement the Central Pacific was to execute to the United States twenty promissory notes dated February 1, 1899, payable respectively on or before each six months for ten years, each note for

the sum of $2,940,635.78, being one-twentieth of the debt, bearing interest at 3%, payable semi-annually, all to mature on default in payment of any one of them. Under the agreement gold bonds not exceeding $100,000,000 were to be issued, secured by first mortgage on all the Central Pacific lines, bond-aided, or not, this mortgage to be prior in lien to any lease of the railroads of the Central Pacific Railroad Company. The bonds were secured by the guaranty of the Southern Pacific. No such agreement of guaranty was embodied in the written settlement, but it was known to the commissioners that the plan contemplated such guaranty. Of these bonds $58,820,000 were to be deposited with the Treasurer of the United States as security for the twenty instalment notes. Speyer & Company within one month after the execution and delivery of the notes were to purchase from the United States the four notes first maturing by paying the face thereof for the same, $11,762,543.12 and interest. A proportionate amount of the collateral mortgage bonds was to go with the notes.

On February 15, 1899, the commission reported the agreement to the House of Representatives. No reference to the guaranty of the Southern Pacific upon the bonds appeared in the report. In the annual report of the Attorney General to the Senate and House of November, 1899, the completion of the settlement, which had been made, was set out, and the guaranty of the Southern Pacific was stated, no doubt by inadvertence, to be upon the notes instead of upon the bonds. The notes, held in the Treasury of the United States, were paid primarily by the checks of the Southern Pacific, and charged by that road against the Central Pacific.

On March 3, 1899, c. 427, 30 Stat. 1245, Congress authorized the Secretary of the Treasury to dispose of any notes in his possession touching the indebtedness of the Central Pacific Railroad Company to the United

States. On March 3, 1901, c. 831, 31 Stat. 1023, the Secretary of the Treasury was authorized and directed to settle claims for interest growing out of transportation services for the Government over non-bond-aided lines of the Southern Pacific and the Central Pacific by crediting the amounts on the Central Pacific notes.

Neither the agreement between the commissioners, the Railroad Company and Speyer & Company, nor the report of the commission to Congress contained any reference to the proposed acquisition of the stock of the Central Pacific by the Southern Pacific. The Speyer plan for the adjustment of the affairs of the Central Pacific was dated February 8, 1899, was put out February 20th of the same year, was extensively published in American and European financial circles, and was given publicity in the Commercial and Financial Chronicle in the February, 1899, issues of that journal. Under the terms of the plan the Central Pacific Railway Company, successor to the Central Pacific Railroad Company, was organized as a corporation of the State of Utah on July 29, 1899. The Central Pacific Railroad Company (the old corporation of 1861), conveyed all of its property to the new company. On August 1, 1899, the Central Pacific Railway Company executed a refunding mortgage of $100,000,000 to the Central Trust Company of New York, trustee, and a mortgage of $25,000,000 to the Union Trust Company of New York. The Southern Pacific Company executed instruments subordinating its lease to the lien of these mortgages. Thereupon, carrying out the Speyer plan for the Southern Pacific to acquire the stock of the new Central Pacific Railway Company, $20,000,000 of the preferred shares of the latter company were issued, which were taken by the Southern Pacific at par. The outstanding stock of the old Central Pacific was taken by the Southern Pacific, share for share, plus 25% in the bonds of the Southern Pacific.

To consummate this transaction Southern Pacific mortgage bonds amounting to $36,819,000 were issued,—$20,000,000 thereof were used to acquire the new Central Pacific preferred stock, the balance to provide the 25% in bonds required to aid in the share-for-share exchange of the outstanding Central Pacific stock in the hands of private owners. Thus the Southern Pacific under the Speyer plan was to become the owner of the Central Pacific Railway Company stock.

In the opinion of the District Court it is said:

"We do not say that the commission was authorized to violate or to sanction the violation of the act of Congress, but the adjustment they effected necessarily involved the question of its pertinence to the business in hand. The acceptance of the guaranty of the Southern Pacific was a recognition that it had sufficient corporate interest in the Central Pacific to justify it. Without such interest its accommodation guaranty of $100,000,000 of bonds of another company would manifestly have been *ultra vires*—a gross, indefensible excess of its corporate powers. Again, the acceptance of the guaranty implied a recognition of its possible natural result; that is to say, the enforcement of the rights of a guarantor against the property of a debtor. The addition of the stock ownership by the Southern Pacific to its long leasehold interest did not so change the situation as to make unlawful what was not so before."

We are unable to accept this view. The commission with the approval of the President was authorized to settle the Central Pacific debt in accordance with the terms of the Act of 1898. It did not undertake to exercise authority not conferred upon it by giving immunity from the penalties of the Sherman Act. The Attorney General testified that the act was not mentioned in the course of the discussion. The Southern Pacific Company's guaranty of the new bonds was made, so far as that company

was concerned, from motives of self-interest sufficient in the opinion of those who controlled it to warrant such action. The commissioners, acting for the Government, accepted such guaranty. They did not thereby condone, or intend to condone, any act which had the effect to violate the Sherman Act. Nor could this settlement estop the Government from prosecuting an action under the provisions of the act.

It is insisted that the decree in the *Union Pacific Case* is decisive of this controversy, and amounts to an adjudication against the Government of the issues involved. The conclusive answer to this contention is that the Central Pacific was not a party to that suit up to the final decree in this court. That suit and the present one do not relate to the same subject-matter. The issues and questions, therein decided, are not the ones presented for decision here. *Cromwell* v. *County of Sac,* 94 U. S. 351; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451.

The defendants contend that the suit is barred by laches on the part of the Government in failing to institute it earlier. Without deciding that this defense is available when an action is brought under an act of Congress embodying, as does the Sherman Act, an expression of public policy enforceable by criminal prosecution and by civil suit instituted by the Attorney General, we are unable to discover that laches exists in the failure to more promptly prosecute the suit. The stock acquisition complained of was in 1899. In 1901 the Union Pacific acquired control of the Southern Pacific by purchase of sufficient stock to accomplish that purpose. The *Union Pacific Case* was begun in 1908, and a final decree reached in 1913, and in 1914 this suit was begun.

Other points are insisted upon in the oral argument and the elaborate briefs of the defendants. We have considered them, but they do not overcome the conclusions here-

inbefore stated which in our view dispose of this cause, and require a reversal of the decree of the District Court.

We do not find it necessary to pass upon the Government's contention that the leases to the Southern Pacific and the acquisition by it of Central Pacific stock were in and of themselves violative of the Pacific Railroad Acts of Congress of 1862 and subsequent supplemental legislation.

We direct that a decree be entered severing the control by the Southern Pacific of the Central Pacific by stock ownership or by lease. But, in accomplishing this purpose, so far as compatible therewith, the mortgage lien asserted in the brief filed for the Central Union Trust Company shall be protected.

In addition, the several terminal lines and cut-offs leading to San Francisco Bay which have been constructed or acquired during the unified control of the two systems for the purpose of affording direct or convenient access to the Bay and to the principal terminal facilities about the Bay should be dealt with, either by way of apportionment or by provisions for joint or common use, in such manner as will secure to both companies such full, convenient and ready access to the Bay and to terminal facilities thereon that each company will be able freely to compete with the other, to serve the public efficiently, and to accomplish the purpose of the legislation under which it was constructed. And a like course should be pursued in dealing with the lines extending from San Francisco Bay to Sacramento and to Portland, Oregon.

To the end that an appropriate decree may be framed, the District Court may and should bring in additional parties whenever that may become advisable in executing our directions.

Reversed and remanded accordingly.

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

Mr. Justice McKenna, dissenting.

I am unable to concur in the opinion and judgment of the court. To this I feel constrained because I think it is unjust for the Government to enforce a dissolution of the relation existing between the Central Pacific Railway Company and the Southern Pacific Company. I put my action on that ground alone though much can be said on the other grounds urged by the Government and contested by the appellee companies.

Prior to this relation another existed between the two companies or systems (they may be said to have had that pretension and extent) constituted by a lease for 99 years, executed in 1885 by the Central Pacific Railroad Company to the Southern Pacific, giving to the latter the dominion of a proprietor. *Waskey* v. *Chambers,* 224 U. S. 564, 565.

The Central Pacific Railroad Company was a bond-aided road and on account of it was under obligation to repay the Government the aid it had received, and Congress by an Act passed July 7, 1898, 30 Stat. 659, created a commission with power to settle the indebtedness. An agreement of settlement was made in which the Southern Pacific was a participant and by it assured the payment of the securities provided for in the agreement of settlement between the Central Pacific Railroad Company and the Government.

This participation was contemplated in the scheme submitted by Speyer & Company to the commission,[1] and

[1] James Speyer of the firm of Speyer & Company being on the witness stand, the following is part of his testimony:

"Q. Please state whether the Central Pacific could have complied with the conditions imposed by that act of Congress [Act of 1898] without a financial readjustment of their affairs of the kind contained in the readjustment which you arranged for?"

The question was objected to, but the witness answered.

"The Witness. Without some kind of readjustment they could not have complied. I am not prepared to say that the adjustment we

the present relation of the company is the outcome of the settlement, and it may be said, is the substitute of the

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made was the only kind; but some kind of adjustment seemed absolutely necessary."

By Mr. Blair:

"Q. And you made a plan of readjustment?

A. We did.

Q. I put before you, for convenience of reference, the plan of readjustment which was used when Mr. Ruhlender was testifying. You recognize that as the plan of readjustment which was arranged for?

A. I do.

Q. Mr. Speyer, when you started to work upon that plan of readjustment did you expect and count upon the intervention and aid of the Southern Pacific Company?

A. I knew I could not carry it through without the help of the Southern Pacific; or some other railroad company, in case the Southern Pacific had not come to assist.

Q. Did you ever contemplate or work upon any plan which did not involve the intervention and aid of the Southern Pacific Company?

A. I did not.

Q. And that plan could not have been carried through without the intervention and aid of the Southern Pacific Company?"

The question was objected to.

"Q. Mr. Speyer, considering the terms required by the act of Congress, namely, the requirement that the entire debt of fifty-eight million eight hundred thousand dollars, in round numbers, would have to be paid in ten years, in twenty semiannual installments, would any one at all familiar with the Central Pacific affairs know that the Central Pacific, with its own resources and credit, could not comply with those conditions?

A. He would.

Q. It would be obvious to anyone at all familiar with the affairs of the Central Pacific that it could not with its own resources and credit comply with the terms of that act?

A. Yes, sir.

Q. In making the agreement which you participated in with the United States, what did you count upon to enable you to carry out the agreement with the United States?

A. The cooperation of the security holders of the Central Pacific and of the Southern Pacific Company."

rights and control the Southern Pacific, as lessee, had of the Central Pacific Railroad Company.

Was it a justifiable substitute? The answer should be in the affirmative. When the Act of 1898 was passed the situation was serious, the problem complex, and because the problem was complex three Cabinet officers were selected to solve it. These were the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General. Their prominence in the Government, their official concern with the subject-matter assured fidelity in the execution of the trust and repel charge or intimation that they were, or could be, actuated by anything other than a strict consideration of duty and the exercise of their trust. And their ability assured judgment in the selection of means. The problem, it is to be remembered, was something more than to ascertain the amount of the debt. It involved, it might be, foreclosure of the Government's liens and, it might also be, government ownership and all that that meant.

The debt was known to be $58,812,715.48. It was secured by a mortgage on the lines of the Central Pacific Railroad Company, it is true, but the mortgage was subordinate to other mortgages for about the same amount. It was to be rescued from this subordination, and given independence and certain solvency. The power given to the commissioners was necessary to and commensurate with the purpose. The power was "to settle the indebtedness" "*upon such terms and in such manner as*" *might* "*be agreed upon*", and to take "*such security as*" might "*seem expedient*". The only limitation was that the payment was not to be extended more than ten years.

Necessarily, therefore, there was power to view the situation and judge of it, its legal and practical aspects, and what was possible in law and fact in the interest of all concerned to be done, and it may be presumed that the commission found that there was nothing exigent in the

situation or that demanded the separation of the Southern Pacific from the Central Pacific, and that the guarantee of the former could be accepted, and all that would follow from it. And it is to be remembered that the action of the commission received the sanction of the President, and was reported to Congress. If either had objected, the settlement as planned could not have been accomplished, and both would have objected if they had discerned anything sinister or inimical to law in it or that would result from it.

It is said, however, that there was no affirmative approval by Congress, and that its approval cannot be assumed from nonaction.

The Government makes much of this, ignoring all else, and ventures, in a kind of desperation, against the circumstances, the incredible assertion that Congress was ignorant of the guarantee of the Southern Pacific and its contributing efficiency. And this against an irresistible presumption to the contrary and in defiance of the fact that the Attorney General reported to Congress the terms of settlement and that the notes taken in settlement were guaranteed by the Southern Pacific; and in defiance of the further fact that the bonds that it was provided were to be deposited as security for the notes with the Secretary of the Treasury, had endorsed upon them the guarantee of the Southern Pacific and that the financial and commercial journals of the country, addressing the business world—the world that was to accept the notes which Congress authorized the Secretary to sell—explained the settlement and the relation of the Southern Pacific to it, and the assurance of safety and value the guarantee of the Southern Pacific gave.

I need not dwell on the contention of the Government; the court has not been impressed by it. The court's view is, rejecting that of the District Court, that there was no acceptance by the commission of the Southern Pacific's

guarantee which carried obligation, and that the guarantee was the prompting of interest on the part of the Southern Pacific. I concede the latter. The enterprise that is necessary, and is exhibited in the conduct of great railroad systems, whose traffic is concerned with a continent, is not induced by the altruistic—it is, and naturally must be, prompted by interest, but it, as other transactions of the business world, is entitled to legal sanction and remedy.

The court asserts an interest in the Southern Pacific that urged its guarantee but does not explain the interest. It is of pertinent concern to consider what it was. It manifestly was no other than the relation of the company to the Central Pacific Railway Company through stock ownership. The company would necessarily have no concern or interest in the Central Pacific (the new company) or the payment of the old company's debts to the Government, if it was to be separated from the Central Pacific and declared a competitor and a business antagonist; and this must have been apparent to everyone connected with the transactions if they gave any reflection to them—anything but a haphazard and reckless attention, inconsiderate of practical and legal consequences. This cannot be assumed and the contrary must be, that is, that the guarantee of the Southern Pacific was accepted as necessary to the settlement of the debt.

I repeat, and summarize, that the situation was of great concern to the Government. Its solution was the consummation desired, and through the aid of the Southern Pacific. The company's guarantee was assurance to the business world that behind the notes and bonds of the Central Pacific were the great properties of the Southern Pacific and the competency of its management. And the company made sacrifices in addition to the guarantee and they, and it, were accepted by the Government, and therefore, the benefit that the company expected cannot be denied it.

There was no thought in anyone's mind that the acquisition of stock by the Southern Pacific in the Central Pacific would be a restraint upon competition, or a detriment to the public interest. The attitude of those concerned in the transaction can be accurately realized by the reflection that the interest—control, if it may be so called—that the Southern Pacific acquired in or over the new company (the Railway Company) was not greater nor more offensive to law than it had in or over the old company (the Railroad Company). The latter control existed from the enactment of the law until it was superseded by the agreement, a period of eight years. And there was no revulsion against or condemnation of the control—not by the Government, whose duty it was to proceed against it if it violated the Anti-Trust Law; not by any business interest, though for such interest the law was enacted as a protection. This suit was not brought until 1914, fifteen years after the agreement, not, however, by the government of the agreement but by the government of a much later time.

I think, therefore, that the decree of the District Court should be affirmed.

MILES, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND, *v.* SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, GUARDIAN OF BROWN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 416. Argued December 16, 1921.—Decided May 29, 1922.

1. A preferential right accorded *pro rata* to the stockholders of a corporation to subscribe at a stated price for a new issue of shares, is not a fruit of stock ownership in the nature of a profit, nor a division of any part of the corporate assets. P. 251.

2. Such a right to subscribe for new stock is but a right to participate, in preference to strangers and on equal terms with other stockholders, in the privilege of contributing new capital called for by the corporation—an equity which inheres in stock ownership as a quality inseparable from the capital interest represented by the old stock. P. 252.
3. Therefore the stockholder's right to take his part of the new shares—assuming their intrinsic value in excess of the issuing price—is analogous to a stock dividend and of itself constitutes no gain, profit or income taxable without apportionment under the Sixteenth Amendment. P. 252.
4. But where the stockholder sells and assigns his subscription right, so much of the proceeds as represents a realized profit over the cost to the stockholder of what was sold, is taxable income. P. 253.
5. Where a corporation doubled its capital stock and offered the new stock share for share to its stockholders at a stated price per share, and a stockholder sold its preference rights, *held* that the taxable gain and income was properly computed by adding the subscription price so fixed for each new share to the market value of each old share as it was before the increase was authorized, taking one-half of the sum as the cost of each new share, and deducting this from the sum of the subscription price and the amount received for each subscription right, the result being the taxable gain or profit. P. 253.

273 Fed. 822, affirmed.

ERROR to a judgment of the District Court which sustained in part the claim of the defendant in error in its action to recover money exacted as an income tax and paid under protest.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for plaintiff in error.

Mr. Arthur W. Machen, Jr., for defendant in error.

Mr. Mansfield Ferry, by leave of court, filed a brief as *amicus curiae.*

Mr. Arthur M. Marsh, by leave of court, filed a brief as *amicus curiae.*

MR. JUSTICE PITNEY delivered the opinion of the court.

Defendant in error, a corporation organized under the laws of Maryland and authorized to act as guardian, was on January 30, 1919, appointed by the Orphans Court guardian of Frank R. Brown, an infant whose father had died intestate about a year before. The son as next of kin became entitled to 35 shares of the stock of the Hartford Fire Insurance Company, and they were transferred to defendant in error as such guardian, and still are held by it in that capacity. At that time the capital stock of the insurance company issued and outstanding consisted of 20,000 shares of the par value of $100 each. Later in the year that company, under statutory authority, increased its capital stock to 40,000 shares of the same par value. The resolution of the stockholders sanctioning the increase provided that the right to subscribe to the new issue should be offered to the stockholders at the price of $150 per share, in the proportion of one share of new stock to each share of stock held by them; subscriptions to be payable in instalments and the directors to have power to dispose of shares not so subscribed and paid for in such manner as they might determine to be for the best interests of the company. In July, 1919, defendant in error, pursuant to an order of the Orphans Court, sold the subscription right to 35 shares owned by its ward for $12,546.80, equivalent to $358.48 per share. The Commissioner of Internal Revenue, holding that this entire amount was income for the year, under the provisions of the Act approved February 24, 1919, c. 18, 40 Stat. 1057, assessed and plaintiff in error collected a tax amounting to $1,130.77 by reason of it. Defendant in error, having paid this under protest and unavailingly appealed to the Commissioner, claiming that none of the amount so re-

ceived was income within the meaning either of the act or of the Sixteenth Amendment, brought this action against the collector to recover the entire amount of tax so assessed and paid. The case was tried before the District Court without a jury on stipulated facts and evidence. Plaintiff's extreme contention that the subscription right to new stock and also the proceeds of the sale of the right were wholly capital and not in any part subject to be taxed as income, was overruled upon the authority of *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, then recently decided. The trial court, in the second place, held that, of the proceeds of the sale of the subscription rights, so much only as represented a realized profit over and above the cost to plaintiff of what was sold was taxable as income. In order to compute the amount of the profit, the court commenced with the value of the old shares prior to authorization of the stock increase, which upon the basis of evidence contained in the stipulation was taken to be what they were assessed at by the United States for purposes of the estate tax at the death of the ward's father, viz., $710 per share, and added the $150 necessary to be paid by a stockholder or his assignee in order to obtain a share of the new stock, making the cost of two shares (1 old and 1 new) $860 and half of this the cost of one share.

The sale of the subscription rights at $358.48, the purchaser to pay the issuing company $150 per share, was treated as equivalent to a sale of the fully-paid shares at $508.48 each, or $78.48 in excess of the $430 which represented their cost to plaintiff; and this difference multiplied by 35, the number of shares or rights sold, yielded $2,746.80 as the gain realized out of the entire transaction. Upon this the court held plaintiff to have been properly taxable, and upon nothing more; no income tax being assessable with respect to the 35 shares still retained, because although they were considered worth more, ex-

rights, than the $430 per share found to be their cost, the difference could not be regarded as a taxable profit unless or until realized by actual sale. 273 Fed. 822. To review the final judgment entered pursuant to the findings and opinion, which sustained only in part plaintiff's demand for a refund of the tax paid, the collector of internal revenue prosecuted a direct writ of error from this court under § 238 Judicial Code, because of the constitutional questions involved.

There is but one assignment of error, based upon a single exception, which denied that plaintiff was entitled to recover anything whatever; hence the correctness of the particular recovery awarded is not in form raised; but the trial judge, having the complete facts before him, almost of necessity passed upon them in their entirety in order to determine, according to truth and substance, how much of what plaintiff received was, and how much was not, income in the proper sense; as is proper in a case involving the application of the Sixteenth Amendment (*Eisner* v. *Macomber*, 252 U. S. 189, 206; *United States* v. *Phellis*, 257 U. S. 156); and in order to review the judgment, it will be proper for us to analyze the reasoning upon which it was based.

It is not in dispute that the Hartford Fire Insurance Company is a corporation of the State of Connecticut and that the stock increase in question was made under authority of certain acts of the legislature and certain resolutions of the stockholders, by which the right to subscribe to the new issue was offered to existing stockholders upon the terms mentioned. It is evident, we think, that such a distribution in and of itself constituted no division of any part of the accumulated profits or surplus of the company, or even of its capital; it was in effect an opportunity given to stockholders to share in contributing additional capital, not to participate in distribution. It was a rec-

ognition by the company that the condition of its affairs warranted an increase of its capital stock to double the par value of that already outstanding, and that the new stock would have a value to the recipients in excess of $150 per share; a determination that it should be issued pro rata to the existing stockholders, or so many of them as would pay that price. This privilege of itself was not a fruit of stock ownership in the nature of a profit; nor was it a division of any part of the assets of the company.

The right to subscribe to the new stock was but a right to participate, in preference to strangers and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation—an equity that inheres in stock ownership under such circumstances as a quality inseparable from the capital interest represented by the old stock, recognized so universally as to have become axiomatic in American corporation law. *Gray* v. *Portland Bank,* 3 Mass. 364; *Atkins* v. *Albree,* 12 Allen, 359, 361; *Jones* v. *Morrison,* 31 Minn. 140, 152–153; *Eidman* v. *Bowman,* 58 Ill. 444, 447; *Humboldt Driving Park Association* v. *Stevens,* 34 Neb. 528, 534; *Electric Co.* v. *Electric Co.,* 200 Pa. St. 516, 520–523, 526; *Wall* v. *Utah Copper Co.,* 70 N. J. Eq. 17, 28, *et seq.; Stokes* v. *Continental Trust Co.,* 186 N. Y. 285. Evidently this inherent equity was recognized in the statute and the resolution under which the new stock here in question was offered and issued.

The stockholder's right to take his part of the new shares therefore—assuming their intrinsic value to have exceeded the issuing price—was essentially analogous to a stock dividend. So far as the issuing price was concerned, payment of this was a condition precedent to participation, coupled with an opportunity to increase his capital investment. In either aspect, or both, the subscription right of itself constituted no gain, profit or income taxable without apportionment under the Sixteenth Amendment.

Eisner v. *Macomber,* 252 U. S. 189, is conclusive to this effect.

But in that case it was recognized (p. 212) that a gain through sale of dividend stock at a profit was taxable as income, the same as a gain derived through sale of some of the original shares would be. In that as in other recent cases this court has interpreted "income" as including gains and profits derived through sale or conversion of capital assets, whether done by a dealer or trader, or casually by a non-trader, as by a trustee in the course of changing investments. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 517–520.

Hence the District Court rightly held defendant in error liable to income tax as to so much of the proceeds of sale of the subscription rights as represented a realized profit over and above the cost to it of what was sold. How the gain should be computed is a matter of some contention by the Government in this court; but it admits of little doubt. To treat the stockholder's right to the new shares as something new and independent of the old, and as if it actually cost nothing, leaving the entire proceeds of sale as gain, would ignore the essence of the matter, and the suggestion cannot be accepted. The District Court proceeded correctly in treating the subscription rights as an increase inseparable from the old shares, not in the way of income but as capital; in treating the new shares if and when issued as indistinguishable legally and in the market sense from the old; and in regarding the sale of the rights as a sale of a portion of a capital interest that included the old shares. What would have happened had defendant in error decided to accept the new shares and pay the issuing price instead of selling the rights is of no consequence; in that event there would have been no realized profit, hence no taxable income. What resulted or might have resulted to defendant in error's retained interest in the company, depending upon whether the purchaser exercised his right

to subscribe or allowed it to lapse, or whether in the latter event the stock was sold by the directors, is of speculative interest only. Defendant in error resorted to the market for the sale of a part of its capital interest, concededly sold at an advance over cost, and what the profit actually was is the sole concern here; not whether it might have been more or less, nor whether the purchaser disposed of the stock to advantage.

That a comparison of the cost at acquisition and the selling price is proper under § 202 (a) of the act (40 Stat. 1060), where, as here, the property was acquired and sold within the same taxing year, we understand to be conceded. Under the stipulation, the court below was warranted in finding $710 per share to have been the fair market value of the old stock when turned over to the guardian, and treating this as its cost to the trust. It was proper to add to this the $150 required to be paid to the company and treat the total as the cost to plaintiff of each two shares one of which was to pass to the purchaser. This in essence is the method adopted by the Treasury Department in the case of a sale of dividend stock, in Regulations 45, 1920 ed., Art. 1547, which reads:

"Art. 1547. *Sale of stock received as dividend.*—Stock in a corporation received as a dividend does not constitute taxable income to a stockholder in such corporation, but any profit derived by the stockholder from the sale of such stock is taxable income to him. [Following *Eisner* v. *Macomber, supra.*] For the purpose of ascertaining the gain or loss derived from the sale of such stock, or from the sale of the stock with respect to which it is issued, the cost (used to include also, where required, the fair market value as of March 1, 1913), of both the old and new shares is to be determined in accordance with the following rules:

"(1) Where the stock issued as a dividend is all of substantially the same character or preference as the stock upon which the stock dividend is paid, the cost of each

share of both the old and new stock will be the quotient of the cost, or fair market value as of March 1, 1913, if acquired prior to that date, of the old shares of stock divided by the total number of the old and new shares. . . ."

That the averaging of cost might present more administrative difficulty in a case more complicated than the present, as where the old shares were acquired at different times, is not a sufficient ground for denying the soundness of the method itself.

Various suggestions, more or less ingenious, as to how the profit ought to be computed, made by counsel for defendant in error and by an *amicus curiae,* have been examined and found faulty for reasons unnecessary to be mentioned. Upon the whole, we are satisfied that the method adopted by the District Court led to a correct result.

Judgment affirmed.

CARLISLE PACKING COMPANY *v.* SANDANGER.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 195. Argued March 24, 1922.—Decided May 29, 1922.

1. According to the general maritime law, a seaman injured in the service of the ship on navigable waters may recover indemnity from the ship or her owner if the injuries were in consequence of her unseaworthiness, but not upon the ground of the negligence of the master or any member of the crew. P. 258.
2. These rules apply whether the suit be in an admiralty or in a common-law court. P. 259.
3. Irrespective of negligence, a motor boat is unseaworthy if not equipped with life preservers or if, when she leaves the dock, on waters where there prevails a custom to start galley fires by means of coal oil, a can marked " coal oil " is filled with gasoline. P. 259.
4. Where a seaman recovered a verdict of compensatory damages for injuries by fire, due to the presence of gasoline in a can usually containing coal oil employed in starting a stove, and due to the

absence of life preservers, *held,* that error in submitting the case to the jury on the theory of the owner's negligence was harmless, since the facts as found by the jury warranted the recovery upon the ground of unseaworthiness. P. 259.

5. When there is only one possible claimant and one vessel owner, the privilege of limited liability accorded by Rev. Stats., § 4283, may be claimed in a state court by proper pleading; but the claim is too late when first presented by a request for a charge to the jury. P. 260.

112 Wash. 480, affirmed.

CERTIORARI to a judgment of the Supreme Court of the State of Washington, affirming a judgment rendered by a trial court against the present petitioner in an action brought by the respondent to recover damages received while serving as a seaman on board the petitioner's vessel.

Mr. J. Harry Covington, with whom *Mr. James A. Kerr Mr. Evan S. McCord* and *Mr. Joseph N. Ivey* were on the brief, for petitioner.

If under the maritime law, whether found in federal statutes or in decisions of federal courts, the petitioner is not liable for damages to respondent in excess of his wages and expenses incident to curing him, then under § 24, Jud. Code, no greater damages can be recovered in a common-law action in the state court.

Admiralty would have had jurisdiction, since respondent was a seaman.

By the maritime law, for the injuries to respondent the petitioner was liable only to the extent of respondent's wages, maintenance and cure, unless his injury was received in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. *The Osceola,* 189 U. S. 158, 175.

Respondent should not have recovered more than his maintenance and cure for negligence of the master. *The Osceola, supra; Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.

The presence of gasoline in a can, supposed to contain kerosene and used to help light a galley fire, would not render the ship unseaworthy, nor would it be a failure to supply and keep in order the proper appliances appurtenant to the ship. *The New York,* 204 Fed. 764; *The Santa Clara,* 206 Fed. 179; *Hanrahan* v. *Pacific Transport Co.,* 262 Fed. 951; s. c., certiorari denied, 252 U. S. 579; *The Santa Barbara,* 263 Fed. 369.

The petitioner could in no event be liable beyond the value of the vessel and the freight money for the current voyage. Rev. Stats., §§ 4283, 4289; *The Alola,* 228 Fed. 1006; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527; *La Bourgogne,* 210 U. S. 95, 120; *Oceanic Steam Navigation Co.* v. *Mellor,* 233 U. S. 732; *White* v. *Island Transportation Co.,* 233 U. S. 350; *Craig* v. *Continental Insurance Co.,* 141 U. S. 638.

Mr. Maurice McMicken, for respondent, submitted.

Mr. Justice McReynolds delivered the opinion of the court.

The Supreme Court of Washington affirmed a judgment against petitioner Packing Company rendered by the trial court upon a verdict for damages on account of injuries which respondent suffered while employed upon petitioner's motor boat afloat in navigable Alaskan waters.

Respondent claimed that, prior to the departure of the boat upon a trip intended to occupy perhaps six or eight hours, petitioner or its agents negligently filled with gasoline and placed thereon a can which ordinarily contained coal oil (and was so labelled) for use according to the prevailing custom in those waters to start fires in the small stove where meals were cooked and water heated. Without knowledge of the substitution, respondent poured the gasoline upon the fire wood, applied a match, an explosion resulted and he was badly burned. He further

claimed that no life preservers had been placed on board and that his injuries were aggravated by delay attending search for one before he jumped into the water to extinguish his flaming clothes.

The trial court held "the basis of the action is negligence," and instructed the jury according to the common-law rules in respect thereto. It said that if petitioner or its authorized agents negligently filled the can with gasoline and placed it upon the boat, and if by reason of such negligence respondent suffered injury, he was entitled to recover compensatory damages therefor, provided he himself had not been guilty of contributory negligence. Further, that if the injuries resulting directly from the explosion were aggravated because no life preservers had been placed on board, then additional compensation could be awarded for such aggravation. Also that if the explosion occurred without petitioner's negligence but the absence of life preservers caused aggravation of respondent's injuries, he would be entitled to recover for such injuries as resulted directly from the negligence in respect of the life preservers but not for those caused solely by the explosion.

We have heretofore announced the general doctrine concerning rights and liabilities of the parties when one of a crew sustains injuries while on a vessel in navigable waters.

"The vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

"All the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence

seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"The seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident." *The Osceola,* 189 U. S. 158, 175; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380, 381.

The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court. *Chelentis* v. *Luckenbach S. S. Co., supra; Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 159.

Here the trial court did not instruct the jury in consonance with these rules, and by failing so to do, fell into error.

But mere error without more is not enough to upset the judgment, if the record discloses that no injury could have resulted therefrom. *West* v. *Camden,* 135 U. S. 507, 521.

Considering the custom prevailing in those waters and other clearly established facts, in the present cause, we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked "coal oil" contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages. *The Silvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 8. The verdict shows that the jury found gasoline had been negligently placed in the can or that through negligence no life preservers were put on board, or that both of these defaults existed, and that as a result of one or both respondent suffered injury without contributory negligence on his part. In effect the charge was more favorable to the petitioner than it could have de-

manded, and we think no damage could have resulted from the erroneous theory adopted by the trial court. *The Caledonia,* 157 U. S. 124, 131; *Thompson Towing & Wrecking Association* v. *McGregor,* 207 Fed. 209, 211.

Petitioner asked an instruction that § 4283 of the Revised Statutes [1] applied, and that under it the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. *The Lotta,* 150 Fed. 219, 222; *Delaware River Ferry Co.* v. *Amos,* 179 Fed. 756. Here the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.

The judgment below must be

Affirmed.

MR. JUSTICE CLARKE concurs in the result.

OLIN *v.* KITZMILLER ET AL.

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

No. 246. Argued April 21, 1922.—Decided May 29, 1922.

The compact between Washington and Oregon, approved by Congress April 8, 1918, agreeing that all laws and regulations for regulating, protecting or preserving fish in the waters of the Columbia River of which the two States have concurrent jurisdiction shall be made and altered only with the consent of both States, and the

[1] Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

provision in the acts in which they accepted the compact, that no license to fish shall be issued to any person not a citizen of the United States unless he has declared his intention to become such, etc., were not intended to prevent either State from narrowing the licensable classes, e. g., by excluding persons who are not citizens. P. 263.

268 Fed. 348, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed, for want of equity, a bill by which the plaintiff sought to compel the defendant officers of the State of Oregon to issue him a license to fish in the Columbia River.

Mr. Arthur I. Moulton, with whom *Mr. Wm. P. Lord* and *Mr. James E. Fenton* were on the brief, for appellant.

Mr. Willis S. Moore and *Mr. W. W. Banks,* with whom *Mr. I. H. Van Winkle,* Attorney General of the State of Oregon, and *Mr. James G. Wilson* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The bill was dismissed upon motion by the trial court for want of equity and the Circuit Court of Appeals affirmed this action. 268 Fed. 348.

Appellant—a native of Russia who has declared his intention to become a citizen of the United States—claims the right to fish in specified locations in the Columbia River and seeks a mandatory injunction requiring the Master Fish Warden and other officers of Oregon to issue a license therefor.

His prayer is based upon the theory that so much of c. 292, General Laws of Oregon, 1919, as directs that no fishing license "shall be issued to any person who is not a citizen of the United States" impairs the obligation (Const., Art. I, § 10) of the compact and agreement be-

tween the States of Washington and Oregon ratified by an Act of Congress approved April 8, 1918—c. 47, 40 Stat. 515—which follows:

" The Congress of the United States of America hereby consents to and ratifies the compact and agreement entered into between the States of Oregon and Washington relative to regulating, protecting, and preserving fish in the boundary waters of the Columbia River and other waters, which compact and agreement is contained in section twenty of chapter one hundred and eighty-eight of the general laws of Oregon for nineteen hundred and fifteen, and section one hundred and sixteen, chapter thirty-one, of the session laws of Washington for nineteen hundred and fifteen, and is as follows:

" 'All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States.'

" Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters."

The statutes in which the States accepted the compact are not identical, but each one provides—

" No license for taking or catching salmon or other food or shell fish, required by laws of this State, shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the State for one year immediately preceding the application for such license, nor shall any license be issued to a corporation unless it is authorized to do business in this State." Oregon Laws, 1915, c. 188, § 5; Washington Laws, 1915, c. 31, § 43.

Appellant's postulate is that the quoted provision read in connection with the compact inhibits each State from restricting its fishing licenses to citizens of the United States without consent of the other. If this is unsound, no foundation exists for his claim and all other questions may be disregarded.

Considering the object and nature of the compact and the two Acts of 1915, we cannot conclude that the parties intended by the identical provision to obligate themselves to issue *any* fishing license; the purpose was to limit the classes of persons who might have them—beyond which the State might not go. There is no inhibition against narrowing these classes nor indeed against a refusal to issue any license. The Oregon legislature acted in harmony with the compact when it excluded aliens; there was no impairment and the judgment of the court below must be

Affirmed.

STATE INDUSTRIAL COMMISSION OF THE STATE OF NEW YORK *v.* NORDENHOLT CORPORATION ET AL.

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

No. 625. Argued March 9, 1922.—Decided May 29, 1922.

1. When an employee, while working on board a vessel lying in navigable waters, sustains personal injuries there and seeks damages from his employer, the liability of the employer must be determined under the maritime law. P. 272.
2. But where the injuries occur while the employee is engaged in unloading the vessel on land the local law has always been applied. P. 273.
3. A longshoreman was injured on a dock (an extension of the land) while engaged about the unloading of a vessel lying in navigable waters in New York, and died as a result of his injuries. *Held*, that his contract of employment did not contemplate any dominant

federal rule concerning his employer's liability in damages; and that whether awards under the State Compensation Act are to be regarded as made upon implied agreement of employer and employee, or otherwise, the act was applicable to the case, since this would not conflict with any federal statute or work material prejudice to any characteristic feature of the general maritime law. P. 275. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and other cases, distinguished.

195 App. Div. 913; 232 N. Y. 507, reversed.

CERTIORARI to a judgment of the Supreme Court of New York, Appellate Division, entered upon a remittitur issued from the New York Court of Appeals pursuant to a decision of the latter court which affirmed a reversal by the former court of an order made under the State Workmen's Compensation Act by the present petitioner requiring the respondents to pay compensation to the widow of a longshoreman who died as the result of personal injuries received while in the employ of the respondent Nordenholt Corporation.

Mr. E. Clarence Aiken, with whom *Mr. Charles D. Newton,* Attorney General of the State of New York, was on the brief, for petitioner.

An injury on a dock, pier or wharf is not a maritime injury and, therefore, not within the admiralty law. If there is no jurisdiction in admiralty, there is no foundation for denying jurisdiction under the New York Workmen's Compensation Law. *The Blackheath,* 195 U. S. 361, 365; *The Plymouth,* 3 Wall. 20, 36; *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland S. S. Co.,* 208 U. S. 316; *Martin* v. *West,* 222 U. S. 191; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 60; *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Rorvik* v. *North Pacific Lumber Co.,* 99 Ore. 82; *Swayne & Hoyt, Inc.* v. *Barsch,* 226 Fed. 581.

Anderson v. *Johnson Lighterage Co.,* 224 N. Y. 539, and *Keator* v. *Rock Plaster Mfg. Co.,* 224 N. Y. 540, held

that the Industrial Commission had no jurisdiction where longshoremen were injured on a pier, because they were engaged in performing a maritime contract, following *Doey* v. *Howland Co., Inc.,* 224 N. Y. 30, in which the employee concededly met his death upon a steamship and therefore was subject to admiralty jurisdiction. In the *Keator Case,* subsequent to the decision in 224 N. Y. 540, the Federal District Court dismissed an action in admiralty, on the ground that the injury was not of a maritime nature. 256 Fed. 574. But *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, decided after the *Keator* and *Anderson Cases,* sustains the view that injuries to an employee working under a maritime contract and received upon a dock might come under the state compensation law. See pp. 158, 162, 166. The injuries in the *Stewart* and *Jensen Cases* occurred in navigable waters or on board vessel, and therefore were within the admiralty jurisdiction.

The Court of Appeals erred in basing its decision upon the fact that remedy for compensation was a matter of contract. That does not affect the question, provided there is no admiralty jurisdiction over injuries received on land. True, the Compensation Law reads its requirements into every contract of employment, but the foundation of that law is not contract but a statutory liability which takes the place of the common-law liability for negligence. *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

Even if the employment of a longshoreman is a maritime contract, there is no federal law governing the relation of master and servant in respect of accidents on land; so that either the state law of torts or the state compensation law is the only remedy. Where the accident happens on land, there is no admiralty tort, and, therefore, no uniform law which can be applied. Congress

under the admiralty power cannot deprive the States of the right to legislate in respect of torts on land, and it has not attempted to exercise that power.

Moreover, the jurisdiction with reference to contracts is concurrent in the state and admiralty courts, under the reservation of a common-law remedy where a common-law remedy is applicable. *Leon* v. *Galceran,* 11 Wall. 185, 188; *Rounds* v. *Cloverport Foundry Co.,* 237 U. S. 303; *Schoonmaker* v. *Gilmore,* 102 U. S. 118. The reservation of such remedy is not limited to causes of action known to the common law at the time of the passage of the Judiciary Act, but includes statutory changes. *Steamboat Co.* v. *Chase,* 16 Wall. 522, 533; *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 644; *The Hamilton,* 207 U. S. 398, 409.

In States where the compensation remedy is based upon contract, i. e., where the compensation is elective rather than compulsory, it is held that injuries occurring upon the dock are not governed by admiralty law but by the state compensation law. See *Berry* v. *Donovan & Sons, Inc.,* 115 Atl. 250.

The only remedy for death from maritime accidents in New York is the remedy of the workmen's compensation law. *Shanahan* v. *Monarch Engineering Co.,* 219 N. Y. 469; *Barnhardt* v. *American Concrete Steel Co.,* 227 N. Y. 531. See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233.

Mr. E. C. Sherwood, with whom *Mr. Benjamin C. Loder* and *Mr. William B. Davis* were on the brief, for respondents.

While admiralty jurisdiction in tort depends on the locality, in matters of contract it depends on the subject-matter, the nature and character of the contract. *North Pacific S. S. Co.* v. *Hall Bros. Co.,* 249 U. S. 119; *Union Fish Co.* v. *Erickson,* 248 U. S. 308.

The work of unloading a vessel is maritime and a contract to do such work is maritime. *Atlantic Transport*

Co. v. *Imbrovek,* 234 U. S. 52, 62; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Peters* v. *Veasey,* 251 U. S. 121.

The question whether an elective compensation statute would be effective in the circumstances upon which this proceeding is based, if the employer and the employee had elected to accept its provisions, is not here presented. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Berry* v. *Donovan & Sons, Inc.,* 120 Maine, 457; but see *Duart* v. *Simmons,* 231 Mass. 313.

Under the New York Compensation Law the liability depends not at all upon the will of the parties to the contract of employment, nor rests upon the theory that there has been fault on the part of the employer. The sole basis of liability is the relationship of employer and employee, plus only the occurrence of an accidental injury arising out of and in the course of the work contemplated by the contract of employment. The liability is grounded upon the contract of employment itself. It is purely contractual, and for this reason follows the parties to the contract when they go into a foreign jurisdiction whose laws regulate the whole question of the employee's right to recover damages for personal injuries; provided only that the contract of employment was entered into within the State of New York. *Post* v. *Burger & Gohlke,* 216 N. Y. 544; *Klein* v. *Stoller & Cook Co.,* 220 N. Y. 670; *Fitzpatrick* v. *Blackall & Baldwin Co.,* 220 N. Y. 671. Cf. *Kruse* v. *Pillsbury,* 162 Pac. 891; *Gould's Case,* 215 Mass. 480, 482.

The question here involved is therefore closely akin to that presented in *Union Fish Co.* v. *Erickson,* 248 U. S. 308.

Counsel for the State Industrial Commission contend, in effect, that the New York Compensation Law ought to be applied in this case, because in the present state of

the law a cause of action cognizable in admiralty did not arise upon and on account of the death of Insana. A somewhat similar idea prevailed in the New York Court of Appeals in the case of *Winfield* v. *New York Central R. R. Co.,* 216 N. Y. 284, in which it was held by that court that this same statute was applicable to cases arising out of work done in connection with interstate commerce, since Congress had not enacted a federal compensation statute; but upon review in this court the error was pointed out and corrected. 244 U. S. 147. The absence of such a federal law is not the controlling consideration. It is more pertinent to inquire: Has Congress the power to enact a compensation statute applicable to all cases of accidental injury and death arising out of and in the course of maritime employment (e. g., stevedoring operations), which occur on the dock as well as to those occurring on the vessel?

The Federal Government's jurisdiction over matters of a maritime nature is not limited to mere adjudication of admiralty causes by the courts of the United States, but resides also in the legislative and executive branches. *Richardson* v. *Harmon,* 222 U. S. 96.

The primary purpose of the constitutional grant of jurisdiction over maritime affairs and over matters relating to the rights of those engaged in shipping, was to insure general uniformity in the law—not merely in the law of torts. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160; *The Lottawanna,* 21 Wall. 558, 574; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.

The field of this jurisdiction is very broad. It covers " maritime matters ", " all subjects of a commercial character affecting the intercourse of the States," and the international and interstate relations arising out of maritime operations. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205.

In seeking to apply the *Jensen* decision the problem is whether the statute works material prejudice to charac-

teristic features incident to the relationship of employer and employee created by the maritime contract of employment. It is pertinent to consider the practical results of attempting to apply the statute to a case like the present one. When we do this we are met at the outset with the consideration that the statute is inapplicable to any case where the accident occurs on or in the water, or upon a vessel afloat in the water. The practical results of applying it to all accidents occurring inshore of the water line would be confusion and conflict, indefensible upon any theory of common sense or practical utility. The operation of loading or unloading a ship moored alongside a dock, work which in its very nature is continuous and indivisible, would be divided physically in half. One system of law would be applied to one part, while another system, entirely and fundamentally different, would be applied to the other. Uniformity of the law, which is frequently spoken of in connection with these cases, does not lie in that direction.

It does not follow that, if the compensation law is not applicable, there is no remedy in a case where the accident can be traced to the fault of the employer.

If the maritime law of torts as now understood and applied by courts of admiralty does not extend to the subject-matter, the state law of torts may be applicable to it, even though the particular state statute here in question may not be so.

Mr. Justice McReynolds delivered the opinion of the court.

Sebastiana Insana, mother of Guiseppe Insana, asked of the New York State Industrial Commission an allowance under the Workmen's Compensation Law on account of her son's death, which she claimed resulted from accidental injuries received May 15, 1918, in the course of his employment as a longshoreman by the Nordenholt Cor-

poration then unloading a vessel lying in navigable waters at Brooklyn. The cargo consisted of bags of cement. These were hoisted to the dock and there tiered up by Insana and other longshoremen. While thus engaged, he slipped and fell on the dock.

The Commission found "the accidental injuries which the said deceased sustained while working for his employer when he fell from the pile of bags to the floor were the activating cause of his death, and his death was a direct result of the injuries sustained by him while engaged in the regular course of his employment," and awarded compensation as specified by the statute. Upon authority of *Keator* v. *Rock Plaster Manufacturing Co.*, 224 N. Y. 540, and *Anderson* v. *Johnson Lighterage Co.*, 224 N. Y. 539, the Appellate Division reversed the award, 195 App. Div. 913, and the Court of Appeals affirmed its action without opinion, October 25, 1921, 232 N. Y. 507.

In both the *Keator* and *Anderson Cases,* the employee suffered injuries on land while helping to unload a vessel lying in navigable waters. The Court of Appeals held when so injured he was performing a maritime contract and that for reasons stated in *Doey* v. *Howland Co., Inc.*, 224 N. Y. 30, the Industrial Commission had no jurisdiction to make an award. While making repairs on an ocean-going vessel lying at the dock in navigable waters, Doey fell down a hatchway and sustained fatal injuries. The Appellate Division reversed an award of compensation, and the Court of Appeals affirmed its action, holding that as Doey was performing a maritime contract the Commission had no jurisdiction, under the doctrine of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Clyde S. S. Co.* v. *Walker,* 244 U. S. 255. It said (224 N. Y. 35, 36):

"Two questions are presented: (a) Was Doey, at the time of his death, engaged in the performance of a maritime contract? . . .

"If the first question be answered in the affirmative, then it necessarily follows from the decisions of the Supreme Court of the United States above referred to [*Southern Pacific Co.* v. *Jensen,* and *Clyde S. S. Co.* v. *Walker*], that the commission had no authority to make the award in question. In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done. (*Erie R. R. Co.* v. *Welsh,* 242 U. S. 303.) In torts the rule is different. There, jurisdiction depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters. (*Atlantic Transport Co. of W. Va.* v. *Imbrovek,* 234 U. S. 52.) An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke,* 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment.

"In the present case, upon the conceded facts, I am of the opinion that Doey was, at the time he met his death, engaged in the performance of a maritime contract. His employer had taken a contract to repair an ocean-going vessel, preparatory to its taking on a cargo of grain. Doey was one of several carpenters employed to make the necessary changes. He was, at the time he was killed, engaged in such work on a steamship then in navigable waters.

The contract to make the changes was certainly maritime in its nature. Preparing a steamship to receive a cargo is as much maritime in nature as putting the cargo on or taking it from the ship. Nor was the nature of the contract changed in any way because the contractor did not actually do the work himself, but employed others to do it for him. Doey's contract of employment was just as much of a maritime nature as was that of his employer. . . ."

An award to Newham, injured on the dock while checking freight and doing work similar to that of a foreman of stevedores was set aside in *Newham* v. *Chile Exploration Co.*, 232 N. Y. 37 (October 18, 1921). The court said:

"We have held in *Matter of Doey* v. *Howland Co.*, 224 N. Y. 30, and in *Matter of Anderson* v. *Johnson Lighterage Co.*, 224 N. Y. 539, and in *Matter of Keator* v. *Rock Plaster Manufacturing Co.*, 224 N. Y. 540, that if the employee was engaged at the time of his injury in the performance of a maritime contract the state did not have jurisdiction of the matter and the Workmen's Compensation Law did not apply. This is the deduction which we have made from the cases of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149."

The court below has made deductions from *Southern Pacific Co.* v. *Jensen; Clyde S. S. Co.* v. *Walker*, and *Knickerbocker Ice Co.* v. *Stewart*, which we think are unwarranted, and has proceeded upon an erroneous view of the federal law.

When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no

general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

The injuries out of which *Southern Pacific Co.* v. *Jensen* arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the Workmen's Compensation statute of the State, and this court held they could not. In the opinion, citing *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60, we said, " The work of a stevedore in which the deceased [Jensen] was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." The doctrine that locality is the *exclusive* test of admiralty jurisdiction in matters of tort had been questioned in the *Imbrovek Case,* and to show beyond any doubt that the maritime rules applied as to Jensen's injuries, we used the quoted language. Later, in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, we said, " The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

In *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 382,—an action at law seeking full indemnity for injuries received by a sailor on shipboard—this was said:

" The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the

parties' rights and liabilities were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co.* v. *Jensen,* no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' "

See also *Peters* v. *Veasey,* 251 U. S. 121; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149.

In *Union Fish Co.* v. *Erickson,* 248 U. S. 308, it was held that when entering into maritime contracts the parties contemplate the system of maritime law, and its well known rules control their rights and liabilities to the exclusion of state statutes.

In *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, it was held that where a stevedore's death on a ship within the State resulted from injuries there received, an admiralty court, in the absence of federal statute or positive maritime rule, would recognize and apply the state statute giving an action for damages on account of death. " The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

In *Grant Smith-Porter Ship Co.* v. *Rohde, supra,* a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette River. The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter—and we said—

"Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. . . .

"In *Western Fuel Co.* v. *Garcia,* we recently pointed out that as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the State applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he can not recover damages in an admiralty court."

Insana was injured upon the dock, an extension of the land, *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland S. S. Co.,* 208 U. S. 316, and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law and the

state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In Jensen's case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law. Compare *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147.

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

Reversed.

NG FUNG HO, OTHERWISE KNOWN AS UNG KIP, ET AL. *v.* WHITE, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

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

No. 176. Argued March 17, 20, 1922.—Decided May 29, 1922.

1. Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings. P. 280.
2. The Chinese Exclusion Act of May 5, 1892, as amended, makes it unlawful for a Chinese laborer not in possession of a certificate of residence to remain in the United States, irrespective of the legality of his entry. P. 281.

3. A Chinese person thus unlawfully in the United States is subject to executive deportation under the General Immigration Act of February 5, 1917, § 19, without giving it a retroactive effect, although he entered the country before it was passed, because the act applies to any alien who "shall be found" here in violation of any federal law, as well as those who shall have entered unlawfully. P. 280.
4. Persons of Chinese blood who have been admitted into the country by the immigration authorities and afterwards arrested and held for deportation, who claim to be citizens of the United States in virtue of the citizenship of their father (Rev. Stats. § 1993,) and who support the claim by evidence both before the immigration officers and upon petition for habeas corpus, are entitled, under the Fifth Amendment, to a judicial hearing of the claim, in the habeas corpus proceeding. P. 282.

266 Fed. 765, affirmed in part and reversed in part.

The petitioners, Chinese held for deportation under warrants issued by the Secretary of Labor pursuant to the Immigration Act of 1917, obtained from the District Court a writ of habeas corpus. That court subsequently ordered the writ quashed and the petitioners remanded to custody. The present review is directed to a judgment of the Circuit Court of Appeals, affirming the action of the District Court as to all of the petitioners except one whom it ordered released.

Mr. Jackson H. Ralston, with whom *Mr. George W. Hott* and *Mr. Geo. A. McGowan* were on the brief, for petitioners.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the court.

On January 27, 1919, five persons of the Chinese race, of whom four are petitioners herein, joined in an application for a writ of habeas corpus to the judge of the federal court for the Southern Division of the Northern District

of California. A writ issued directed to the Commissioner of Immigration for the Port of San Francisco, who held the petitioners in custody under warrants of deportation of the Secretary of Labor pursuant to § 19 of the General Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889. The case was heard upon the original files of the Bureau of Immigration containing the record of the deportation proceedings. Each petitioner had entered the United States before May 1, 1917, the effective date of the General Immigration Act of February 5, 1917, and within five years of the commencement of the deportation proceedings. As to each the warrant of deportation recited that the petitioner was a native of China, was found to have secured his admission by fraud, and was found within the United States in violation of § 6 of the Chinese Exclusion Act of May 5, 1892, c. 60, 27 Stat. 25, as amended by the Act of November 3, 1893, c. 14, 28 Stat. 7, being a Chinese laborer not in possession of a certificate of residence. The District Court entered an order quashing the writ and remanding the prisoners to the custody of the immigration authorities. The judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, except as to one appellant who was ordered released, 266 Fed. 765. The case is here on writ of certiorari, 254 U. S. 628.

There is a faint contention, which we deem unfounded, that the petitioners were not given a fair hearing and that there is no evidence to sustain the findings of the immigration official. The contention mainly urged is that any violation of the Chinese Exclusion Laws [1] of which peti-

[1] See Act of May 6, 1882, c. 126, 22 Stat. 58, as amended by the Act of July 5, 1884, c. 220, 23 Stat. 115; Act of September 13, 1888, c. 1015, § 13, 25 Stat. 476, 479; Act of October 1, 1888, c. 1064, 25 Stat. 504; Act of May 5, 1892, c. 60, §§ 2, 3, 6, 27 Stat. 25; Act of November 3, 1893, c. 14, § 1, 28 Stat. 7; Act of March 3, 1901, c. 845, 31 Stat. 1093; Act of April 29, 1902, c. 641, 32 Stat. 176; Act of April 27, 1904, c. 1630, § 5, 33 Stat. 394, 428.

tioners may be guilty occurred prior to the effective date of the General Immigration Act of February 5, 1917; that, consequently, petitioners were not subject to its provision authorizing deportation on executive orders; and that under the provisions of the Chinese Exclusion Acts they could be deported only upon judicial proceedings. In certain respects the situation of two of the petitioners differs from that of the other two; and, to that extent, their rights require separate consideration.

First. As to Ng Fung Ho and Ng Yuen Shew, his minor son, the question presented is solely one of statutory construction. Deportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings; that is, upon a warrant issued by a justice, judge or commissioner of a United States court upon a complaint and returnable before such court, or a justice, judge or commissioner thereof. From an order of deportation entered by a Commissioner an appeal is provided to the District Court and from there to the Circuit Court of Appeals. *United States, Petitioner,* 194 U. S. 194. We held in *United States* v. *Woo Jan,* 245 U. S. 552, that § 21 of the General Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, which authorized deportation of aliens on executive orders, did not apply to violators of the Chinese Exclusion Acts and that they continued to enjoy the right to a judicial hearing. The 1907 Act remained in force until May 1, 1917, when the General Immigration Act of February 5, 1917, became operative. Section 19 of the latter act also provides for deportation of aliens on executive orders. The question is: Did the Act of 1917 also preserve to Chinese the exceptional right to a judicial hearing as distinguished from an executive hearing?

Petitioners practically concede that Chinese who first entered the United States after April 30, 1917, are subject to deportation under the provisions of § 19; but they insist that the rights and liabilities of those who entered before

May 1, 1917, are governed wholly by the Chinese Exclusion Acts; and that these remain entitled to a judicial hearing. The mere fact that at the time petitioners last entered the United States they could not have been deported except by judicial proceedings presents no constitutional obstacle to their expulsion by executive order now. Neither Ng Fung Ho nor Ng Yuen Shew claims to be a citizen of the United States. Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings. *Bugajewitz* v. *Adams,* 228 U. S. 585; *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291. Our task, therefore, so far as concerns these two petitioners, is merely to ascertain the intention of Congress.

Petitioners argue that to hold § 19 of the 1917 Act applicable to them would give it retroactive operation contrary to the expressed intention of Congress. They rely particularly on the clauses in § 38 which declare that "as to all . . . acts, things, or matters," "done or existing at the time of the taking effect of this [1917] Act" the "laws . . . amended . . . are hereby continued in force." [1] The Government, on the other hand, insists that

[1] Section 19 provides for taking into custody upon warrant of the Secretary of Labor, and deportation, of "any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States."

The third proviso of § 19 reads:

"That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States."

Section 38 specifically repeals the existing law upon the taking effect of the act and continues:

"*Provided,* That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons . . . except as provided in section nineteen hereof: . . . *Provided further,* That nothing contained in this Act

§ 19 was intended to operate retroactively and to cover acts done prior to its going into effect, provided deportation proceedings were begun within five years after entry. But its main contention rests upon the fact that here the arrest and deportation are based, not merely upon unlawful entry, but upon the unlawful remaining of the petitioners after May 1, 1917. For the charge as to each is, " that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

Unlawful remaining of an alien in the United States is an offense distinct in its nature from unlawful entry into the United States. One who has entered lawfully may remain unlawfully. This is expressly recognized in § 6 of the Act of May 5, 1892, under which the deportations here in question were sought. See *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Li Sing* v. *United States,* 180 U. S. 486; *Ah How* v. *United States,* 193 U. S. 65. A different rule might apply if the statute had so connected the two offenses that there could not be an unlawful remaining unless there had been an unlawful entry. Compare § 1 of the Act of May 6, 1882, c. 126, 22 Stat. 58. As we agree with the Government that the orders of deportation were valid because these petitioners were then unlawfully within the United States, we have no occasion to consider its further contention that Congress intended § 19 to be broadly retroactive.

Second. As to Gin Sang Get and Gin Sang Mo a constitutional question also is presented. Each claims to be

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shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this Act are hereby continued in force and effect."

a foreign-born son of a native-born citizen; and, hence, under § 1993 of the Revised Statutes, to be himself a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. *United States* v. *Ju Toy,* 198 U. S. 253; *Tang Tun* v. *Edsell,* 223 U. S. 673. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. See *United States* v. *Wong You,* 223 U. S. 67. They arrived at San Francisco, a regularly designated port of entry; were duly taken to the immigration station; and, after a protracted personal examination, supplemented by the hearing of witnesses and the examination of reports of immigration officials, were ordered admitted as citizens. Then they applied for and received their certificates of identity. Fifteen months after the entry of one and six months after the entry of the other, both were arrested, on the warrant of the Secretary of Labor, in Arizona where they were then living. The constitutional question presented as to them is: May a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio. United States* v. *Sing Tuck,* 194 U. S. 161. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim?

The question suggests—but is different from—another concerning deportation proceedings on which there is much difference of opinion in the lower courts, namely: Whether the provision which puts upon the detained the burden of establishing his right to remain (see § 3 of the Act of May 5, 1892; *Chin Bak Kan* v. *United States,* 186 U. S. 193; *Ah How* v. *United States,* 193 U. S. 65) applies where one resident within the country is arrested under the provisions of the Chinese Exclusion Law, and claims American citizenship.[1] There the proceeding for deportation is judicial in its nature. It is commenced usually before a commissioner of the court; but on appeal to the District Court additional evidence may be introduced and the trial is *de novo. Liu Hop Fong* v. *United States,* 209 U. S. 453. The constitutional question presented in those cases is merely how far the legislature may go in prescribing rules of evidence and burden of proof in judicial pro-

[1] In *Moy Suey* v. *United States,* 147 Fed. 697, where a Chinaman who claimed to have been born in the United States was ordered deported by the commissioner because he found that the prisoner had not "satisfactorily established, by affirmative proof, his lawful right to be and remain in the United States," the order of deportation was reversed by the Circuit Court of Appeals for the Seventh Circuit, because one within the country claiming to be a citizen "may not be deported or banished until the right of the government to deport or banish has been judicially determined." This decision was followed in *Gee Cue Beng* v. *United States,* 184 Fed. 383 (C. C. A., Fifth Circuit); *Fong Gum Tong* v. *United States,* 192 Fed. 320; *United States* v. *Charlie Dart,* 251 Fed. 394. Compare *United States* v. *Jhu Why,* 175 Fed. 630. In the following cases it was held that the burden of establishing American citizenship rested upon the Chinaman: *Yee King* v. *United States,* 179 Fed. 368; *Kum Sue* v. *United States,* 179 Fed. 370; *United States* v. *Too Toy,* 185 Fed. 838; *Yee Ging* v. *United States,* 190 Fed. 270; *Bak Kun* v. *United States,* 195 Fed. 53; *United States* v. *Hom Lim,* 223 Fed. 520; *Fong Ping Ngar* v. *United States,* 223 Fed. 523; *Ng You Nuey* v. *United States,* 224 Fed. 340; *Chin Ah Yoke* v. *White,* 244 Fed. 940; *Sit Sing Kum,* 277 Fed. 191.

ceedings. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 729. *Bailey* v. *Alabama,* 219 U. S. 219, 238; *Luria* v. *United States,* 231 U. S. 9, 26; *Hawes* v. *Georgia,* 258 U. S. 1. Here the proceeding is throughout executive in its nature.

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex parte Reed,* 100 U. S. 13; *In re Grimley,* 137 U. S. 147; *In re Morrissey,* 137 U. S. 157; *Johnson* v. *Sayre,* 158 U. S. 109. Compare *Ex parte Crow Dog,* 109 U. S. 556. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive, *United States* v. *Ju Toy,* 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow* v. *United States,* 208 U. S. 8, or the finding was not supported by evidence, *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, or there was an application of an erroneous rule of law, *Gegiow* v. *Uhl,* 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow* v. *United States,* 208 U. S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth

Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States* v. *Woo Jan,* 245 U. S. 552, 556; *White* v. *Chin Fong,* 253 U. S. 90, 93.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in *Chin Yow* v. *United States, supra,* and approved in *Kwock Jan Fat* v. *White,* 253 U. S. 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew the judgment of the Circuit Court of Appeals is affirmed.

Judgment affirmed in part and reversed in part.

Writ of habeas corpus to issue as to Gin Sang Get and Ging Sang Mo.

GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* MERCHANTS ELEVATOR COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 202. Argued April 18, 1922.—Decided May 29, 1922.

When, in an action by a shipper to recover charges exacted by a carrier under an interstate tariff, the rights of the parties depend entirely upon a legal construction of the tariff, involving no question of fact either in aid of the construction or in other respect, and no question of administrative discretion, the courts have jurisdiction without preliminary resort to the Interstate Commerce Commission. P. 289. *Texas & Pacific Ry. Co.* v. *American Tie &*

Timber Co., 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, and other cases, distinguished.
147 Minn. 251, affirmed.

CERTIORARI to a judgment of the Supreme Court of Minnesota affirming a judgment for the plaintiff in a suit by the present respondent to recover overcharges from the petitioner Railway Company.

Mr. John F. Finerty, with whom *Mr. F. G. Dorety* was on the brief, for petitioners.

The decision below, in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require resort in the first instance to the Interstate Commerce Commission, not only directly contravenes the decision of this court in *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, but is in contravention of, or inconsistent with, the following decisions of this court: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43; *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Director General* v. *Viscose Co.*, 254 U. S. 498; and *Minnesota Rate Cases*, 230 U. S. 352.

Nor can the decision of the court below be justified under the decisions of this court in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the Interstate Commerce Act of a character which this court has generally recognized to be primarily within the jurisdiction of the Interstate Commerce Commission. *Wight* v. *United States,* 167 U. S. 512; *Southern Ry. Co.* v. *Tift,* 206 U. S. 428; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.,* 223 U. S. 70; *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Florida East Coast Ry. Co.* v. *United States,* 234 U. S. 167; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121; *Eastern Ry. Co.* v. *Littlefield,* 237 U. S. 140; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.,* 238 U. S. 275; *Philadelphia & Reading Ry. Co.* v. *United States,* 240 U. S. 334; *Pennsylvania R. R. Co.* v. *Jacoby & Co.,* 242 U. S. 89; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281; *Pennsylvania R. R. Co.* v. *Kittanning Iron Co.,* 253 U. S. 319; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252; *Central R. R. Co.* v. *United States,* 257 U. S. 247; *Schaff* v. *Famechon Co.,* 258 U. S. 76.

The only two decisions of state or subordinate federal courts which have followed and applied the decision in the *American Tie & Timber Case, supra,* are: *Cheney* v. *Boston & Maine R. R.,* 227 Mass. 336; and *Poor* v. *Western Union Telegraph Co.,* 196 Mo. App. 557.

The following decisions of state and subordinate federal courts with reference to the jurisdiction of the Interstate Commerce Commission and of the courts, respectively, over questions arising under the Interstate Commerce Act, were either rendered before the decision in

the *American Tie & Timber Case,* or are distinguishable from that case: *Hite* v. *Central R. R. of N. J.,* 171 Fed. 370; *National Pole Co.* v. *C. & N. W. Ry. Co.,* 211 Fed. 65; *Gimble Bros., Inc.* v. *Barrett,* 215 Fed. 1004; *Chicago, Burlington & Quincy Ry. Co.* v. *Feintuch,* 191 Fed. 482; *Kansas City Southern Ry. Co.* v. *Tonn,* 102 Ark. 20; *Hardaway* v. *Southern Ry. Co.,* 90 S. Car. 475; *Western & Atlantic R. R. Co.* v. *White Provision Co.,* 142 Ga. 246; *Southern Pacific Co.* v. *Frye & Bruhn, Inc.,* 82 Wash. 9; *St. Louis, San Francisco & Texas Ry. Co.* v. *Roff Oil Co.,* 61 Tex. Civ. App. 190; *Laing-Harris Coal Co.* v. *St. Louis & San Francisco R. R. Co.,* 15 I. C. C. 37.

Mr. Harold G. Simpson for respondent.

Mr. Justice Brandeis delivered the opinion of the court.

This action was brought by the Merchants Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for sixteen cars of corn shipped from points in Iowa and Nebraska to Willmar, Minnesota, and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the State by this route is inspected and graded under the laws of Minnesota and of the United States; and the carrier knew, or should have known, that fact. Immediately after inspection disposition orders were given and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:

" Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, . . . a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination."

The shipper contended that the case was within the exception known as Exception (a), as amended by Supplement One, which provided that rules (including Rule 10) shall not apply to:

"(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138, and *Loomis* v. *Lehigh Valley R. R. Co.,* 240 U. S. 43, claimed seasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. That court overruled the objection; construed the exception to mean that cars of grain are exempted from Rule 10 if held on track at billed destination for inspection and for " disposition orders " incident to such inspection; held that the disposition order may be an order to make disposition by way of reconsignment to another destination and that forwarding to Anoka was such disposition; and entered judgment for the shipper. That judgment was affirmed by the Supreme Court of the State on the authority of *Reliance Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 139 Minn.

69. The case is here on writ of certiorari, 255 U. S. 567. The tariff containing the rule under which the $5 charge was made was the only governing tariff. It had been duly filed with the Interstate Commerce Commission. The validity of the tariff, including the rule and exception, was admitted. And there was no dispute concerning the facts. The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction.

The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests, in the main, upon the following argument. The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To ensure uniformity the true construction must, in case of dispute, be determined by the Commission.

This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and

thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.

Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be neces-

sary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established.[1] But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.

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[1] *Goddard* v. *Foster*, 17 Wall. 123, 142; *Hutchison* v. *Bowker*, 5 M. & W. 535, 542; *Tubbs* v. *Mechanics' Insurance Co.*, 131 Ia. 217; *Aetna Indemnity Co.* v. *Waters*, 110 Md. 673; *Tower Co.* v. *Southern Pacific Co.*, 184 Mass. 472. See *Ogden* v. *Parsons*, 23 How. 167, 170; *Fuller* v. *Metropolitan Life Insurance Co.*, 70 Conn. 647, 677; Thayer, Preliminary Treatise on Evidence, 203–207, 215, 259.

It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the situation in the *American Tie & Timber Co. Case, supra.* The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. The only matter really in issue was whether the word " lumber " which was in the tariff, had been used in a peculiar sense. The trial judge charged the jury: " If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment." This question was obviously not one of construction; and there is not to be found in the opinion of this court, or in the proceedings in either of the lower courts, a suggestion that the case involved any disputed question of construction. The only real question in the case was one of fact; and upon this question of fact " the views of men engaged in the lumber and railroad business as developed in the testimony " were in " irreconcilable conflict," p. 146. As that question, unlike one of construction, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to ensure uniformity. The situation in *Loomis* v. *Lehigh Valley R. R. Co., supra,* was similar. There the question to be decided did not require the consideration of voluminous conflicting evidence; but it involved the exercise of administrative judgment. The carrier had been requested by a shipper of grain, fruits and vegetables to supply cars for loading. In order to load ordinary box cars to the minimum capacity on which the freight rates are based and to the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or transverse bulkheads, so that they may

safely contain the load and enable unloading to be done without waste and inconvenience. Those sent lacked the inside doors and bulkheads. The carrier having refused to furnish these, the shipper was obliged to do so and sought reimbursement. The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable. To determine this enquiry the court held that preliminary resort to the Commission must be had, because "an adequate consideration of the . . . controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered."

In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case,* or in the *Loomis Case.* Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. The petition for certiorari was asked for on the ground that the decision of the Supreme Court of Minnesota in this case was in conflict with the above decisions of this court and also that the decisions in several state courts and in the lower federal courts were in serious conflict on the question involved. In the brief and argument on the merits, it was also asserted that some recent decisions of this court are in conflict with the rule declared and applied in the *American Tie & Timber Co. Case, supra,* and the *Loomis*

Case, supra. If in examining the cases referred to [1] there is borne in mind the distinction above discussed between

[1] In the following cases in which the jurisdiction of the court was sustained without preliminary resort to the Commission, the question involved was solely one of construction of a tariff, or otherwise a question of law, and not one of administrative discretion. (1) *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 84; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 134; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120; *Pennsylvania R. R. Co.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U. S. 319. See also *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hasty & Sons*, 255 U. S. 252, 256. (2) *Hite* v. *Central R. R. of N. J.*, 171 Fed. 370, 372; *Gimble Bros., Inc.* v. *Barrett*, 215 Fed. 1004; 218 Fed. 880; 226 Fed. 623; *National Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 246 Fed. 588; *Francesconi & Co.* v. *Baltimore & Ohio R. R. Co.*, 274 Fed. 687, 691. Compare *Empire Refineries, Inc.* v. *Guaranty Trust Co.*, 271 Fed. 668. (3) *Kansas City Southern Ry. Co.* v. *Tonn*, 102 Ark. 20, 26; *Western & Atlantic R. R. Co.* v. *White Provision Co.*, 142 Ga. 246; *Gustafson* v. *Michigan Central R. R. Co.*, 296 Ill. 41; *Wolverine Brass Works* v. *Southern Pacific Co.*, 187 Mich. 393, 396; *Reliance Elevator Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 139 Minn. 69; *St. Louis, San Francisco & Texas Ry. Co.* v. *Roff Oil & Cotton Co.*, 61 Tex. Civ. App. 190, 192; *Southern Pacific Co.* v. *Frye & Bruhn, Inc.*, 82 Wash. 9. Compare *Hardaway* v. *Southern Ry. Co.*, 90 S. Car. 475. See *contra Cheney* v. *Boston & Maine R. R.*, 227 Mass. 336. Compare *Poor* v. *Western Union Telegraph Co.*, 196 Mo. App. 557, 564.

In the following cases where the court refused to take jurisdiction because there had not been preliminary resort to the Commission, the question presented either was one of fact or called for the exercise of administrative discretion. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; *Director General* v. *Viscose Co.*, 254 U. S. 498. See also *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87.

controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist and that the decisions referred to are in harmony also with reason.

Affirmed.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 207. Argued April 21, 1922.—Decided May 29, 1922.

1. In fixing special bankers' taxes under the Act of June 13, 1898, c. 448, § 2, 30 Stat. 448, the assessment is not confined to that part of a banker's capital which is used in making loans or directly in other banking transactions, but includes capital held or deposited as a reserve or invested in securities and which serves to give credit to the banking business; and even where such securities have been designated as assets of another kind of business and physically segregated as such, they still may represent capital employed in the banking business if they continue to give it credit. P. 301.
2. But where a corporation is lawfully engaged in several distinct lines of business, including banking, for each of which its capital supplies necessary credit, the whole of the common capital cannot be deemed capital of a single department; there should be an apportionment, and the extent to which the capital is used in banking is a question of fact. P. 301.
3. In an action to recover taxes collected under this act, where the plaintiff corporation claimed that the business of its banking department was conducted without the use of its capital but solely on its depositors' money, and the Court of Claims, though requested, made no specific finding on that subject but other findings respecting the segregation of the plaintiff's several kinds of business, investments, accounting, etc., from which the extent, if any, to which the capital was used in banking could not be definitely ascertained, *held* that the case should be remanded for further findings. P. 303.

4. The limitation on actions in the Court of Claims on claims arising under the Refunding Act of July 27, 1912, is six years. P. 303. *Sage* v. *United States,* 250 U. S. 33.

55 Ct. Clms. 535, remanded for further findings, etc.

APPEAL from a judgment of the Court of Claims dismissing a petition for recovery of money paid as bankers' special taxes under the Spanish War Revenue Act of June 13, 1898.

Mr. George Sutherland, with whom *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* were on the briefs, for appellant.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck, Mr. Carl A. Mapes* and *Mr. B. H. Littleton* were on the briefs, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the Court of Claims by the Fidelity and Deposit Company of Maryland to recover the sum of $8,300, being the aggregate of amounts paid as bankers' special taxes for the years 1898 to 1901, under § 2 of the Spanish War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448. The company applied on November 22, 1913, for a refund, pursuant to the Act of July 27, 1912, c. 256, 37 Stat. 240, alleging that the taxes had been assessed and collected on plaintiff's capital, but that in fact none of it had been used or employed in the banking business. The application was rejected by the Secretary of the Treasury on April 19, 1917; and this suit was begun on July 25, 1918. The Government insisted that the taxes were legally payable and also that the claim was barred by the two-year statute of limitations. The court dismissed the petition without opinion on authority of *Union Trust Co.* v. *United States,* 55 Ct. Clms. 424; and the case is here on appeal. A motion to remand for further findings of fact made here by appellant earlier in this term was denied without prejudice.

By the Act of 1898 "bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars" were required to pay a special tax of $50; and for every additional $1,000 the further amount of $2. The act provided, among other things, that "in estimating capital surplus shall be included"; and that "every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency" subject to check, are to be deemed bankers. The Fidelity Company was unquestionably a banker; but banking was only one of four departments of its business. The others were: (a) the surety business—that is, acting as surety upon bonds conditioned for the faithful performance of duties by principals; (b) the safe-deposit business—that is, renting safe-deposit boxes for the safe keeping of valuables; (c) the business of acting as trustee under bond issues of other corporations. Whether the company had used or employed its capital in the banking business, within the meaning of the Act of 1898, is the main question presented.

The tax paid upon capital used or employed in banking was assessed for the year 1898 upon $25,000; for 1899 upon $1,125,000, and for 1900 and 1901 upon $1,500,000. The company claimed that it had not used any of its capital in banking during any of those years; and duly requested the lower court to find as facts that: "The entire business of the banking department was conducted solely on its depositors' money. Neither the capital stock nor surplus of plaintiff company was used or employed by or in the banking department." The court made no specific finding on that subject; and it overruled the motion for a new trial, in the supplement to which the company renewed its application for such findings, and also requested other specific findings in support of them. In the motion made here to remand the case for further find-

ings of fact the company requested that the Court of Claims be directed to find from the evidence: (1) Whether or not the banking department used only the funds of its depositors in the conduct of the business of that department; (2) whether or not any of the capital or surplus of the company was actually used or employed in the banking business, and, if so, what amount; and (3) what was the net income of appellant's surety or bonding department during each of the years in question. The court had already found the annual net income of the banking department; and it was asserted that in volume and profits the surety business was far more important than that of banking. If specific findings on these subjects are necessary to a proper determination of the case, it should clearly be remanded for that purpose; since the requests therefor were made seasonably in the lower court and here.

The Government contends that the findings requested are immaterial, because, as a matter of law, all of the capital (and surplus) was used or employed in banking. It argues that the words used and employed are not to be given the same meaning; that all the company's capital was, as matter of law, employed in the banking business, because all of it was, as matter of law, available for use in the banking department; and that all of it must in fact have enhanced the credit of the banking department, even if none of it was actually used in banking and the income of the banking department was derived directly from the investment of its deposits. In other words, the contention is that the act fixes the tax upon the banker "using or employing" a capital; and that a firm, or company, being a banker, can not escape, or reduce, the tax by showing that it is engaged in several lines of business and that, in fact, none, or only a part, of its capital was used specifically in its banking operations.

The findings of fact made by the Court of Claims were these: The company's capital stock and the surplus were

each $1,000,000 in 1898. Both were increased from time to time. In 1901 the former was $2,000,000, the latter $2,550,000. All the money derived from the sale of the capital stock and all the money of the surplus were permanently invested in real estate (including the office building at Baltimore in which the company's business was done) and in bonds, stocks and other securities. These investments were referred to and were designated on its books as "Capital Stock Investments." The securities and valuable papers representing them were segregated in a separate compartment of the company's vault in separate envelopes earmarked as capital stock. The financial operations concerning them were kept in a separate set of books distinct from the records of all other business transacted by the company. The business of the banking department was likewise kept separate, physically and as a matter of accounting, from all other business of the company. And the record of its operations was kept in a distinct set of books. The money received from deposits (which in 1901 exceeded $4,000,000) was invested in stocks and bonds which were kept in the vault in separate envelopes earmarked as such. The expenses of each department of the company's business were charged to the separate account of that department payable out of its earning. But physically expenses of the several departments may have been paid from a common fund. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department. The earnings of each department were carried to the undivided profits account of the company at the end of each year.

A portion of the office building was occupied by the banking department.

We cannot, on these findings of fact, say, as matter of law, that all the capital of the Fidelity Company was used in the banking business; nor can we say that at least the amount upon which the tax was assessed (which in no year was as much as one-half the company's capital) was so used. Capital may be employed in banking although it is not used strictly as working capital and none of it is used in making loans or directly in other banking transactions. Money of a banker held in the vault or with depositaries as a reserve is employed in banking as much as money loaned to customers. Capital invested in securities may be employed in banking even if its sole use is to give to the banker the credit which attracts depositors or to make it possible for him otherwise to raise money with which banking operations are conducted. And if such securities serve to give credit, they will continue, also in the legal sense, to be capital used in the banking business, even if they are designated by the company as assets of another department and physically segregated as such. Compare *Canal & Banking Co.* v. *New Orleans,* 99 U. S. 97. If a company is engaged exclusively in banking, all of its capital, however invested, may reasonably be held to be capital employed in banking without enquiry into the particular use to which it is put. Compare *Leather Manufacturers' National Bank* v. *Treat,* 116 Fed. 774; 128 Fed. 262. But where a company is lawfully engaged in several distinct businesses to the successful conduct of each of which credit is necessary, and the company's capital supplies such credit to each, the whole of this common capital cannot be deemed capital of a single department. Under such circumstances charges incident to common capital are, in accounting practice, apportioned ordinarily among the several departments; and it may not be assumed that Congress in laying this tax intended to depart from the usage of business.

With the apportionment of charges incident to capital used in common by several departments or branches of a business, both courts and legislatures have become familiar. Such apportionment is made when the tangible property of a corporation is scattered through different States and its intangible property is treated, for purposes of taxation, as distributed among the several States in which the tangible property is located. *Adams Express Co.* v. *Ohio,* 165 U. S. 194; 166 U. S. 185; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165. Statutes are common by which foreign corporations are taxed upon the amount of their capital employed within the taxing State. Would it be contended that all the capital of the foreign corporation was taxable in each such State, because all of its capital is conceivably available for use in each and all is liable for debts incurred in each? The Act of 1898 applies to individual bankers as well as to corporations. Surely Congress could not have intended to tax as capital employed in banking the whole net property of an individual banker. Yet the possession of large wealth would probably aid him in attracting depositors; and all his property would, if required, be available legally, and possibly in fact, to meet requirements of his banking business. That apportionment of the capital of a company among its several departments can and should be made for purposes of taxation has been held by lower courts in cases arising under § 3 of the Act of Congress October 22, 1914, c. 331, 38 Stat. 745, 750, which is substantially the same as the provision here in question.[1] They recognize that

[1] *Anderson* v. *Farmers' Loan & Trust Co.,* 241 Fed. 322; *Title Guarantee & Trust Co.* v. *Miles,* 258 Fed. 771; *Real Estate Title Insurance & Trust Co.* v. *Lederer,* 263 Fed. 667. Compare *Central Trust Co.* v. *Treat,* 171 Fed. 301; *Treat* v. *Farmers' Loan & Trust Co.,* 185 Fed. 760; *Fidelity Trust Co.* v. *Miles,* 258 Fed. 770; *Germantown Trust Co.* v. *Lederer,* 263 Fed. 672.

the question whether the capital was used in the banking business, and if so to what extent, is a question of fact.

On the facts found by the Court of Claims we are unable to say that no part of the capital was used in the banking business or that there was used at least as much thereof as was represented by the taxes assessed. It follows that in order to determine what sums, if any, are recoverable, additional facts must be found. The request for further findings made by appellant was appropriate; and the case should be remanded with directions to make such findings; unless, as the Government contends, the claim sued on is barred by the two-year statute of limitations.

The contention is that the cause of action accrued on May 22, 1914, which is six months after presentation of the claim to the Commissioner of Internal Revenue; that the two-year statute of limitations prescribed by § 3227 of the Revised Statutes applies; that the fact that the claim was not rejected by the Treasury Department until April, 1917, is immaterial; and that therefore the suit, which was begun in July, 1918, is barred. This was the view taken by the Court of Claims for reasons theretofore given in *Kahn* v. *United States,* 55 Ct. Clms. 271. But, as we held in *Sage* v. *United States,* 250 U. S. 33, 39, the six-year statute of limitations applies to cases arising under the Act of July 27, 1912, c. 256. See also *Henry* v. *United States,* 251 U. S. 393, 394.

Motion to remand granted with directions to make new findings of fact as prayed and modify the judgment, if need be, to conform to this opinion.

FIDELITY TITLE & TRUST COMPANY, PITTSBURGH, PENNSYLVANIA, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued April 21, 1922.—Decided May 29, 1922.

1. The limitation on actions in the Court of Claims on claims arising under the Refunding Act of July 27, 1912, is six years. P. 305. *Fidelity & Deposit Co.* v. *United States, ante,* 296.
2. In an action in the Court of Claims by a corporation engaged in banking and other kinds of business, to recover bankers' taxes collected under the Act of June 13, 1898, c. 448, § 2, 30 Stat. 448, upon the ground that its capital was not used or employed in banking, the burden is on the plaintiff to prove that none of it, or less than the amount for which it was assessed, was used or employed in its banking department. P. 306. Cf. *Fidelity & Deposit Co.* v. *United States, ante,* 296.
3. This burden is not sustained where the business and assets of the several departments were not separated, where the proportions of capital and accumulated profits used in the respective departments were not shown, where there was no finding that the net profits of the banking department came solely from the use of depositors' money, and where a finding that no part of the capital and accumulated profits was used in banking, or findings from which the proportion so used, if any, could be determined, were not requested. P. 306.
4. In providing that, in estimating capital, surplus shall be included, the Act of 1898, *supra,* takes no account of the technical distinction between surplus and undivided profits often made by banking corporations, but embraces all capital used or employed in banking, including funds designated as undivided profits. P. 307.

55 Ct. Clms. 535, affirmed.

APPEAL from a judgment of the Court of Clams dismissing a petition for recovery of money paid as bankers' special taxes under the Spanish War Revenue Act of June 13, 1898.

Mr. George Sutherland, with whom *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* were on the briefs, for appellant.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck, Mr. Carl A. Mapes* and *Mr. B. H. Littleton* were on the briefs, for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

This suit was brought in the Court of Claims by the Fidelity Title & Trust Company of Pittsburgh, in July, 1918, to recover the sum of $10,028.94 assessed upon its whole capital and undivided profits and paid as bankers' special taxes under § 2 of the Spanish War Revenue Act. That court entered judgment for the defendant; and the case is here on appeal. Appellant contends that nothing was payable as a tax, because none of the capital or undivided profits was used or employed in banking; and that the tax was, in no event, assessable on the undivided profits, because these were not a part of the capital within the meaning of the act. The Government contends that the whole capital and undivided profits were taxable; and that, in any event, the action is barred by the two-year statute of limitations, because the application for refund had been made in November, 1913. In the main, the facts are similar to, and the questions of law are the same, as those considered in *Fidelity & Deposit Co.* v. *United States, ante,* 296. For the reasons there stated we hold that the action was not barred. As bearing upon the merits material differences in the facts must be considered. In the case now under consideration, the businesses and the assets of the several departments were not separated; and there was not technically a surplus, but a fund designated as undivided profits.

The company carried on five classes of business, one of which was banking. An amount in excess of its capital was permanently invested in bonds and real estate, the latter including its office building. A schedule of these investments was carried on the books designated " Sched-

ule of Investments of the Capital Stock of One Million Dollars"; but there was no physical segregation of these assets from others belonging to the company. Nor was there segregation of the money received from the capital stock or from investments made therewith, from the money derived from earnings of the several departments. No attempt was made to segregate or earmark investments as having been made for any particular department. All moneys received by the company, including bank deposits, were commingled; and from these general funds all investments were made and all expenses and losses were paid. The office building was used by all the departments. All the earnings from the several departments were pooled and went into the profit and loss account. There was carried in this account a credit representing undivided profits amounting in 1898 to $414,468.86, which increased from year to year and was $948,074.56 in 1902. These undivided profits were not at any time during the period in question set apart in any way as a separate fund and they were at all times subject to distribution by the board of directors as dividends and available for any department of the business. At a date subsequent to the period here in question additional stock was sold above par to form a surplus fund.

The burden lay on the plaintiff to establish that none of the company's capital, or that less of it than the amount for which it was assessed, had been used or employed in the banking department. It failed entirely to sustain that burden. The proportions of capital and accumulated profits used in the respective departments were not established by the evidence. There was no finding that the net profits of the banking department were received solely from the use of depositors' money. And there does not appear to have been any request for a finding of fact that no part of the capital and undivided profits was used in banking; or for a finding of facts from

which the proportion so used, if any, could be determined. Therefore the Court of Claims properly denied recovery for any part of the taxes paid; unless we can say, as matter of law, that undivided profits, on which for the years 1898 and 1901 taxes were assessed as upon capital, were not assessable as such.

The act declares that "in estimating capital surplus shall be included" and that the "annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year." The act does not mention undivided profits. The question is whether Congress intended to draw a distinction between surplus and undivided profits; or intended that all capital actually used in banking should be taxed, whether it was strictly capital stock, or surplus or undivided profits.

The company argues that while the word surplus, in its general and popular meaning, includes undivided profits, Congress in the Act of 1898 used the term in its technical and restricted sense of a fund formally set apart and called surplus by the authorized officers of the bank; and that, as matter of law, no tax can be assessed on undivided profits. This view finds support in opinions of the Attorney General rendered in 1899 and 1900. 22 Ops. Atty. Gen. 320; 23 Ops. Atty. Gen. 341. But his rulings were not acquiesced in by the Treasury Department. It recommended promptly an amendment of the act which should expressly declare that undivided profits were to be considered surplus, Annual Reports of Commissioner of Internal Revenue, 1899, p. 91; 1900, p. 89; and it submitted the question thereafter to the courts for determination. In *Leather Manufacturers' National Bank* v. *Treat,* 116 Fed. 774 (1902), the Circuit Court held that undivided profits were subject to taxation; and the judgment in that case was affirmed by the Circuit Court of Appeals for the Second Circuit, 128 Fed. 262 (1904).

With these courts we agree. By the Act of 1898 Congress imposed the tax, not on incorporated banks only, but also on any person, firm or company engaged in banking. And it measured the tax by the amount of capital actually used or employed in banking. The technical distinction between capital, surplus and undivided profits is obviously not applicable to the banking business when conducted by individuals or firms; and the distinction between surplus and undivided profits, while commonly observed by incorporated banks, is not ordinarily made by other business corporations. As it is the use or employment of capital in banking, not mere possession thereof by the banker, which determines the amount of the tax, the fact that a portion of the capital so used or employed is designated undivided profits is of no legal significance.[1] Compare *Fidelity & Deposit Co. v. United States, ante,* 296.

But while capital assets of a banker are not, as matter of law, exempt from taxation under the Act of 1898 merely because they are designated undivided profits, undivided profits, like any other part of the company's capital, may be free from the tax, because they were not, in fact, used or employed in banking. And the company contends that the Court of Claims did find as a fact that these undivided profits were not so used. The passage in the findings relied upon is this: "The said profit and loss credit balance was never designated as or set apart or appropriated to capital or surplus or used for capital or surplus purposes." It is argued that the last clause of the sentence means that none of the undivided profits were used for banking purposes. The contention is plausible. But

[1] The Revenue Act of October 22, 1914, c. 331, 38 Stat. 745, 750, provides in terms that undivided profits shall be included in capital. It is under this act that *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 327; *Real Estate Title Insurance & Trust Co.* v. *Lederer,* 229 Fed. 799; *Germantown Trust Co.* v. *Lederer,* 263 Fed. 673, relied upon by the Government, were decided.

when the passage is read in connection with other parts of the findings, it seems clear that such was not the meaning of the court. There was, thus, no finding to the effect that the undistributed profits, as distinguished from capital, were not used or employed in banking.

Affirmed.

COLLINS *v.* LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

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

No. 672. Argued April 28, 1922.—Decided May 29, 1922.

1. To warrant extradition (in this case to India under the treaties with Great Britain) it is not necessary that the name by which the crime is described in the two countries be the same, nor that the scope of the liability be coextensive, or, in other respects, the same in each; it is enough if the particular act charged is criminal in both jurisdictions. P. 311.
2. The Act of August 3, 1882, c. 378, § 5, 22 Stat. 216, repealing Rev. Stats. § 5271 so far as inconsistent, admits as evidence in extradition proceedings, warrants and other papers, and copies thereof, as well as depositions, authenticated so as to authorize their admission for similar purposes in courts of the foreign country, when such authentication is proven by the certificate of the principal diplomatic or consular officer of the United States resident in such country. P. 313.
3. In extradition for an offense committed at Bombay, India is the "foreign country", within the meaning of this statute, and the papers may be certified by the Consul General of the United States stationed at Calcutta, of whose identity and of whose status as our principal diplomatic or consular officer resident in that country the court takes judicial notice. P. 314.
4. Evidence that the accused obtained valuable personal property by knowingly false representations of his wealth and standing, of his authority to draw the draft given the vendor and of the identity and financial standing of the drawee, *held* sufficient to show an obtaining by false pretenses within the law of Louisiana as well as a cheat at common law. P. 314.

5. Under the Treaty of August 9, 1842, with Great Britain, providing that extradition shall only be had on such evidence of criminality as, according to the laws of the place where the person charged is found, would justify his arrest and commitment for trial if the offense had been committed there, and under the law of Louisiana, allowing accused persons to present evidence in their own behalf before the committing magistrate, a person arrested for extradition is entitled to introduce evidence rebutting probable cause, but not evidence in defense. P. 315.
6. The function of the committing magistrate is to determine whether there is competent evidence sufficient to hold the accused for trial and not whether it would suffice for a conviction. P. 315.
7. His conclusions as to relevancy of evidence are not reëxaminable in *habeas corpus* unless so clearly unjustified as to amount to denial of the hearing prescribed by law. P. 317.
8. The phrase "such evidence of criminality" in the Treaty of 1842, *supra,* refers to sufficiency of evidence in elements essential to a conviction, not to the character of specific instruments of evidence or to rules governing admissibility. P. 317.
9. The procedural law of the State cannot entitle the prisoner to introduce evidence made irrelevant by the treaty. P. 317.

Affirmed.

APPEAL from a judgment of the District Court in *habeas corpus,* remanding the appellant to the custody of the marshal under a commitment issued in an extradition proceeding.

Mr. Guion Miller and *Mr. Edgar Allen Poe,* with whom *Mr. J. Zach Spearing* and *Mr. J. Kemp Bartlett* were on the brief, for appellant.

Mr. Robert H. Marr for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is the second appeal by Collins in this case. The first was dismissed in *Collins* v. *Miller,* 252 U. S. 364, for want of jurisdiction. There the earlier proceedings and the nature of the controversy are fully set forth. After our decision the case was again heard by the District Court,

on the same record and the same evidence; and on October 25, 1921, judgment was entered. By that judgment the writ of habeas corpus was granted, so far as the commitment was based on charges of obtaining property by false pretenses from Pohoomull Brothers and from Ganeshi Lall & Sons; and as to these commitments the court discharged Collins. But as to the commitment based on the charge of obtaining property by false pretenses from Mahomed Ali Zaimal Ali Raza, the court dismissed the application for habeas corpus and remanded Collins to the custody of Loisel, the marshal. The British Consul General acquiesced in this judgment. Collins appealed from so much thereof as recommitted him to the custody of the marshal. As the judgment below was final and disposed of the whole case, we now have jurisdiction. It is insisted, on several grounds, that the committing magistrate was without jurisdiction, and that consequently the appellant should have been discharged.

First. Collins contends that the affidavit of the British Consul General does not charge an extraditable offense. The argument is that the affidavit charges cheating merely; that cheating is not among the offenses enumerated in the extradition treaties; that cheating is a different offense from obtaining property under false pretenses which is expressly named in the Treaty of December 13, 1900, 32 Stat. 1864; that to convict of cheating it is sufficient to prove a promise of future performance which the promisor does not intend to perform, while to convict of obtaining property by false pretense it is essential that there be a false representation of a state of things past or present. See *State* v. *Colly,* 39 La. Ann. 841. It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries. It is also true that the charge made in the court of India rests upon § 420 of its Penal Code, which declares: " Whoever cheats and thereby dishonestly induces the person de-

ceived to deliver any property to any person . . . shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,"[1] whereas § 813 of the Revised Statutes of Louisiana declares: "Whoever, by any false pretence, shall obtain, or aid and assist another in obtaining, from any person, money or any property, with intent to defraud him of the same, shall, on conviction, be punished by imprisonment at hard labor or otherwise, not exceeding twelve months." But the affidavit of the British Consul General recites that Collins stands charged in the Chief Presidency Magistrate's Court with having feloniously obtained the pearl button by false pretenses; and the certificate of the Secretary to the Government of India, which accompanies the papers on which Collins' surrender is sought, describes the offense with which he is there charged as "the crime of obtaining valuable property by false pretenses." The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in *Wright* v. *Henkel,* 190 U. S. 40, 58; *Kelly* v. *Griffin,* 241 U. S. 6, 14; *Benson* v. *McMahon,* 127 U. S. 457, 465; and *Greene* v. *United States,* 154 Fed. 401. Compare *Ex parte Piot,* 15 Cox C. C. 208. The offense charged was, therefore, clearly extraditable.

Second. Collins contends that the evidence introduced was wholly inadmissible. That particularly objected to

[1] Imprisonment under the Indian Penal Code is either "simple" or "rigorous"—the latter with hard labor. Indian Penal Code, § 53. "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly.'" Indian Penal Code, § 24.

on this ground is the warrant of arrest and copies of *prima facie* proceedings in the Court of the Chief Presidency Magistrate, Bombay, which accompanied the affidavit of the British Consul General. The Consul General for the United States in Calcutta had certified that these papers proposed to be used upon an application for the extradition of Collins "charged with the crime of obtaining valuable property by false pretenses alleged to have been committed in Bombay" were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of British India, as required by the Act of Congress of August 3, 1882." That act, c. 378, § 5, 22 Stat. 215, 216, declares that "depositions, warrants, and other papers, or the copies thereof" so authenticated, shall be received and admitted as evidence for all purposes on hearings of an extradition case if they bear "the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country." One argument of Collins is that the admissibility of evidence is determined, not by the above provision of the Act of 1882, but by § 5271 of the Revised Statutes, which provided only that copies of foreign depositions shall be admitted when "attested upon the oath of the party producing them to be true copies," and which did not provide for the admission of "warrants or other papers"; and that, on these grounds, copies both of the Indian documents and of certain London depositions should have been excluded; since neither the Consul General at Calcutta, the Secretary of the Embassy at London, nor the British Consul General at New Orleans, could attest that the papers were true copies. But § 6 of the Act of 1882 expressly provides for the repeal of so much of § 5271 as is inconsistent with earlier provisions of that act; and under § 5 thereof the admissibility of papers is not so restricted. Another argument of Collins is that the Indian documents were not

properly authenticated because they were certified to by the Consul General at Calcutta, and not by the Consul at Bombay, where the offense charged is alleged to have been committed. The "foreign country" here in question is India, not Bombay; and we may, in this connection, take judicial notice of the fact that the Consul General of the United States who is stationed at Calcutta is the principal diplomatic or consular officer resident in that country and who he is. Compare *New York & Maryland Line R. R. Co.* v. *Winans,* 17 How. 30, 41; *Keyser* v. *Hitz,* 133 U. S. 138, 146. The papers were, therefore, properly authenticated and were admissible. Compare *In re Behrendt,* 22 Fed. 699; *In re Charleston,* 34 Fed. 531; *In re Orpen,* 86 Fed. 760.

Third. Collins contends that the evidence introduced did not support the charge of obtaining property by false pretenses. The papers introduced tended to prove that Collins obtained the pearl button from the jewelers as a result of his representing that he was a wealthy man; that he was a partner in William Collins Sons & Company of Glasgow and London; that he was a colonel in the Howe Battalion of the Royal Naval Division and was then on six months' leave; that he had a right to draw on Messrs. E. Curtice & Company, 8 Clarges Street, London, the draft of £1700 which he gave the jewelers; and that this was a firm of bankers. The papers tended to prove also that all these representations were false to Collins' knowledge. It is clear that evidence to this effect, if competent and believed, would justify a conviction not only for cheating, but also of obtaining property under false pretenses. *State* v. *Tessier,* 32 La. Ann. 1227; *State* v. *Jordan,* 34 La. Ann. 1219; *State* v. *Will,* 49 La. Ann. 1337; *State* v. *Seipel,* 104 La. 67. The contention of Collins is that the evidence established only a broken promise or, at most, common-law cheating. It was not the function of the committing magistrate to determine whether Collins was guilty, but

merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension and commitment for trial if the crime had been committed in that State. *Charlton* v. *Kelly,* 229 U. S. 447, 456. If there was such evidence this court has no power to review his finding. *Ornelas* v. *Ruiz,* 161 U. S. 502, 508; *Terlinden* v. *Ames,* 184 U. S. 270, 278; *McNamara* v. *Henkel,* 226 U. S. 520. The papers tended to establish more than a broken promise or common-law cheating; and according to the law of Louisiana they furnished "such reasonable ground to suppose him guilty as to make it proper that he should be tried." See *Glucksman* v. *Henkel,* 221 U. S. 508, 512.

Fourth. Finally Collins contends that the evidence of criminality was not such as under the law of Louisiana would have justified his apprehension and commitment for trial if the crime or offense had been committed there. The argument is that by the law of Louisiana a person charged with having committed an offense is entitled to make a voluntary declaration before the committing magistrate and also to present evidence in his own behalf (Revised Statutes 1870, § 1010; Laws of 1886, Act No. 45); that this right to introduce such evidence is, therefore, secured to a prisoner by the treaty; [1] and that this requirement as to evidence of criminality was not complied with, because Collins was not permitted to introduce evidence in his own behalf.

Collins was allowed to testify, and it was clearly the purpose of the committing magistrate to permit him to testify fully, to things which might have explained ambiguities or doubtful elements in the *prima facie* case

[1] "Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." Treaty of August 9, 1842, Art. X, 8 Stat. 572, 576.

made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense. It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal. *Charlton* v. *Kelly,* 229 U. S. 447, 461. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. *Grin* v. *Shine,* 187 U. S. 181, 197; *Benson* v. *McMahon,* 127 U. S. 457, 461; *Ex parte Glaser,* 176 Fed. 702, 704. In *In re Wadge,* 15 Fed. 864, 866, cited with approval in *Charlton* v. *Kelly, supra,* 461, the right to introduce evidence in defense was claimed; but Judge Brown said: "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties." The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in *Charlton* v. *Kelly, supra,* between evidence rebutting probable cause and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is

obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government." And in that case evidence of insanity was declared inadmissible as going to defense and not to probable cause. Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

The phrase "such evidence of criminality" as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction. It does not refer to the character of specific instruments of evidence or to the rules governing admissibility. Thus, unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination. *Elias* v. *Ramirez,* 215 U. S. 398; *Rice* v. *Ames,* 180 U. S. 371. And whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State. *Glucksman* v. *Henkel,* 221 U. S. 508, 513. Here the evidence introduced was clearly sufficient to block out those elements essential to a conviction under the laws of Louisiana of the crime of obtaining property by false pretenses. The law of Louisiana could not, and does not attempt to, require more. It is true that the procedure to be followed in hearings on commitment is determined by the law of the State in which they are held. *In re Farez,* 7 Blatchf. 345, Fed. Cas. No. 4645; *In re Wadge, supra; In re Kelley,* 25 Fed. 268; *In re Ezeta,* 62 Fed. 972, 981. But no procedural rule of a State could give to the prisoner a right to introduce evidence made irrelevant by a treaty.

Affirmed.

CITY OF HOUSTON *v.* SOUTHWESTERN BELL TELEPHONE COMPANY.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* CITY OF HOUSTON.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

Nos. 219, 220. Argued April 24, 25, 1922.—Decided May 29, 1922.

1. The evidence establishes that the local telephone rate fixed by the appellant city was confiscatory. Pp. 321, 322.
2. In a suit by a local telephone company to restrain enforcement of an ordinance rate as confiscatory, there was evidence that the instruments used by the plaintiff were leased by it from another corporation which owned substantially all of its stock and also owned a large majority of the stock of a third corporation from which the plaintiff obtained much of its equipment and supplies, and that the charges paid by the plaintiff in return were reasonable and less than such services and supplies could be obtained for from other sources. *Held,* that the plaintiff was not obliged to prove the profits made by the two other companies, generally or in the business thus done with the plaintiff. P. 323.
3. A telephone company, by acceptance of a city ordinance approving its purchase of and merger with another company and containing an agreement on its part to measure its rates by a fair return upon its capital actually invested in the plant purchased, is not estopped from insisting that they shall be based upon the fair value of the property useful and used at the time of inquiry, when the ordinance is void as to the city, under the state constitution, and therefore lacks mutuality as between the parties. P. 324.
4. Whether going-concern value should be considered in determining the base for fixing the rates of a public service corporation depends on the financial history of the corporation. P. 325. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388.
5. An assignment of error which involves careful study of a voluminous record will not be considered if the provisions of Equity Rule 75, that evidence be stated in simple, condensed form, and of Rule 21 of this court, that briefs refer to the pages of the record relied on, have not been properly complied with. P. 325.

268 Fed. 878, affirmed.

APPEAL and cross appeal from a decree of the District Court enjoining a city from enforcing a rate fixed by ordinance for a telephone company.

Mr. W. J. Howard and *Mr. Sewall Myer,* with whom *Mr. A. E. Amerman* was on the briefs, for the City of Houston.

Mr. C. M. Bracelen and *Mr. Nelson Phillips,* with whom *Mr. W. H. Duls* and *Mr. N. T. Guernsey* were on the brief, for Southwestern Bell Telephone Co.

MR. JUSTICE CLARKE delivered the opinion of the court.

These are cross appeals in a suit to restrain the enforcement of an ordinance enacted by the City of Houston, Texas (hereinafter referred to as the City), prescribing rates for telephone service, based upon the claim that the rates are confiscatory.

The master to whom the case was referred found that the rates were clearly confiscatory and the District Court, while modifying his findings in some respects, confirmed his report and in its decree enjoined the enforcement of the ordinance. A federal constitutional question being involved a direct appeal brings the case to this court for review.

The Constitution of Texas, adopted in 1876, § 17, Article I, provides:

"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 has been definitely decided that, while municipal corporations in Texas, as agencies of the State, may have the power to prescribe rates for public service corporations, this provision of the constitution prohibits their making contracts for the future which may not be modified at any time by appropriate action of the municipal-

ity. *San Antonio Traction Co.* v. *Altgelt,* 200 U. S. 304; *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547, and *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539.

The ordinance here involved was passed in 1909 and therefore this state of the law would remove all question of contract from the case, if it were not that in 1915 the appellee in No. 219, the Southwestern Bell Telephone Company (hereinafter referred to as the Company), by purchase and merger acquired all of the property of a local corporation, the "Houston Home Telephone Company," and duly accepted an ordinance by which the City approved the merger. This ordinance contained the provision that the Company "agrees that it will not increase rates as at present charged by it for service in the City of Houston, unless it appears upon a satisfactory showing . . . that there exists a necessity for an increase of charges, in order that the said company may earn a fair return upon its *capital actually invested* in the Houston plant."

It is now contended by the City that the acceptance of this ordinance estops the Company from asserting that the value of its plant, as of the date of the inquiry, and not the cost of it—the "capital actually invested",—shall be the basis for rate-making, but the Company contends that the quoted provision of the state constitution rendered the City incapable of contracting by such an ordinance and that therefore it is void and not binding on either party.

The master, treating the merger ordinance as void, determined the value of the property, used and useful in the operations of the Company, on the basis of its value at the time of the taking of the testimony in 1919, to be $6,000,000; that the Company's total revenues for 1919, computed on the ordinance rates, amounted to $908,258, and that its total expenses were $1,214,462, thus showing

a net loss to the Company for the year of $306,204, without making any allowance for interest upon the investment.

Upon exceptions to the report of the master, the District Court decided that the Company was bound by the merger ordinance of 1915 to accept the cost of its plant, as distinguished from its value at the time of the inquiry, as the basis for rate-making, and thereupon reduced the valuation of the Company's property to $4,571,567. The court also reduced the allowance of "reserve for annual depreciation", as found by the master, from $348,150 to $289,380. After making these and some other deductions the court, nevertheless, found that the operating expenses of the Company, not making any allowance for return on the investment, exceeded the income during 1919 by the sum of $247,434. We fully agree with the District Court that there is a clear preponderance of the evidence in favor of the conclusion that the ordinance rate was confiscatory, and the decree of the court will, therefore, be affirmed.

The decree enjoining the City from enforcing the rate ordinance provides, that the City shall have the right to apply for a modification of it whenever it shall be made to appear that, by reason of change of circumstances or conditions, the rates prescribed by the ordinance (of 1909) are sufficient to yield a fair return upon the capital of the Company actually invested, and also that the decree is without prejudice to the rights of the City to exercise its rate-making power within constitutional limits. This form of decree and the change in business conditions since it was entered render it so probable that there will be further controversy as to what are reasonable rates for telephone service in the City, in which it will be important to determine what the legal basis is for determining the value of the Company's property, that we think it proper to consider several of the assignments of error presented

by the appeal and cross appeal, although our conclusions with respect to them will not modify the result we have stated of this review.

While the City's assignments of error are numerous, in the brief they are frankly limited to three:

First: That the division of receipts derived by the Company from long distance tolls, approved by the court, was not a fair or adequate one.

The Company not only operated the Houston local exchange but it owned and operated long distance toll lines, connecting the local exchange with various towns and cities in Texas and several other States. The property used in the long distance service, which was not also used in the local service, was not included in valuing the investment for determining local rates, but, as the local lines were used to the extent of permitting a subscriber to connect from his home or office station with the long distance lines through the long distance station, the Company, in practice, and for the purposes of this suit, credited the local exchange with 25% of the long-distance toll revenues received from calls originating in Houston as compensation for the use made of the local plant in rendering long distance service. The City contends that this allowance is not enough, but that it should be at least 60%. Both the court and the master found: that the proportion so credited from long distance tolls was greater than that allowed to any one of eight independent exchanges in the State of Texas by independent long-distance toll lines with which they were connected; that the amount is larger than that paid by the Company to over 300 independent exchanges with which it has like connections; and that the allowance is one customarily approved by state commissions throughout the country. Compared with the formidable and very convincing evidence on which these conclusions rest, the testimony introduced by the City is meager and unsatisfactory, and we agree

with the District Court that upon the record before us the allowance was reasonably sufficient.

Second and Third: The American Telephone & Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone & Telegraph Company the Company leases its instruments and secures their maintenance and renewal and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business, but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone & Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the court recognized and applied this rule. Here again, the evidence introduced by the City was meager and indefinite, while that of the Company was exceptionally full and complete, and both contentions must be denied.

In its cross appeal the Company assigns as error the holding of the District Court that the merger ordinance of

1915 obliges the Company to accept the cost of its physical plant as the basis for rate-making, instead of the usual basis, the value, at the time of the inquiry, of the property used and useful in operating the plant. (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52; *Minnesota Rate Cases*, 230 U. S. 352; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178). The asserted reason for this contention is that the merger ordinance of 1915 and the acceptance of it by the Company did not constitute a contract binding upon either the City or the Company, but that, though contractual in form, it was void under the provisions of the state constitution and the decisions cited, *supra*. In its answer the City avers that it did not and could not, by that ordinance or otherwise, limit its rate-making power for the future. But, notwithstanding this agreement of the parties that the merger ordinance was void, the court held that the Company, having accepted and acted upon it, was estopped to claim that it was not bound by its terms. Misrepresentation not being involved, mutuality was necessary to any estoppel growing out of this transaction, and while thus asserting that the ordinance is void as to itself the City may not successfully assert that its adversary is bound by the acceptance of it. We think that neither party was bound by the ordinance and the acceptance of it, that the District Court fell into error, and that the proper base for rate-making in the case is the fair value of the property, useful and used by the Company, at the time of the inquiry.

The master recognized " going concern value " as an element to be taken into consideration in determining the value of the Company's property and for this allowed $765,000, which was included in the value which he fixed upon the plant. The court, however, changing the base from the value of the property to the cost of it, concluded that under the agreement in the merger ordinance no such allowance should be made, but stated, incidentally, in

its opinion, that if it had made such an allowance it would not have been in excess of one-half the amount allowed by the master. To thus reject going concern value is assigned as error by the Company.

Whether going concern value should be considered and allowed at all in determining the base for rate making, and if allowed what the amount of it should be, depends upon the financial history of the Company (*Galveston Electric Co.* v. *Galveston,* 258 U. S. 388), and it is impossible for us to determine whether the requisite history for deciding this question is to be found in the three large volumes of the transcript of the record of the case, containing 1664 pages, without reading the whole of it.

Equity Rule No. 75 provides that evidence to be included in the record shall not be set forth in full but shall be stated in a simple and condensed form, and Rule 21 of this court provides that briefs of the argument shall be filed in each case, with references to the pages of the record and the authorities relied upon in support of each point. The first of these rules has been wholly ignored in the printing of this record and the second has been so neglected in the preparation of the briefs that it is impossible for the court to consider this question except by itself reading and briefing the voluminous record. This we cannot consent to do, and for the reason that the record and briefs are not prepared in conformity with the rules prescribed by this court, we decline to consider this assignment of error.

The other questions argued in the briefs must necessarily be presented so differently on any further hearing of the issues involved that discussion of them here would be profitless. The decree of the District Court must be

Affirmed.

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

UNITED STATES EX REL. FRENCH *v.* WEEKS, SECRETARY OF WAR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 724. Argued April 20, 1922.—Decided May 29, 1922.

1. The Army Reorganization Act of June 4, 1920, c. 227, § 24b, 41 Stat. 773, provides (1) for a preliminary classification of all officers into two classes, A, those who should be, and B, those who should not be, retained in the service; (2) for a hearing of those placed in class B, before a Court of Inquiry, and (3) for a reconsideration of each case so heard by a Final Classification Board whose finding, it declares, "shall be final and not subject to further revision except upon the order of the President." *Held:*
(*a*) That review of a finding of the Final Classification Board placing an officer in class B is discretionary with the President, not a right of the officer, and that the finality of the Board's action is not dependent on the President's approval, either personal or delegated. P. 332.
(*b*) The power of the President to approve such findings may be exercised, on his behalf and under his authority, by the Secretary of War. P. 334.
2. Proceedings of lawfully constituted military tribunals, acting within the scope of their lawful authority, with jurisdiction over the person and subject-matter involved, cannot be reviewed or set aside by the civil courts by mandamus or otherwise. P. 335.

277 Fed. 600, affirmed.

ERROR to a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Supreme Court of the District granting the writ of mandamus against the present defendant in error and dismissed the proceeding. See also the next case, *post,* 336.

Mr. Samuel T. Ansell and *Mr. Charles Pope Caldwell,* with whom *Mr. Edward S. Bailey* was on the brief, for plaintiff in error. For a summary of their argument in this and the next succeeding case, see *post,* 337.

Mr. Solicitor General Beck and *Mr. Frederick M. Brown* for defendant in error.

Mr. Daniel Wilkinson Iddings, by leave of court, filed a brief as *amicus curiæ.*

Mr. Justice Clarke delivered the opinion of the court.

In the petition in this case a writ of mandamus is prayed for, commanding the Secretary of War to annul an order by him, purporting to have been made by direction and authority of the President, approving the action of a final classification board and retiring the relator, Colonel John W. French, from active service in the Army, under the provisions of § 24b of the Army Reorganization Act, approved June 4, 1920, c. 227, 41 Stat. 759, 773, and to restore him to the status of a Colonel of Infantry which he had before the order. The Secretary of War filed an answer and a demurrer thereto being sustained, the writ was allowed by the Supreme Court of the District of Columbia, as prayed for. This judgment was reversed by the Court of Appeals of the District of Columbia and the case is here on writ of error for construction of the statute and on the question of the jurisdiction of the court to issue a writ of mandamus in such a case.

The Army Reorganization Act is intended to provide for a reduction of the Army of the United States to a peace basis while maintaining a standard of high efficiency. To contribute to this purpose, Congress made elaborate provision in the act for retaining in the service officers who had proved their capacity and fitness for command and for retiring or discharging those who, for any reason, were found to be unfit. Every step of this process is committed to military tribunals, made up of officers, who by experience and training should be the best qualified men in the country for such a duty, but with their action all subject, as we shall see, to the supervisory control of the President of the United States.

Not being in any sense a penal statute, the act should be liberally construed to promote its purpose, and it is of first importance that that purpose shall not be frustrated by unnecessarily placing technical limitations upon the agencies which are to carry it into effect. *Street* v. *United States,* 133 U. S. 299.

Section 24b deals only with the "Classification of Officers," and is printed in the margin.[1] The process provided by the section for classifying and reducing the number of officers, is as follows:

First: The President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, viz: "Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service." This classification is tentative and since it is intended simply to furnish a basis for further action the board will be referred

[1] "Sec. 24b. CLASSIFICATION OF OFFICERS.—Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the find-

to herein as the " Preliminary Classification Board." No exception is taken as to the manner in which this board was convened or as to its composition.

Second: If, when an officer is notified that he has been placed in Class B by the Preliminary Classification Board, he shall request, as Colonel French did, an opportunity to appear before a Court of Inquiry, then " he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf."

The powers and procedure of such a Court of Inquiry are not defined in the section, but their definition is found in c. II of the act, being Articles of War 97 to 103, inclusive (41 Stat. 807) in which it is provided, that such a Court of Inquiry " shall consist of three or more officers " (Art. 98), that it " shall not give an opinion on the merits

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ing is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date, 60 per centum. If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service. The board convened upon the passage of this Act shall also report the names of those second lieutenants of the Quartermaster Corps who were commissioned under the provisions of section 9 of the Act of June 3, 1916, who are not qualified for further promotion. The officers so reported shall continue in the grade of second lieutenant for the remainder of their service and the others shall be placed upon the promotion list according to their commissioned service, as hereinbefore provided."

of the case inquired into unless specially ordered to do so" (Art. 102), and that "it shall keep a record of its proceedings, which shall be . . . forwarded to the convening authority." (Art. 103.) In this case, however, § 24b provides that the record of the Court of Inquiry shall be forwarded to the Final Classification Board.

Third: After a hearing has been had by a Court of Inquiry the section requires that its record shall be forwarded to the Final Classification Board for reconsideration of the case, "and after such consideration *the finding of said classification board shall be final and not subject to further revision except upon the order of the President.*"

No objection is made in this court to the manner of the convening nor to the membership of this Board.

Fourth: After the Final Classification Board has made a finding, if the President does not order further revision and the officer who has demanded the Court of Inquiry is continued in Class B, then the section provides that another "board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay," as provided in the section.

This board will be hereinafter referred to as the "Honest and Faithful Board," a name by which it is commonly and widely designated. The action of this board is not and could not be complained of for it was favorable to the relator.

It is to be observed that there is no requirement in the section that the officer whose case is under consideration shall either be notified of the hearing or that he shall be heard, by any of the tribunals thus provided for, except the Court of Inquiry.

The facts essential to the decision of the case, derived from the allegations of the petition not denied in the

answer and from the allegations of the answer admitted by the demurrer, are as follows: When the relator was notified that he had been tentatively placed in Class B as an officer not to be retained in the Army, he requested a Court of Inquiry, which was thereupon convened. He appeared before that court, was represented by counsel, and was given an opportunity to present testimony of himself and others in his behalf of which he availed himself.

The record of the Court of Inquiry was forwarded to the Final Classification Board for reconsideration of the case, but the classification of relator in Class B was adhered to by that board, and was approved by the Secretary of War, under authority from the President, which, it is averred and admitted by the demurrer, was given to him prior to any determination in the relator's case. Prior to the submission of the record of the Final Classification Board to the Honest and Faithful Board for the purpose of having determined the cause of the relator's classification, the Secretary of War, "acting on behalf of and by the authority of the President," signed at the foot of that record the notation: "Approved: Baker, Secretary of War." After the Honest and Faithful Board had determined that relator's classification was not due to his own neglect, misconduct or avoidable habits, he was retired from service by the following order:

"Washington, D. C., December 24, 1920.

"The action of the Classification Board in finally classifying Colonel John W. French, Infantry, in Class B, is approved by the President, and, by his direction, a board of officers having determined that such classification is not due to the officer's neglect, misconduct or avoidable habits, Colonel French is retired from active service, after twenty-two years of commissioned service, under the provisions of section 24b of the act of Congress approved June 4, 1920.

"NEWTON D. BAKER,
"*Secretary of War.*"

Newton D. Baker having been succeeded by John W. Weeks as Secretary of War, Secretary Weeks was substituted as defendant in the case.

While there are allegations in the petition that various formalities in the procedure prescribed by § 24b were not complied with, reliance is not placed upon any of these, in the assignments of error in this court and in argument the relator presses only one question upon our attention for decision, viz:

It is contended that § 24b imposes a personal, non-delegable, judicial duty upon the President, to review the record of the Board of Final Classification in each case after it has made a finding, and by his order, to approve or disapprove it, and that because the approval in this case was not made by the President personally but by the Secretary of War, acting under delegated general direction and authority from the President, it is void and must be so treated.

The construction of the section thus contended for, obviously, would place such a burdensome, if not impossible, personal duty upon the President during the process of reducing the Army from a war to a peace basis that if Congress had intended to attempt such a thing, we may be sure its purpose would have been clearly expressed, and not left to doubtful implication.

The argument for the relator is bottomed entirely upon the use of the words " except upon the order of the President," for there is nothing else in the section suggesting participation by the President after the convening of the Preliminary Classification Board, and we are thus brought to consider the construction which should be placed upon these seven words.

To give the effect claimed for the words by the relator would result in denying any meaning whatever to the clear and emphatic declaration immediately preceding them that " the finding of said classification board shall

be final and not subject to further revision," for it would render such finding ineffective in every case until approved by the President, and then, of course, its effect and finality would be derived from the President's approval and not from the finding of the Board, which would be rendered, at most, merely advisory. Familiar principles (*United States* v. *Gooding,* 12 Wheat. 460; *Peck* v. *Jenness,* 7 How. 612; *Montclair* v. *Ramsdell,* 107 U. S. 147), forbid the acceptance of such a construction save under the compulsion of a clear expression of congressional purpose, such as is not to be found in either the section or the act we are considering.

But both the meaning and purpose of the entire expression seem very clear. The declaration that the finding of the Final Classification Board shall be " final and not subject to further revision " could not be more emphatically worded, while the exception " upon the order of the President " is in such general terms that it plainly contemplates only discretionary action on his part to be taken, on the suggestion of the Secretary of War in special cases, on the application of officers involved or their friends, or on his own " mere motion." The exception plainly enough was inserted, not for the purpose of imposing a very great burden upon the President, but rather as a congressional recognition of the right in him as the Chief Executive and Commander-in-Chief of the Army (a right which he probably would have had without it), to interfere in such cases at his option, leaving the finding of the Board to become final should he elect not to take any action, and perhaps, also, for the purpose of forestalling the chance of its being successfully argued that the unusual finality—" not subject to further revision "—given to the finding of the Board, was intended to place such finding beyond the power of interposition in any case by the President. This construction gives consistent effect to each clause of the provision and that contended for by the relator must be denied.

In support of his contention, which has thus been rejected, the relator relies upon *Runkle* v. *United States,* 122 U. S. 543; *United States* v. *Page,* 137 U. S. 673, and *United States* v. *Fletcher,* 148 U. S. 84. All of these were court-martial cases, conducted under authority of the then 65th Article of War (2 Stat. 367, c. 20), which prescribed that the sentence of such a court in cases such as were there under consideration should not be carried into execution " until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case." It was held, obviously enough, that the quoted language called for personal review and action by the President and that making him, as it did, in effect, a member of the court, the required review was judicial in character and therefore nondelegable. The difference between such a statute and the one we have here renders these decisions too plainly inapplicable for discussion.

Under the construction of § 24b thus arrived at neither personal nor delegated approval by the President of the finding by the Final Board of Classification was necessary before action by the Honest and Faithful Board, and, if no action whatever had been taken by him through the agency of the Secretary of War, that finding, by force of the express words of the statute, would have become " final and not subject to further revision," and thereupon the case would have been ripe for the further action prescribed by the statute.

Since the section did not require personal action by the President, the action on his behalf and by his authority, taken by the Secretary of War, was in a legally sufficient form. Rev. Stats., § 216; *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Williams* v. *United States,* 1 How. 290, 297; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States,* 244 U. S. 351, 357.

But the Court of Appeals held that the action of the Secretary of War, which is assailed in the case, was taken in the exercise of duly delegated administrative power of the President and was really executive action by him which the courts may not control by mandamus or otherwise and that, therefore, the judgment of the Supreme Court of the District of Columbia was without jurisdiction and void.

As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense. *Reaves* v. *Ainsworth,* 219 U. S. 296, 304.

By the demurrer it is admitted that the three Boards and the Court of Inquiry, provided for by § 24b, were lawfully convened and constituted. They obviously had jurisdiction over the relator and over the subject-matter involved, and there is no contention that any of them exceeded the scope of its lawful powers. The only infirmity claimed to exist in the entire proceeding is, that the review and approval of the findings of the Final Classification Board and the ultimate order retiring relator from the Army, were made by the Secretary of War, " acting in the name of and by the authority of the President," instead of by the President personally. But we have found this contention unsound and that the action of the President by the Secretary was a legally sufficient compliance with the act of Congress.

Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. *Johnson* v. *Sayre,* 158 U. S. 109, 118; *Carter* v. *Mc-*

Claughry, 183 U. S. 365, 380, 381; *Mullan* v. *United States,* 212 U. S. 516, 520; *Collins* v. *McDonald,* 258 U. S. 416.

"If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." *Dynes* v. *Hoover,* 20 How. 65, 82.

It results that, because the action of the President, given effect by the order of the Secretary of War, was in full compliance with the act of Congress, and also because the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for, the judgment of the Court of Appeals reversing the judgment of that court must be

Affirmed.

UNITED STATES EX REL. CREARY *v.* WEEKS, SECRETARY OF WAR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 725. Argued April 20, 1922.—Decided May 29, 1922.

1. *French* v. *Weeks, ante,* 326, followed, to the effect that § 24b of the Army Reorganization Act does not require personal and judicial action on the part of the President precedent to the final classification of an army officer as one to be retired or discharged from the Army. P. 342.
2. Section 24b of the Army Reorganization Act does not violate due process of law in not affording an officer who, after due hearing before a Court of Inquiry, has been classified by the Board of Final Classification as one who should not be retained in the service, a notice and a further hearing before the further determination, by another board, of the question whether the classification was due to his neglect, misconduct or avoidable habits, in-

volving, if affirmative, his discharge from the Army or, if negative, his placement on the retired list at diminished pay. P. 343.

3. Proceedings of lawfully constituted military tribunals, acting within the scope of their lawful authority, with jurisdiction over the person and subject-matter involved, cannot be reviewed or set aside by the civil courts by mandamus or otherwise. P. 344.

277 Fed. 594, affirmed.

ERROR to a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Supreme Court granting the writ of mandamus against the present defendant in error and dismissed the proceeding.

Mr. Samuel T. Ansell and *Mr. Charles Pope Caldwell,* with whom *Mr. Edward S. Bailey* was on the brief, for plaintiff in error. The following is a summary of their argument in this and the next preceding case, *ante,* 326:

I. The Secretary of War's "approval" of the final classification of these officers, and of the Honest and Faithful Board's proceedings in the case of Colonel Creary was without authority of law and null and void.

(1) The law requires Presidential review and action.

(a) It is held throughout and by all that the law requires the President to review the proceedings of the Classification Board and of the Honest and Faithful Board. The President was of that opinion; but misconceiving, as we think, the judicial character of his duty, he undertook to make a general delegation of it in all cases to the Secretary of War. The Supreme Court and the Court of Appeals also agreed as to the necessity of Presidential action but differed as to whether it was judicial or administrative in character.

(b) The statute clearly imposes the duty of Presidential review. It designates a Court of Inquiry and Military Boards to hear and determine the question of classification and the causes therefor, and specifically provides

that the President shall be the convening authority. Courts of Inquiry and Military Boards are of such a nature that their proceedings must necessarily be reviewed by the authority convening them. Winthrop's Military Law and Precedents, pp. 795–822. The statute makes express reference to the President's power of revision.

The then President seems to have had no doubt that he was the reviewing authority in all cases; and such is the view of the present President, as indicated by the regulations established by him.

(2) The proceedings themselves are judicial in character, and so, necessarily, must be the Presidential review of them. That review therefore can not be delegated. *Runkle* v. *United States,* 122 U. S. 543; *United States* v. *Page,* 137 U. S. 673; *United States* v. *Fletcher,* 148 U. S. 84.

(a) The Presidential review is inherently judicial. The statute provides for the removal of officers of the Army for causes specified which affect their good name, standing, and honor. If the officer is found inefficient, he can no longer remain on the active list, and if his inefficiency is found to be due to his own misconduct, neglect, or avoidable habits, then he is to be separated from the Army absolutely, discharged "without honor" and without pay. Where such is the case, in accordance with a fundamental principle of our law, the proceedings are judicial. *Runkle v. United States,* 122 U. S. 542; *Reagan* v. *United States,* 182 U. S. 419, 425; *Shurtleff* v. *United States,* 189 U. S. 311–314; *Kalbfus* v. *Siddons,* 42 App. D. C. 310, 318.

Reaves v. *Ainsworth,* 219 U. S. 296, and *Street* v. *United States,* 133 U. S. 299, relied upon by counsel on the other side, support him at no point, but proceed in recognition of the principles of law relied upon by us. The statute which constituted the law of the case in *Reaves* v. *Ains-*

worth was one which authorized the President to establish a system of examination for promotion, not removal from office for specified cause. That statute placed the entire power in the hands of the President; he could establish any system he pleased, without restriction. The system which by regulation he did establish kept the power of final review over the examining boards in his own hands and this fact is emphasized in the opinion of the court. That statute, for that purpose, gave unlimited power to the President; the present statute does nothing of the kind, but specifies the causes of removal, and endows boards of a judicial character with power to determine such causes after hearing. These boards must grant the hearing and keep within their jurisdiction.

In the *Street Case,* which arose under a statute the primary purpose of which was to reduce the Army (by honorable discharge and by discharge for cause without honor), the Department proceeded first to eliminate an officer for cause under § 11 of the act. That section expressly required a hearing for such elimination. The Department, finding it could not get the witnesses, abandoned the hearing for cause and proceeded under § 12, which authorized the Department to create a list of supernumerary officers (officers who were not needed in the largely reduced Army), and honorably discharged such supernumeraries. This was not a removal for cause, but a method of muster-out of a large number of officers no longer needed, the war being over. All that the court held in that case was that the authorities had the right, of course, to withdraw the charges of removal for cause and proceed under the honorable muster-out section.

(b) That Congress legislated with this principle in view and contemplated proceedings of a judicial character is indicated also by the judicial character of the agencies designated for the purpose.

(c) That Congress intended that every officer subjected to removal proceedings should have a full and fair hearing is clearly shown by the legislative history of said section. Committee Reports, No. 400, 66th Cong., 2d sess.; 59 Cong. Rec., No. 80, pp. 4626, 4629; *id.*, No. 82, pp. 4712–4724.

II. The proceedings of the Honest and Faithful Board, had without giving to Colonel Creary notice and opportunity to be heard, are null and void. *Reagan* v. *United States,* 182 U. S. 419; *Shurtleff* v. *United States,* 189 U. S. 311; *Kalbfus* v. *Siddons,* 42 App. D. C. 310. In removal proceedings for cause an officer must be given a hearing. *Ekern* v. *McGovern,* 154 Wisconsin, 157; *Dullam* v. *Willson,* 53 Mich. 392; *Page* v. *Hardin,* 8 B. Mon. 648; *Shumann* v. *McCartney,* 34 App. Div. 19, 53 N. Y. S. 1047; *Kasschan* v. *Police Comm.,* 155 N. Y. 40; *State ex rel. Gill* v. *Watertown,* 9 Wis. 254; *Randall* v. *State,* 16 Wis. 340; *Larkin v. Noonan,* 19 Wis. 82; *Benson* v. *People,* 10 Colo. App. 179; *Ham* v. *Board of Police of Boston,* 142 Mass. 90; *Metevier* v. *St. Louis,* 90 Mo. 19; *Peck v. Commissioner of Brooklyn,* 106 N. Y. 65; *Attorney General* v. *Hogan,* 64 Ohio St. 532; *Biggs* v. *McBride,* 17 Ore. 640; *Field* v. *Commonwealth,* 32 Pa. St. 478; *Commonwealth* v. *Slifer,* 25 Pa. St. 34; *Hallgren* v. *Campbell,* 82 Mich. 255.

III. The validity of the orders for retirement and discharge depends upon the validity of the proceedings had under § 24b, for it was by virtue of the authority of that section that the orders were issued. The suggestion that the orders in both cases might be sustained by the 118th Article of War is met by the fact they were not made under that authority.

IV. The court below held, inconsistently, that although Colonel Creary was entitled to a hearing before the Honest and Faithful Board, which is to the effect that the proceedings of that board were judicial in character,

the duty of review imposed upon the President was nevertheless administrative and delegable to the Secretary of War.

V. The Secretary of War, having unlawfully dispossessed these officers of their offices, mandamus is the proper remedy. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Kalbfus* v. *Siddons*, 42 App. D. C. 310; *Garfield* v. *Spalding*, 32 App. D. C. 153; *Moyer* v. *Baldwin*, 77 Oh. St. 532; *Chicago* v. *People*, 210 Ill. 84; *Metzker* v. *Neally*, 41 Kans. 122; *Pratt* v. *Police and Fire Commissioner*, 15 Utah, 1; *Miles* v. *Stevenson*, 80 Md. 358; *Field* v. *Malster*, 88 Md. 691; *Percival* v. *Cram*, 50 App. Div. 380; *Sugden* v. *Partridge*, 174 N. Y. 87; *Garfield* v. *Goldsby*, 211 U. S. 249.

Mr. Solicitor General Beck and *Mr. Frederick M. Brown* for defendant in error.

Mr. Daniel Wilkinson Iddings, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice Clarke delivered the opinion of the court.

This case is in most respects so like No. 724, *United States ex rel. French* v. *Weeks*, *ante*, 326, that the two were argued and submitted together.

The relator herein was a Colonel in the Army and was discharged on November 17, 1920, "by direction of the President" on order of the Secretary of War, under the provisions of § 24b of the Army Reorganization Act (41 Stat. 759, 773). In his petition he prays, as did Colonel French in the other case, for a writ of mandamus commanding the Secretary of War to vacate the order for his discharge and to restore him to the status of Colonel in the Army, which he had held before the order.

The defendant answered the petition, a demurrer to the answer was sustained, and the defendant not desiring to

plead further, the Supreme Court of the District of Columbia granted the writ of mandamus as prayed for. On error the Court of Appeals of the District of Columbia reversed the judgment of the Supreme Court and the case is here for construction of the act of Congress involved.

In addition to the contention that § 24b of the Army Reorganization Act required personal and judicial action on the part of the President, this day disposed of in No. 724, only one other question is argued in this case, viz: Did the failure to give the relator notice of the time and place of the meeting of the Honest and Faithful Board which considered his case, with an opportunity to be heard in his own behalf, so deny to him due process of law as to render void the action resulting in his discharge?

We shall not repeat the discussion of § 24b which led to our conclusion in No. 724, but we shall here confine ourselves to the additional question, as we have stated it, presented by this record.

When Colonel Creary was notified that he had been placed in Class B, as an officer "who should not be retained in the service," he requested a Court of Inquiry, which was thereupon convened, and it is averred in the answer and admitted by the demurrer that "by and before said Board he was given full and free opportunity to present testimony of himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired."

The record of the Court of Inquiry was forwarded, as provided for by § 24b, to the Board of Final Classification, and that Board, without notice to the relator, reconsidered his case, but by its final finding retained him in Class B. Thereupon, again without notice to relator, his case went to the Honest and Faithful Board, which finally classified him in Class B for "causes due to his neglect, misconduct, and avoidable habits," and under the terms of the statute he was discharged from the Army.

Thus is presented for decision the question whether the due process clause of the Fifth Amendment required that the relator should be given an opportunity to be heard before the finding was made by the board which required his discharge from the Army.

The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, § 8) is as plenary and specific as that given for the organization and conduct of civil affairs; military tribunals are as necessary to secure subordination and discipline in the Army as courts are to maintain law and order in civil life; and the experience of our Government for now more than a century and a quarter, and of the English Government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs (2 Stat. 359; *Dynes* v. *Hoover,* 20 How. 65). It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the Army, provided for in § 24b. In its nature it belongs to the executive and not to the judicial branch of the Government.

In the present case it is admitted that the relator was given full opportunity to be heard and that he was heard by the Court of Inquiry, and this is the only one of the four tribunals which dealt with his case which the act of Congress requires shall give him a hearing. The various boards provided for, each certainly had jurisdiction over the person of the relator as an army officer and over the subject of inquiry, under the terms of the act of Congress, and also because the right dealt with was distinctly military in its nature, affecting the status in the Army of a soldier, and it is entirely clear that the boards which acted on his case did not exceed the powers conferred upon

them. Such being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action. *Dynes* v. *Hoover,* 20 How. 65, 82; *Johnson* v. *Sayre,* 158 U. S. 109; *Carter* v. *McClaughry,* 183 U. S. 365, 380; *Mullan* v. *United States,* 212 U. S. 516; *Reaves* v. *Ainsworth,* 219 U. S. 296, 304. Without pursuing the subject further it is sufficient to repeat what was said by this court in *Reaves* v. *Ainsworth,* 219 U. S. 296, 304: "To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

It results that, because the action of the President, given effect by the order of the Secretary of War, was in full compliance with the act of Congress, and also because the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for, the judgment of the Court of Appeals reversing the judgment of that court must be

Affirmed.

UNITED MINE WORKERS OF AMERICA ET AL. *v.* CORONADO COAL COMPANY ET AL.

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

No. 31. Argued October 15, 1920; restored to docket for reargument January 3, 1922; reargued March 22, 23, 1922.—Decided June 5, 1922.

1. In view of the Conformity Act and the law of Arkansas respecting consolidation of causes, *held,* that the District Court did not abuse its discretion in permitting several allied corporations to be joined as plaintiffs in an action prosecuted by their receiver to recover triple damages under § 7 of the Sherman Act for the destruction of their properties and business committed in an alleged conspiracy to restrain interstate commerce. P. 382.

2. Unincorporated labor unions, such as the United Mine Workers of America, and its district and local branches, impleaded in this case, recognized as distinct entities by numerous acts of Congress, as well as by the laws and decisions of many States, are suable as such in the federal courts upon process served on their principal officers, for the torts committed by them in strikes; and their strike-funds are subject to execution. P. 385.
3. Such associations are included by § 7 of the Sherman Act, permitting actions for damages resulting from conspiracies in restraint of interstate commerce to be brought against " corporations and associations existing under or authorized by the laws of either the United States " or the laws of any Territory, State or foreign country. P. 392.
4. Where the constitution of a general association of workmen, organized for the declared purpose of improving their wages and working conditions through strikes and other means, and subdivided into district and local unions, through which its treasury was supplied, authorized the several district organizations to order local strikes within their respective districts, but upon their own responsibility and without financial support from the general body unless sanctioned by its governing board, and a local strike in which serious trespasses were committed was called by a district without such sanction, but in accordance with its own constitution, and conducted by it at its own expense, *held*, that the general association was not responsible, upon principles of agency, even though it had power to discipline the district and take over the strike at its own expense, and that liability on its part and that of its officers could not be sustained without substantial evidence of their participation in or ratification of the torts committed. P. 393.
5. The overwhelming weight of evidence in this case establishes that the defendant district union and its officers, with other individual defendants, participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence, and in its execution destroyed the plaintiffs' properties. P. 396.
6. Where the constitution of a district organization of several local labor unions authorizes the district officers to order a local strike, the district is responsible for injuries unlawfully inflicted in a strike so ordered, and its strike funds may be subjected to a resulting judgment. P. 403.
7. The mining of coal is not interstate commerce; and a conspiracy to obstruct mining at particular mines, though it may prevent coal

from going into interstate commerce, is not a conspiracy to restrain that commerce, within the Sherman Act, unless an intention to restrain it be proven or unless so direct and substantial an effect upon it necessarily result from the obstruction to mining that such intention must in reason be inferred. P. 410.

8. Evidence that a union of coal miners belonged to a general association which, as an incident of its object to promote wages, etc., had a general policy to unionize coal mines by strikes, etc., and thus discourage competition of open-shop against union mines in interstate commerce, *held* not sufficient to prove that a conspiracy of the lesser organization and its members, accompanied by a local strike, to prevent the employment of non-union miners and the mining of coal at particular mines, was a conspiracy to restrain interstate commerce in violation of the Sherman Act, where the strike and its lawless activities were the affair of the conspirators, explained by local motives, and the normal output of the mines was not enough to have a substantial effect on prices and competition in interstate commerce from which a motive to assist the general policy might be inferred. Pp. 403, 412.

258 Fed. 829, reversed.

THIS is a writ of error brought under § 241 of the Judicial Code, to review a judgment of the Circuit Court of Appeals of the Eighth Circuit. That court on a writ of error had affirmed the judgment of the District Court for the Western District of Arkansas, in favor of the plaintiffs, with some modification, and that judgment thus affirmed is here for review.

The plaintiffs in the District Court were the receivers of the Bache-Denman Coal Company, and eight other corporations in each of which the first-named company owned a controlling amount of stock. They were closely interrelated in corporate organization and in the physical location of their coal mines. These had been operated for some years as a unit under one set of officers in the Prairie Creek Valley in Sebastian County, Arkansas. In July, 1914, the District Court for the Western District of Arkansas appointed a receiver for all of the nine companies by a single decree. The receiver then appointed

was Franklin Bache, whose successors as such are defendants in error here.

The defendants in the court below were the United Mine Workers of America, and its officers, District 21 of the United Mine Workers of America, and its officers, 27 local unions in District No. 21, and their officers, and 65 individuals, mostly members of one union or another, but including some persons not members, all of whom were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce, in violation of the first and second sections of the Anti-Trust Act, and with having, in the course of that conspiracy, and for the purpose of consummating it, destroyed the plaintiff's properties. Treble damages for this and an attorney's fee were asked under the seventh section of the act.

The original complaint was filed in September, 1914, about six weeks after the destruction of the property. It was demurred to, and the District Court sustained the demurrer. This was carried to the Court of Appeals on error, and the ruling of the District Court was reversed. *Dowd* v. *United Mine Workers,* 235 Fed. 1. The case then came to trial on the third amended complaint and answers of the defendants. The trial resulted in a verdict of $200,000 for the plaintiffs, which was trebled by the court, and to which was added a counsel fee of $25,000, and interest to the amount of $120,600, from July 17, 1914, the date of the destruction of the property, to November 22, 1917, the date upon which judgment was entered. The verdict did not separate the amount found between the companies. On a writ of error from the Court of Appeals, the case was reversed as to the interest, but in other respects the judgment was affirmed. 258 Fed. 829. The defendants, the International Union and District No. 21, have given a supersedeas bond to meet the judgment if it is affirmed as against both or either of them.

The third amended complaint avers that of the nine companies, of which the plaintiff was receiver, and for which he was bringing his suit, five were operating companies engaged in mining coal and shipping it in interstate commerce, employing in all about 870 men, and mining an annual product when working to their capacity valued at $465,000, of which 75 per cent. was sold and shipped to customers outside of the State. Of the five operating companies, one was under contract to operate the properties of two of the others, and four non-operating companies were each financially interested in one or more of the operating companies either by lease, by contract, or by the ownership of all or a majority of their stock. The defendant, the United Mine Workers of America, is alleged to be an unincorporated association of mine workers, governed by a constitution, with a membership exceeding 400,000, subdivided into thirty districts and numerous local unions. These subordinate districts and unions are subject to the constitution and by-laws not only of the International Union, but also to constitutions of their own.

The complaint avers that the United Mine Workers divide all coal mines into two classes, union or organized mines operating under a contract with the union to employ only union miners, and open shop or non-union mines, which refuse to make such a contract; that owing to the unreasonable restrictions and regulations imposed by the union on organized mines, the cost of production of union coal is unnecessarily enhanced so as to prevent its successful competition in the markets of the country with non-union coal; that the object of the conspiracy of the United Mine Workers and the union operators acting with them is the protection of the union-mined coal by the prevention and restraint of all interstate trade and competition in the products of non-union mines. The complaint enumerates twenty-three States in which coal

mining is conducted, and alleges that the coal mined in each comes into competition in interstate commerce, directly or indirectly, with that mined in Illinois, Kentucky, Alabama, New Mexico, Colorado, Kansas, Oklahoma and Arkansas, in the markets of Louisiana, Texas, Oklahoma, Nebraska, Kansas, Missouri, Iowa and Minnesota, where, but for the defendants' unlawful interference, plaintiffs would have been engaged in trade in 1914; that the bituminous mines of the greater part of the above territory are union mines, the principal exceptions being Alabama, West Virginia, parts of Pennsylvania and Colorado, which the defendant has thus far been unable to organize.

The complaint further avers that, early in 1914, the plaintiff companies decided that the operating companies should go on a non-union or open shop basis. Two of them, the Prairie Creek Coal Mining Company and the Mammoth Vein Coal Company, closed down and discontinued as union mines, preparatory to reopening as open shop mines in April. They were to be operated under a new contract by the Mammoth Vein Coal Mining Company. Another of the companies, the Hartford Coal Company, which had not been in operation, planned to start as an open shop mine as soon as convenient in the summer of 1914. The fifth, the Coronado Coal Company, continued operating with the union until April 18, 1914, when its employees struck because of its unity of interest with the other mines of the plaintiffs. The plaintiffs say that in April, 1914, the defendants and those acting in conjunction with them, in furtherance of the general conspiracy, already described, to drive non-union coal out of interstate commerce, and thus to protect union operators from non-union competition, drove and frightened away the plaintiffs' employees including those directly engaged in shipping coal to other States, prevented the plaintiffs from employing other men, destroyed the structures and facilities for mining, loading and shipping coal, and the

cars of interstate carriers waiting to be loaded, as well as those already loaded with coal in and for interstate shipment, and prevented plaintiffs from engaging in or continuing to engage in interstate commerce. The complaint alleges that the destruction to the property and business amounted to the sum of $740,000, and asks judgment for three times that amount or $2,220,000. Certain of the funds of the United Mine Workers in Arkansas were attached. The defendants, the United Mine Workers of America, District No. 21, and each local union and each individual defendant filed a separate answer. The answers deny all the averments of the complaint. The trial began on October 24, 1917, and a verdict and judgment were entered on November 22, following. The evidence is very voluminous, covering more than 3,000 printed pages.

Mr. William A. Glasgow, Jr., with whom *Mr. Charles E. Hughes, Mr. Henry Warrum, Mr. G. L. Grant* and *Mr. Allen S. Hubbard* were on the briefs, for plaintiffs in error.[1]

I. The judgment of the Circuit Court of Appeals was reviewable here. Jud. Code, § 128.

II. The court below erred in holding that the action could be brought, process had and judgment recovered against unincorporated labor unions.

A group of individuals is not liable to be sued in tort unless it constitutes a person in law.

It is clearly established that the members of an unincorporated association may not be sued in the name of the association. *Oxley Stave Co.* v. *Coopers International Union,* 72 Fed. 695; *Hopkins* v. *Oxley Stave Co.,* 83 Fed. 912; *American Steel Co.* v. *Wire Drawers Union,* 90 Fed. 598; *Dowd* v. *United Mine Workers of America,* 235 Fed. 1.

[1] At the former hearing the case was argued by *Mr. Charles E. Hughes,* on behalf of the plaintiffs in error.

The very essence of the action of the State in creating a corporation is that it brings into being a legal entity which can be treated as such, in suing and being sued. It is well settled that it must appear that an association, if it is not a corporation, has received by appropriate legislation a legal status before it, or its members, may be sued in the name of the group.

It is apparent from §§ 7 and 8 of the Sherman Act that Congress did not attempt to provide a new remedy against all unincorporated groups or associations. It made no designation of officers or agents upon whom process might be served. It made no provision as to the effect of the judgment to be recovered, or limiting execution thereon to common property or property jointly held through group or association.

This is a penal statute; it may be enforced by criminal prosecution; and treble damages may be awarded under it. It is wholly inadmissible to give it a breadth which would reach, contrary to its terms and to the principles of the common law, every unincorporated association.

Congress defined who were to be liable. They were to be " persons " who shall make any such contract or engage in any such combination or conspiracy (§§ 2, 3). The term " person," has a well-established legal significance and an unincorporated group is not, as such, a " person." And the extent to which any association or group might be held liable as a " person " under the Sherman Act was explicitly defined in § 8. Congress included " corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." It was not the privilege of the court below to go beyond these terms in the search of any supposed policy. The question was not, who should be exempted from liability, but who were made liable. The policy of the statute must be found in its terms. *United*

States v. *Wiltberger,* 5 Wheat. 76, 96; *Hadden* v. *The Collector,* 5 Wall. 107, 111–112.

It may be said that in some cases associations have been joined with the individuals and corporations comprising the association in suits under the Sherman Act, but these have been equity suits for injunction in which the individuals and corporations which were members of the association were parties. In *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, also an injunction suit, it does not appear that the point was raised.

Had Congress stopped with the words "corporations and associations," the rule *noscitur a sociis* would apply, and the term "associations" would be taken to mean such organizations as those to which legislation had given a legal status as quasi corporations. But the added words, saying explicitly what sort of associations were meant, relieve the question of doubt. *Eliot* v. *Freeman,* 220 U. S. 178.

The expression "existing under or authorized by the laws" of the United States or of any State should appropriately be taken to refer to statutes. Abbott's Law Dictionary, Title "Law," subdiv. 3; *Swift* v. *Tyson,* 16 Pet. 1, 18. Otherwise, the clause would mean that associations that were unlawful were not within the purview of the section. Moreover, if Congress had intended to refer simply to unincorporated associations, without reference to any legislation which had given them the status of persons, that is to any lawful association whatever, it would not have added the last clause. The construction for which the plaintiffs contend makes the words "existing under or authorized by the laws of either the United States," etc., surplusage.

The provision of § 7, that the action shall be brought "in the district in which the defendant resides or is found," is appropriate if the word "association" is used

as defined in § 8, but is inapposite if it is sought to give it the breadth for which the plaintiffs contend.

Whatever may be said of the *Taff Vale Case,* [1901] A. C. 426, as a matter of statutory construction (and it may here be noted that the effect of the decision was swept away by Parliament five years later, 6 Edw. VII, c. 47, § 4, subsec. 1; see *Vacher & Sons, Limited,* v. *London Society of Compositors,* [1913] A. C. 107), it certainly forms no precedent for a construction of §§ 7 and 8 of the Sherman Act. By that act, Congress did not attempt to give labor unions a status which they did not have before.

No one doubts that the Sherman Act applies to the members of a labor union as well as to business men, but the act has its appropriate application when actions are brought against the persons guilty of combination in accordance with the familiar principles of the common law.

III. Recovery against the United Mine Workers of America was entirely unwarranted by the evidence.

(*a*) A labor union, as such, is not within the Sherman Act. The fact that a labor union has a membership throughout the country does not bring it within the act. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; Clayton Act, § 6.

The miners were thus entitled to organize, and through organization to seek the amelioration of the condition of miners in the various mines throughout the country and to pursue this end by all lawful means.

(*b*) The constitution of the United Mine Workers of America is the agreement of membership. It fixes the terms upon which these miners unite and contribute to the funds which the judgment below turns over to the plaintiffs. The constitution and the objects of the association are entirely lawful. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 253, 267.

The constitution deals with strikes and classifies them as follows: (1) Where the major portion of the members of a district are to be involved; (2) where the strike is in an unorganized field; (3) where the strike is in an organized field, but is to be financed by the International Union; and (4) where the strike is in an organized field and is not to be financed by the International Union. In the first three cases, the sanction of an international convention or of the international executive board must be procured before a strike may be called. In the last case, the district is permitted to call a strike upon its own responsibility.

It is urged by the plaintiffs that the district, and the members of local unions, in the case of a local strike conducted on their own responsibility and without the sanction of the International Association, are the agents of the Association in calling and conducting the strike. But this is simply to ignore the definitive words of the section above quoted, "on their own responsibility." This is the formal and definitive agreement of all the members of the Association with each other. It is an agreement to the effect that if some of the members locally go on strike on their own account, such a strike shall be on their own account, and that the other members shall not be in any way responsible therefor. Responsibility must rest upon facts of authorization and representation, which here are absolutely negatived. The insertion of this provision had a very clear purpose, for the context shows that the important point of a financial support for a district engaged in a strike was involved, and it was made clear that the International Association could not be called upon for any support for a strike unless it was sanctioned, and that if a district ordered a strike, without the authority of the Association, the latter assumed no responsibility of any sort with respect to it. *Denaby & Cadeby Main Collieries* v. *Yorkshire Miners' Association,* [1906] A. C. 384.

Further, under the constitution of the Association, the president had no authority to sanction a strike without the action of the international executive board.

The Association did not have control over the district where the district went ahead on its own responsibility. By the express provision of the constitution, to that extent there was local autonomy. The control which the Association was entitled to exert was control according to the terms of the constitution of the Association, and not otherwise.

It is wholly untenable to say that, when a local union acts on its own responsibility and the Association does not sanction its action, the Association must resort to expulsion to save itself from liability.

(*c*) The United Mine Workers of America did not authorize, participate in, or ratify the alleged acts committed in Arkansas by reason of which the recovery of damages was allowed. The disturbances were local, arising from local grievances, caused entirely by local conditions.

In any view, the controlling fact is that no board or officer of the International Association participated in any of these acts or authorized any of them at any of the mines. If a distinction between a "lock-out" and a "strike" be ignored, and it be assumed that there were strikes at all the mines in question, still none of these strikes, and none of the acts in question, was authorized or sanctioned by the Association. Moreover, nothing is better settled than that a strike is not in itself unlawful, and the question here is the responsibility for particular acts that were not any necessary part of a strike.

It is not enough to show that some members of the union committed acts of violence. Even in cases of conspiracy, where an illegal combination is found to exist, members are not liable for acts not within the scope of

the illegal agreement. *Commonwealth* v. *Campbell,* 7 Allen, 541, 544; *Pettibone* v. *United States,* 148 U. S. 197, 207. And certainly there is no principle better established than that, where a number of persons combine to achieve a lawful end by lawful means, and certain persons of the association combine to achieve that same end by unlawful means, the whole association is not responsible for the unlawful acts of the few members. *Commonwealth* v. *Hunt,* 4 Metc. 111, 129; *United States* v. *Kane,* 23 Fed. 748; *Lawlor* v. *Loewe,* 187 Fed. 522; 223 U. S. 729; 235 U. S. 534, 535; *Eagle Glass & Mfg. Co.* v. *Rowe,* 245 U. S. 275; 219 Fed. 719, 720, 721. Certainly, the law does not require less proof to connect individual members of a union with the tortious acts of other members in this action for triple damages under the Sherman Act than it does in an application for an injunction on ordinary equitable grounds, such as was considered in the *Eagle Glass Co. Case.*

The liability of the International Association should be tested by the question whether an individual miner, a member of the Association living in Pennsylvania, could be sent to jail for violation of the Anti-Trust Act because of the conduct of these Arkansas miners and his alleged connection with them. The gist of the action under § 7 is the alleged combination in restraint of trade. The individual miners, members of the International Union, are the persons who, it is claimed, constitute this combination. Unless these miners located in Pennsylvania, Ohio, Indiana and other States, as well as in Arkansas, have confederated together to restrain by unlawful means interstate trade and commerce, there is no basis for the judgment against the Association. *Patterson* v. *United States,* 222 Fed. 599. Surely, a person may not be convicted of participation in a criminal conspiracy because he fails to set himself up as a court of justice to try and discipline persons who are claimed to have violated the criminal law.

(*d*) Notwithstanding the provisions of the constitution of the International Association, and notwithstanding that it did not authorize, participate in or sanction either the "strike" or the alleged wrongful acts in Arkansas, liability has been predicated on the view that these acts in Arkansas were committed in carrying out the "aims, objects and purposes" of the national organization. Such a view, we submit, is wholly without warrant and is based upon a misconstruction of the policy of the Association.

IV. The verdict is also unsustainable with respect to District No. 21. Entirely apart from the relation of the District to the strike, the officers of the District were without authority to bind the membership of the district organization, the miners of Texas, Oklahoma and Arkansas, so as to impose liability for the alleged illegal acts in which the members had not participated. And the same is true with respect to the local unions so far as their members had not authorized the acts in question.

V. The facts proved at the trial did not justify a recovery against any of the defendants under the Sherman Act. There was no proof of any combination or conspiracy in restraint of interstate commerce.

This action is to recover damages for particular acts alleged to have been committed by certain individuals in Arkansas. What were these acts? Without now going into the questions which were contested at the trial, with respect to provocation and incitement, the most that can be said from the standpoint of the plaintiffs is that certain individuals committed trespasses and destroyed property, thus inflicting the damage sought to be recovered.

We start then with these individuals. Certainly, it cannot be said that their conduct, separately considered, had any such direct relation to interstate commerce as would justify an action against them under the Sherman

Act. The fact that a factory or a mine produces commodities, which are the subject of interstate trade, of course does not make the destruction of the factory or mine a matter of federal cognizance under the Commerce Clause.

Again, if it were assumed that several persons combined to impair or destroy a factory or mine at which commodities were produced which would go in interstate commerce, still that fact alone would not support a finding of a combination or conspiracy in restraint of interstate commerce. The fundamental question, recognized as of vital importance in the exercise of the important jurisdiction of this court in defining the scope of the Commerce Clause and the validity and application of legislation under that clause, is whether the conduct sought to be regulated has direct or indirect relation to interstate commerce. Were it not for this test of direct or indirect relation, the court would be at sea without chart or compass. If whatever may be deemed to have an indirect or consequential relation to, or effect upon, interstate commerce were regarded as being within the Commerce Clause, it would be difficult to find any activity of importance in any community that fell without it. Such a construction of the Constitution would destroy the Constitution itself. Difficult as may be the application of the test in certain cases, there is no difficulty in apprehending the test itself. To hold that merely because a mine produces coal, which if produced and sold would enter into interstate commerce, an injury to the mine is interference with interstate commerce cognizable by Congress, is to ignore the distinction which underlies countless decisions of this court and to establish a centralized power in the Federal Government which would know no limitation with respect to all the activities which precede interstate commerce,—activities not only relating to production but to all the manifold affairs which affect the productive capacity of human beings.

Hopkins v. *United States,* 171 U. S. 578, 592; *United States* v. *Patten,* 187 Fed. 664, 671; 226 U. S. 525, 542.

The mining of coal is not interstate commerce and a mine is not an instrumentality of interstate commerce, *Kidd* v. *Pearson,* 128 U. S. 1, 21; and the fact that an article was manufactured for export to another State does not make it an article of interstate commerce within the meaning of the Constitution. *Coe* v. *Errol,* 116 U. S. 517.

And the fact that a commodity might come into interstate commerce does not preclude the exercise of the police power of the State so as to prevent its manufacture, if such prevention is otherwise within the police power of the State. *Kidd* v. *Pearson, supra.*

An injury to a miner in mining coal is not an injury to interstate commerce and is not an injury to an instrumentality of interstate commerce. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *Hammer* v. *Dagenhart,* 247 U. S. 251, 272.

The thought of the individuals who committed the alleged wrongs, if the testimony introduced by the plaintiffs be accepted, was on the mining and the men who were mining and the conditions of work. It was not upon commerce, but on production. If it be assumed that the purpose was to prevent certain men, non-union men, from working, it was still the prevention of work by these men that they had in mind.

Of course, a finding of conspiracy or combination in restraint of interstate commerce, that being the gist of the action, must be supported by the sort of proof that will sustain a criminal prosecution or an action for treble damages. The conspiracy must be established as a fact over and above any and all evidence of injury to property used in production, or of intent to injure such property, or of combination for that purpose.

The objects of the International Association have no direct relation to interstate commerce; and the fact that

they relate to employment in production in many mines, or to mines in several States, does not alter their essential character. Their legal and constitutional aspect is the same with respect to work in mines in a dozen States, as it is with respect to work in one mine.

It may be said that the constitution of the Association contemplated strikes. But a strike, as such, in a mine, or in a factory, while it may affect production, has no direct relation to interstate commerce. The constitution of the Association, in its provisions relating to strikes, said nothing of boycotts or of anything having direct relation to trade, interstate or otherwise.

Again, the effort to "unionize" does not imply any conduct having direct relation to interstate commerce. The number of instances involving the same policy does not affect the nature of that policy in relation to interstate commerce, and it is necessary to find something more than the mere policy of "unionizing," or of strikes, or of refusal to work with non-union men, or of refusal to mine coal with non-union men, in order to create a combination or conspiracy in restraint of interstate commerce.

The prevention of the mining of coal by non-union men may, of course, be brought about by "unionizing" a mine. This can be accomplished by entirely lawful means, and illegal purpose or illegality of means is not to be presupposed but requires proof. Apart from this, the prevention of mining coal by non-union men, as such, is not an interference with interstate commerce in the proper sense. When the intent and purpose have relation simply to hours, wages and conditions of production, the agreement or combination relates to production and not to interstate commerce, the effect of the latter, if it exists, being merely incidental.

The mere act of conference between operators and miners, and the agreements for wages, etc., which were reached, we must assume to be unobjectionable. There

has been no finding that the operators and the miners entered into a conspiracy in restraint of interstate commerce.

Statements in speeches made at these conferences have been introduced for the purpose of showing that there was a conspiracy or combination, in which the International Association was engaged, in restraint of interstate commerce. This sort of evidence is a very frail reliance when it is sought to hold hundreds of thousands of members of an association, with expressed purposes which are entirely lawful and laudable, as being guilty of a violation of the criminal law. It is true that the individuals at these conferences were representatives or delegates, but it does not follow that all the members were bound by anything a delegate in the heat of controversy might say. But if these utterances are examined, they fall far short of showing the intent and purposes which are here ascribed.

There is nothing to show that the local unions and District No. 21 had engaged in any combination or conspiracy in restraint of interstate commerce. The reasoning that we have employed above also applies to these associations.

VI. The District Court erred in its instructions to the jury.

VII. There was a misjoinder of plaintiffs and of their causes of action, the complaint failing to show any community of interest in the plaintiffs or any joint cause of action.

To entitle plaintiffs to join in an action for damages they must have a joint legal interest in the property affected and in the damages sought to be recovered. 1 Chitty's Pleadings, p. 64; *Oliver* v. *Alexander,* 6 Pet. 143, 145; *Yeaton* v. *Lenox,* 8 Pet. 123; *Bertrand* v. *Byrd,* 5 Ark. 651; *Harris* v. *Preston,* 10 Ark. 201. This rule is fundamental and prevails in States, of which Arkansas is

one, that have adopted the reform procedure. Pomeroy, Code Remedies, § 231; Kirby's Ark. Digest, § 6005; *Johnson* v. *Ditlinger,* 140 Ark. 509.

It is said, however, that if separate actions had been brought, they could have been consolidated under the Arkansas Consolidation Act. Kirby's Digest, § 6083–a. This is a plain copy of the federal statute of consolidation. Rev. Stats., § 921; Jud. Code, § 1. Where a State adopts a statute that has been interpreted in other jurisdictions, it presumptively adopts the interpretation which has there been accorded it. This would seem to be the more imperative where the statute adopted has operated and determined the practice in courts having concurrent jurisdiction with the courts of the adopting State. The federal statute has been uniformly interpreted by the federal courts as leaving the right to order consolidation wholly to the discretion of the court. *Mutual Life Insurance Co.* v. *Hillmon,* 145 U. S. 285, 292; *Toledo &c. R. R. Co.* v. *Continental Trust Co.,* 95 Fed. 497, 506. In construing the Arkansas act, the courts of that State, however, have declared themselves untrammeled by this interpretation of this court. *Fidelity-Phenix Insurance Co.* v. *Friedman,* 117 Ark. 71. The right exercised by the state court to indulge in new experiments in procedure should not be superior to the right of the federal court to follow its own long-established practice. Under the Federal Conformity Act, conformance to the practice adopted by the Arkansas courts is neither required nor justified on the part of the federal courts. 2 Bates, Federal Procedure and Law, p. 680, § 971; *Mutual Life Insurance Co.* v. *Hillmon, supra; Mexican Central Ry. Co.* v. *Pinkney,* 149 U. S. 194; *Shepard* v. *Adams,* 168 U. S. 618; *Hanks Dental Association* v. *International Tooth Crown Co.,* 194 U. S. 303, 310.

The alleged Arkansas rule and the right asserted by plaintiffs is furthermore in antagonism to the doctrine

that, after consolidation, the causes of action remain distinct and require separate verdicts and judgments. *Mutual Life Insurance Co.* v. *Hillmon,* 145 U. S. 285. Even the practice in Arkansas does not authorize this verdict. *Southern Anthracite Coal Co.* v. *Thrasher,* 93 Ark. 140, 143; *Lumiansky* v. *Tessier,* 213 Mass. 182, 188.

Moreover, the Federal Anti-Trust Acts provide a special proceeding, lying only within the jurisdiction of the federal courts, and, to the extent they indicate the practice to be followed in actions to recover damages, must govern regardless of procedure in the state courts. Section 7 of the Sherman Act provides that "any person who shall be injured in his business or property . . . may sue therefor." The clear and necessary implication is that each person must bring his suit alone. See 21 Cong. Rec., 3149, 3151.

No authority in law has been offered or can be found for the proposition that because receivers were appointed for these nine corporations in one suit and in one decree, their separate causes of action thereby became joint. 23 Am. & Eng. Encyc. of Law, 1073; High on Receivers, 4th ed., § 204.

Finally, even upon the assumption that divers plaintiffs with separate demands under the Sherman Act may join in suing, it appears from the complaint that the five non-operating companies are wholly without rights of action.

The Arkansas decisions merely hold that where a trial court has erroneously failed to grant a defendant's motion to strike out because of a misjoinder, the Supreme Court will not reverse the judgment, if it appears that the separate causes, if they had been brought separately, could have been consolidated. Manifestly, the Conformity Act does not require a federal court to follow the decisions of the Arkansas courts as to what they conceive to be harmless error or similar questions.

VIII. The orders requiring the unincorporated labor unions and their officers to produce their books and documents, for the purpose of proving the officers and members of these unions guilty of the alleged criminal conspiracy, were violative of their rights under the Fourth and Fifth Amendments. *American Banana Co.* v. *United Fruit Co.*, 153 Fed. 943. The defendant unions not being incorporated, *Hale* v. *Henkel*, 201 U. S. 43, has no application.

Mr. Henry S. Drinker, Jr., and *Mr. James B. McDonough*, with whom *Mr. Roger B. Hull* was on the brief, for defendants in error.

The crucial question is whether a labor union is liable, under the Sherman Anti-Trust Act, for damages inflicted by its duly constituted officers and representatives, in the furtherance of its collective aims and purposes, in the course of a combination and conspiracy in restraint of interstate commerce.

Although the union has a membership of upwards of 400,000 men, bound together by a constitution to carry out its objects, which objects constitute the sole business and livelihood of its members; although it has an organization as highly centralized as it would be possible to create, with innumerable district and local branches chartered and created by the main organization to carry on its activities and do its bidding and subject to discipline or annulment by it for refusal so to do; although it has vast associate funds delegated to its officers to be used in carrying on its business, and which, as in the present case, may be employed solely by unlawful means and with an unlawful purpose to crush those who stand in its way; nevertheless, it is claimed, these same vast funds cannot be made to pay for the damage which they have caused, solely because the union has not chosen to incorporate.

In case of an association of this type, what the parties have actually done and what powers they have actually

assumed and exercised in the management of the organization are even more important than what their constitution says.

I. The unions were subject to be sued as associations, under the Sherman Act.

Loewe v. *Lawlor,* 208 U. S. 274, has settled the question that, when Congress forbade every combination or conspiracy in restraint of interstate commerce, it meant "every" such combination.

When Congress expressly included in its definition of the "person" against whom suit might be brought, corporations or associations existing under or authorized by state or federal laws, it obviously intended to make the test of liability not the volition of the parties liable or the ingenuity of the attorneys who organized them in a particular form of association, but the actual existence of such an association in a form sufficiently tangible to commit a violation of this statute in its associate capacity.

So far as we know, no question has ever been raised of the propriety of joining, as a party defendant to such suits by the United States, any unincorporated association which itself constituted the combination violating the law. Indeed, the decisions of this court in two of the leading Anti-Trust cases bear the names of unincorporated associations,—*United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. One of the Circuit Court decisions, cited with approval by this court in the *Danbury Hatters Case,* 208 U. S. 274, was *United States* v. *Workingmen's Amalgamated Council,* 54 Fed. 994.

Under § 5 of the Clayton Act the decree of the court in such a case would *prima facie* bind such defendant in a subsequent civil suit. Section 8 of the Sherman Act does not use the words "organized under," but the broader phrase "authorized by." It will be further noted,

that the language is not "authorized by and existing under," but "existing under or authorized by."

Associations may be of three types: (1) A quasi-corporation, organized pursuant to a statute, to which it owes its powers and its very existence; (2) an association formed at common law but with the express sanction of a statute authorizing it so to be formed; (3) an association formed at common law which, while not expressly authorized by statute, yet is recognized by statute as properly existing and is given statutory rights and benefits not enjoyed at common law. *Eliot* v. *Freeman,* 220 U. S. 178.

In practically every State in the United States, including all of the States in which the United Mine Workers has active district branches, there are statutes distinctly recognizing trades unions as existing thereunder, and giving them a standing and protection in connection with their associate rights and interests, and the most noticeable instance of statutory recognition is the provision in § 6 of the Clayton Act, which might well be said to constitute a direct authorization by Congress of the organization and continued existence of labor unions,—certainly a distinct recognition that such associations were among those "existing under the laws of the United States," within the meaning of the Sherman Act.

Congressional recognition of the existence of trades unions similar to that by the Clayton Act, as well as their liability to prosecution as such by the United States for violation of the Sherman Act, is found in the rider to the Appropriation Acts of 1913, 1914 and 1915, 38 Stat. 53, 652, 866. Also the National Trades Union Act of June 29, 1886, 24 Stat. 86.

It may be said that since the Trades Union Act, § 2, made incorporated unions liable to suit in their corporate name, this implied an absence of such liability in a union which was not incorporated. As applied to an unincorpo-

rated union between 1886 and July 2, 1890, there might be something in this argument; indeed, we make no claim that at common law an unincorporated association is liable to suit in its associate name. The Sherman Act, however, made an advance on the common law. Although it did not purport to make labor unions, or any other unincorporated associations, subject to suit in all legal proceedings, it did render such associations liable, in their associate capacity, to suit for the commission of the particular offense forbidden by the act.

All that is necessary to hold an association liable for damages under the Sherman Act is to show its existence in some form sufficiently tangible to enable the court by its process to reach its funds or property. Federal and state statutes recognizing its existence and giving it special rights merely make its liability clearer. It can not take advantage of its associate and combined existence to harm other people in the manner forbidden by the Sherman Act, and use its associate funds for that purpose, and not at the same time have those same associate funds subject to the provisions of that statute.

II. The procedure employed in bringing defendants into court was derived by clear and necessary implication from the Sherman and Clayton Acts, and is that prescribed by the Arkansas Code, Kirby & Castle's Digest, § 7446, permitting one or more parties to be sued for all where the question is one of common or general interest and the parties very numerous. See *Branson* v. *Industrial Workers of the World,* 30 Nev. 270; Martin, Modern Law of Labor Unions, § 218; *St. Germain* v. *Bakery, &c., Union,* 97 Wash. 282; *Penny* v. *Central Coal Co.,* 138 Fed. 769; *Tinker* v. *Powell,* 23 Wyo. 352.

Both the National Organization and District No. 21 moved to dismiss the first writ of error from the Circuit Court of Appeals, and afterwards answered in the District Court, which in effect amounted to a general appearance

and a waiver of any defect of process. *Ferguson* v. *Carr,* 85 Ark. 246; *Dunbar* v. *Bell,* 90 Ark. 316; *Lowry* v. *Tile Mantel Association,* 98 Fed. 817.

While the defendant has made frequent objections on the ground that it was not an entity or suable under the Sherman Act, the record does not disclose that it has ever objected to the service of process on it in the name of its representatives as prescribed by the Arkansas Code.

We do not contend that the judgment rendered below is a personal judgment against the individual members of the United Mine Workers of America or binds the real estate of a miner in California or Pennsylvania who had no actual part in the Prairie Creek strike and who is not specifically named as a defendant in this suit.

The provision in the Arkansas Code merely removes the difficulty of getting the union into court in its associate capacity. Whether, as we believe, it is suable in its associate name, or whether it should be sued in the names of its officers as its representatives, is immaterial, since both are named in the writ and caption in the present case. The Code of Procedure of Arkansas merely applies the long-standing rule in equity cases to cases arising at common law. The cases cited by the other side are all actions at common law in jurisdictions where the procedure had not been modified by statute so as to permit a suit against a large association in the name of certain representatives.

III. The United Mine Workers of America, acting through its national officers and its official journal, as well as by its duly constituted district and local branch agencies and officers, authorized, caused, participated in, encouraged, ratified and approved the destruction of the business and property of defendants in error.

In the constitution of this national body there is obviously no attempt to limit its liability to third parties, where strikes are ordered by district branches, but merely

to provide that, as between the principal and the agent, the latter could expect no funds other than those collected from the district unless the national executive board sanctioned the strike.

Even if the constitution had required the sanction of the executive board for the institution of a local strike, such sanction was amply evident. The constitution, however, gave specific authority to District No. 21 to order such a strike on its own initiative. Instead of limiting the authority and discretion of the districts, as plaintiffs in error contend, this provision clearly enlarges it. Distinguishing, *Denaby & Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners Association* [1906], A. C. 384.

It affirmatively appears in the case at bar that the association granted benefits to the strikers. The treasurer's report shows payments to the local unions participating in this strike, of more than $20,000, paid from the defense fund, which under the constitution can be used only for this purpose.

It clearly appears that the union, through its officers, its executive board, its official journal and by vote of all the delegates at its national convention, officially recognized that the destruction of plaintiffs' property and business had been brought about by the union, through its officers, members and representatives, in order to carry out its aims, objects and purposes, and that it accepted the benefit to the union from the suppression of the open shop mine and ratified the whole proceedings.

A number of English cases, decided between the decision in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* [1901], A. C. 426, and the passage of the act of Parliament which annulled it, are instructive on the question of the liability of the national union for the acts of its district and local branches. *Giblan* v. *National Amalgamated Laborers' Union* [1903], 2 K. B. 600; *Mackendrick* v. *National Union of Dock Laborers,*

48 Scot. L. Rep. 17. See also *Spaulding* v. *Evenson,* 149 Fed. 913; 150 Fed. 517; *United States* v. *American Co.,* 263 Fed. 147, 152; *Nederlandsch S. M.* v. *Stevedore's Society,* 265 Fed. 397.

This court has recognized the development of the law in the extension of corporate liability for tortious acts, which, while not strictly within the corporate power, or within the express authority of the agent who committed them, were within the scope of the agent's employment, and were done on behalf of and for the benefit of the principal, even though against its express orders. *Salt Lake City* v. *Hollister,* 118 U. S. 256, 260; *Denver & Rio Grande Ry. Co.* v. *Harris,* 122 U. S. 597; *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534, 544; *New York Central R. R. Co.* v. *United States,* 212 U. S. 481, 492; *Joplin Mercantile Co.* v. *United States,* 213 Fed. 926; *In re Grand Union Co.,* 219 Fed. 353, 363; *United States* v. *Nearing,* 252 Fed. 223.

The evidence in this case sustains the liability of the union on four distinct grounds:

(1) The constitution authorized the district to call this strike. Plaintiffs offered to prove that the National Organization, both through its convention proceedings, and through editorials and articles in its official journal, for years before 1914, had not only encouraged its membership to suppress open shop operations, but by recounting, often with express approval, usually without disapproval, and always without disciplinary action, illegal methods used in other districts to accomplish this result, had sanctioned the use of such methods in carrying on its strikes. The ruling excluding this evidence was clearly erroneous, and as it was made in the instance of defendants, they clearly cannot now base any contention on the absence of such evidence in the record. *Missouri, K. & T. Ry. Co.* v. *Elliott,* 102 Fed. 96, 103. But there was other evidence, admitted, to the same effect.

(2) The Association, through its executive board, its president and its official journal, actively encouraged and thus participated in the illegal proceedings at Prairie Creek, while these proceedings were going on.

(3) The Association, through its official journal and by resolutions of its executive board and of the convention of all its delegates, expressly and officially recognized that the active participants in the Prairie Creek affair had acted as its representatives and in its behalf in carrying out its aims, objects and purposes.

(4) The failure by the union to express its official disapproval, or to exercise the control which it had over the district and local branches, officers and members, and its failure to take steps to discipline them and thus prevent a recurrence of the same thing in other fields, was of itself evidence both of ratification and that what had been done was with the authority and approval of the union.

If under the law no trade union or no union leader could be held responsible for damage in labor disputes without direct evidence that it or he personally incited the particular disturbances which gave rise to the trouble, labor leaders would be for all practical purposes beyond the reach of the law. The damage done in labor disputes is caused for the most part by entirely irresponsible parties, members of the union or their sympathizers, many of whom at the time are unrestrainable by their leaders, even if the latter wished to restrain them.

Under the law the test of the responsibility of the union and of the higher officials thereof, for activities of the members in a labor dispute, is gauged not only by whether or not the union officials specifically incited the particular activities, but by a broader test, viz.: Did the union officials and union organization set in motion the machinery which in the natural course of events and according to previous experience would lead to the injurious results?

Where a union declares or conducts a strike in which injury to property is done by its members or by those acting in conjunction with them, the union and its officers will be held responsible, unless the damage done is such as might not readily be foreseen by them when they set in motion the forces which have caused it, and unless, also, as soon as they learn of the illegal acts, whether during their commission or after the damage has been done, they clearly show their good faith and disapproval of what has happened, not merely by words but by actions. *Loewe* v. *Lawlor,* 208 U. S. 274; *Southern Ry. Co.* v. *Machinists Local Union,* 111 Fed. 49; *Allis-Chalmers Co.* v. *Reliable Lodge,* 111 Fed. 264; *Union Pacific R. R. Co.* v. *Ruef,* 120 Fed. 102; *Allis-Chalmers Co.* v. *Iron Molders Union,* 150 Fed. 155; *Phillips Sheet & Tin Plate Co.* v. *Amalgamated Association of Iron, Steel & Tin Workers,* 208 Fed. 335; *Alaska S. S. Co.* v. *International Longshoremen's Association,* 236 Fed. 964; *Kroger Co.* v. *Retail Clerks' International Protective Assn.,* 250 Fed. 890, 896. See also *Franklin Union* v. *People,* 220 Ill. 355; *Illinois Central R. R. Co.* v. *International Association of Machinists,* 190 Fed. 910; *Stephens* v. *Ohio State Telephone Co.,* 240 Fed. 759, 778; *Niles-Bement Co.* v. *Iron Moulders Union,* 246 Fed. 851, 863–864.

IV. The destruction of the business and property of defendants in error was accomplished in the course of an unlawful combination and conspiracy in restraint of interstate commerce.

The motive of the unionists may have been to benefit their craft by unionizing all the mines of the country; their immediate purpose was to prevent plaintiffs from shipping their coal to other States in competition with that there mined with union labor.

The conspirators must be held to have intended the necessary and direct consequences of their acts. *United States* v. *Patten,* 226 U. S. 525. Furthermore, it is not

the specific intent of the immediate participants which is important, but the collective intent, the intent of the association which inspired, instigated and conducted the whole affair.

In cases of this kind it is the association that is the essence of the illegal combination. The immediate participants are usually but the ignorant tools, often having no specific intent but a blind rage inspired by the brains of the association higher up.

In the *Knight Case,* 156 U. S. 1, there was no evidence of a specific intention to restrain interstate commerce or to prevent other people from engaging therein. The question was simply whether the bare acquisition under one control of a number of competing sugar plants, without evidence of illegal means used or of a purpose to lay any plant idle, in itself amounted to an attempt at a monopoly or a combination in restraint of trade.

If in that case it had appeared, as it did in *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.,* 166 Fed. 254, in *Shawnee Compress Co.* v. *Anderson,* 209 U. S. 423, or in *United States* v. *Reading Co.,* 226 U. S. 324, that the purpose was to close the plants up or to prevent them from competing with the defendant, the court which decided the *Knight Case* would certainly have held the combination illegal. Even so, the case would not attain the flagrancy of " the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." *Loewe* v. *Lawlor,* 208 U. S. 274. It is in the latter class that the combination here involved falls. Where, as here, it is conclusively shown that the purpose of the illegal acts was to prevent shipment of commodities from one State to another, then every means to attain that result is a direct and unreasonable interference. *Nash* v. *United States,* 229 U. S. 373.

The fact that coal mining is not interstate commerce in no way proves that the destruction of a coal mine for the purpose of restraining interstate commerce does not have that effect.

Ever since the decision in *Welton* v. *Missouri,* 91 U. S. 275, 282, it has been settled that a state statute discriminating against articles which have come from other States or are destined thereto, is unconstitutional, even though it be of a nature which would bring it, but for the discrimination, within the recognized power of the State. In such cases the attempted discrimination shows a conclusive intent by the State to restrain interstate commerce, and, such intent being shown, every restraint thereby produced is held to be direct and unreasonable. See also *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *In re Debs,* 158 U. S. 564, 600.

The facts proved in the case at bar show beyond question a combination and conspiracy in restraint of interstate commerce,—because the acts done so necessarily produced that result that no proof of specific intent was necessary; and because such specific intent was conclusively proved.

V. There was no error in the joinder of parties or causes of action. Arkansas Laws, 1905, p. 798; *St. Louis &c. R. R. Co.* v. *Broomfield,* 83 Ark. 288; *Mahoney* v. *Roberts,* 86 Ark. 130; *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140; *Fidelity Insurance Co.* v. *Friedman,* 117 Ark. 71.

The Sherman Act left the procedure to the local law.

The Act of Congress of February 26, 1919, Jud. Code, § 269, directing that technical errors be disregarded, overcomes any conflict that might be claimed between the Arkansas and federal practice.

Mutual Life Insurance Co. v. *Hillmon,* 145 U. S. 285, is to be distinguished. There was apparently no Kansas statute " existing at the time " which authorized the pro-

cedure in that case, and § 921, Rev. Stats., as construed by the court, did not go so far as to authorize it. In fact § 819 prohibited it.

The record fails to show that defendants made any claim to additional challenges.

When the Act of 1905, as construed by the Arkansas Supreme Court in connection with §§ 6148, 6130, 6084, of the Arkansas Code, extended the power and discretion of the trial court in joinder cases, the Conformity Act, Rev. Stats. § 914, operated to add such additional powers to those already given the federal trial judges under § 921. *O'Connell* v. *Reed,* 56 Fed. 536; *Union Pacific R. R. Co.* v. *Jones,* 49 Fed. 343; *Sawin* v. *Kenny,* 93 U. S. 289; *Rush* v. *Newman,* 58 Fed. 158; *Bond* v. *Dustin,* 112 U. S. 604; *Glenn* v. *Sumner,* 132 U. S. 152, 156; *Bryson* v. *Gallo,* 180 Fed. 70.

The case at bar is analogous to the cases arising under the Employers' Liability Act, in which there need be no apportionment of the damages because the law provided a method. *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinniss,* 228 U. S. 173; *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507; *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485; *Kansas City Southern Ry. Co.* v. *Leslie,* 238 U. S. 599, 603.

The contention of plaintiffs in error that these companies had independent claims, which they could have prosecuted separately, overlooks not only the facts relative to their organization but the nature of the right of recovery given under the Sherman Act,—for injury to business. The good-will of all these companies was owned and enjoyed by them jointly and was attacked by the United Mine Workers as a joint operation.

VI. There was no error in requiring the representatives of the association to produce the books and papers called for. *Wilson* v. *United States,* 221 U. S. 361; *Wheeler* v. *United States,* 226 U. S. 478; *Grant* v. *United*

States, 227 U. S. 74; *Johnson* v. *United States,* 228 U. S. 457.

Mr. Daniel Davenport, Mr. Walter Gordon Merritt and *Mr. Thomas Hewes,* by leave of court, filed a brief as *amici curiæ.*

We join in the contention of the plaintiffs that the United Mine Workers of America and the other voluntary associations sued as defendants come within the statutory definition of "associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State . . ." Sherman Act § 8.

The record discloses, as does also *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, the essential characteristics of the United Mine Workers of America: A membership of over 400,000; representative conventions like stockholders' meetings as the source of power; the election of executive officers and an executive committee chosen from the districts, who, in the interim between conventions, administer its affairs and wield the enormous strength of this body; a name in which it does business; a central office; an official magazine; a complete system for collecting dues; a large income and accumulated wealth freely spent in furthering the ends of the union.

Incorporation of this body would not require it to alter in any substantial way its present organization. It is a complete working machine, having all the earmarks of an entity entirely apart from its members, and is so acting.

The Sherman Law creates rights and imposes duties. It gives to persons and the public the right to be free from injury through unlawful restraints of trade and imposes the duty on persons to refrain from so causing injury. The evidence shows clearly that the defendant union, acting in its organized capacity, as an entity, can and has

successfully restrained trade and has deliberately ruined the plaintiffs. It has common funds from which damages can be collected. It should be made to pay. It is clearly an entity apart from its members. Common sense declares this; economic facts declare it; the law should declare it. Pollock, First Book of Jurisprudence, 2nd ed., pp. 110, 111, 114; Wald's Pollock on Contracts, 3rd ed., by Williston, p. 124, *et seq;* 15 Harv. Law Rev., p. 311; Holland, Jurisprudence, 11th ed., pp. 80, 82, 87, 88, 91, 93, 96, 97, 335, 336, 337; *Taff Vale Ry. Co.* v. *Amalgamated Society* [1901], A. C. 426; *Brent* v. *New Orleans,* 41 La. Ann. 1098.

In *Walworth* v. *Holt,* 4 Myl. & Cr. 619, the court declared its duty "to adapt its practice and course of proceeding to the existing state of society."

It is not necessary that legal systems shall create artificial persons. The ideals and necessities of mankind recognize them before the law. Pound, Readings on the History and System of the C. L., p. 448, from Gareis, Science of Law, § 15.

This statement is a convenient explanation of the theory of lost charters described by Blackstone when discussing the necessity of sovereign recognition for common-law juristic persons.

It is undoubtedly true that the common law for a long time knew of but two classes of legal persons—natural persons and artificial persons. The only artificial person recognized was the corporation. Coke Litt., 2–a; 1 Black. Comm., pp. 123, 467, *et seq.*

A careful examination of many authorities fails to disclose any particularly illuminating explanation of this fact except this: In the early days of Rome no sovereign permission was necessary to create a so-called corporation with its distinct feature of immortality, but later such bodies were looked upon with extreme disfavor unless they had been officially approved by the State.

The State felt it necessary for self-protection to exercise control over bodies of individuals who might acquire vast and even rival power. And this principle, though not at first recognized in England, likewise in time became the law. 3 Holdsworth, History of the English Law, pp. 362, 373; Pollock and Maitland, History of English Law, Bk. II. c. II, § 12; Taylor, Science of Jurisprudence, p. 580, *et seq;* Markby, Elements of Law, p. 82, *et seq; Lloyd* v. *Loaring,* 6 Ves. 773.

The power of the sovereign in thus exercising control was made effective through the passive means of refusing to recognize in unincorporated bodies either rights or duties. But voluntary associations continued to grow in number and because of their dynamic activity in society it became absolutely essential in the administration of justice to make them amenable to legal process, and so the chancellor invented the representative action and in the courts of equity for two hundred years they have sued and been sued, have enforced rights and been compelled to respect duties. *Meux* v. *Maltby,* 2 Swan. 277; Story, Equity Pleadings, 8th ed., § 77.

And so Congress in many statutes has included in its definition of " persons," partnerships, companies and voluntary associations.

Therefore, it seems historically that the State began by refusing to recognize associations, and when this did not stop their growth, looked to their regulation and supervision by giving them juristic personality. 30 Harv. Law Rev., 683, 684.

The inevitable revulsion of justice against the archaic rigidity of the common-law theory is found in the opinion of Lord Lindley in the *Taff Vale Case, supra,* p. 443.

The question of the right to sue an association is purely formal and procedural. *Saunders* v. *Adams Express Co.,* 71 N. J. L. 270; *Mayhew & Isbell Lumber Co.* v. *Valley Truck Growers' Assn.,* 216 S. W. 225; *Taff Vale*

Ry. Co. v. *Amalgamated Society* [1901], A. C. 426. It does not alter duties or rights. *Taff Vale Case, supra,* pp. 438, 442–445; *Huth* v. *Humboldt,* 61 Conn. 227. It is held in some cases that unless the question of the suability of an association is raised by demurrer it is waived. *United Mine Workers* v. *Cromer,* 159 Ky. 605; *Agricultural Club* v. *Hirsch,* 39 Cal. App. 433. Where an unincorporated association appears and answers as an entity and is named in an injunction order, it can thereafter be punished for contempt as an entity. *Barnes & Co.* v. *Chicago Typographical Union,* 232 Ill. 402. Such a question cannot be raised for the first time on appeal. *Iron Molders' Union* v. *Allis-Chalmers Co.,* 166 Fed. 45. These cases are cited not with a view to claiming that defendants have waived their rights, but in support of the contention that the question is purely a technical one as to the form of a writ and not one of substantive law.

Every argument of public policy is in favor of our contention. In these days when associations of employers and associations of workmen, acting as a unit under a constitution and by-laws, electing officers and controlling large funds, perform practically all the functions of a corporate entity and exercise a power for good or ill far beyond that of individuals, there is every reason why Congress, when dealing with their most familiar activities, should be presumed to have brought them within the reach of civil process. Collective responsibility should accompany collective action. As was said in the *Taff Vale Case,* if this principle be denied, injured parties are without a remedy because of the impracticability of enforcing the law against the numerous members of associations. If any fair construction of the statute will permit, it is the duty of the court to declare that Congress intended to avoid such an unfortunate result. Law exists for society and the instincts of right and wrong must

be given effect by the courts wherever reasonable interpretation of law and laws permit. 30 Harv. Law. Rev. 680.

The Anti-Trust Law was enacted primarily to protect the public in the enjoyment of the benefits of the free flow of commerce. It granted such protection against combinations of employees (*Loewe* v. *Lawlor*, 208 U. S. 274,) as well as combinations of employers, and to that end is presumed to have brought within the clutches of the law voluntary associations of employers and employees, which are the commonest instrumentalities by which restraints of trade are accomplished. When we consider the nature of the mischief which the statute aimed to remedy, the comprehensive remedies provided, and the fact that an important part of the remedy lay in controlling associations, there is every reason to believe that the words "associations existing under or authorized by the laws," etc., intended to include the ordinary and familiar type of associations of employers and employees which were largely the cause of that mischief. To reach a contrary conclusion we must declare what today sounds amazing—that labor unions do not exist under, and are not authorized by, the laws of any State or of the United States. How absurd it would be to impute to Congress an intention to include combinations of employees and to keep out of reach of civil or criminal process those institutions which are entities in fact and the sole agencies whereby employees restrain trade. How strained it is to say that Congress intended this result when it took care to enumerate all associations existing under any state or federal law. How unwarranted such a conclusion would be when it runs counter to the needs of society and negatives the rule that where there is a right there is a remedy, as so conspicuously shown in this case. The statute can be naturally construed and should be construed to remove a technical obstacle to the administration of justice.

The aptness of the words used by Congress as applied to labor unions is emphasized by the extent to which unions have been recognized and have received benefits and privileges through federal and state enactments. These statutes show to what a surprising extent unions are " associations existing under or authorized by " state and federal laws.

The defendants contend that the words of the statute only include associations organized under the express provision of some statute. If that were so, why did the legislators not stop with the words " authorized by " instead of also providing for associations " existing under " the laws? But authority as well as reason oppose the contention that the words used in this statute are limited to associations organized under some statute. In the construction of our revenue laws just the contrary has been held. *Eliot* v. *Freeman,* 220 U. S. 178.

That this has been the accepted construction by the executive and judiciary branches of the Government in connection with the Anti-Trust Law is shown by the records in a number of the cases where judgment was entered against voluntary associations.

See also, *Hillenbrand* v. *Building Trade Council,* 14 Oh. Dec. (N. P.) 628; 15 Harv. Law Rev. 311; 30 *id.,* 263.

Mr. Chief Justice Taft, after stating the case, delivered the opinion of the court.

There are five principal questions pressed by the plaintiffs in error here, the defendants below. The first is that there was a misjoinder of parties plaintiff. The second is that the United Mine Workers of America, District No. 21, United Mine Workers of America, and the local unions made defendants, are unincorporated associations and not subject to suit and therefore should have been dismissed from the case on motions seasonably made. The third is that there is no evidence to show any agency by the

United Mine Workers of America, in the conspiracy charged or in the actual destruction of the property, and no liability therefor. The fourth is that there is no evidence to show that the conspiracy alleged against District No. 21 and the other defendants, was a conspiracy to restrain or monopolize interstate commerce. The fifth is that the court erred in a supplemental charge to the jury, which so stated the court's view of the evidence as to amount to a mandatory direction coercing the jury into finding the verdict which was recorded.

First. It does not seem to us that there was a misjoinder of parties under the procedure as authorized in Arkansas. In that State the law provides that when causes of action of a like nature, or relative to the same question, are pending before any of its circuit or chancery courts, the court may make such orders and rules regulating proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so. In *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, the court consolidated, over objection by defendant, two suits by two workmen who had been injured in the same accident, and the Supreme Court approved of this action. In *Fidelity-Phenix Fire Insurance Co.* v. *Friedman,* 117 Ark. 71, it was held that actions by an injured person and by a mortgagee against eight insurance companies on eight different fire insurance policies could be consolidated against the objection by defendants, and they were tried together. Of course, the application of this rule of the Arkansas courts under the Federal Conformity Act, will be qualified to prevent injury to any substantial right secured by federal law in the trial. It is a case for the exercise of reasonable discretion by the trial court. We cannot say that that discretion was abused in this case. All the companies for which the plaintiffs herein are receivers, were united together in interest

and were largely under the control of one of the companies. The active manager of all of them for years was Franklin Bache. He was the first receiver, and as such the plaintiff. There was no need for a division in the verdict of damages found, because the union of interest between the plaintiffs involved no difficulty in the distribution among them of the amount found. The judgment is *res judicata* as to all the plaintiffs, and we can find no substantial reason for disturbing it on this ground. No difficulty presented itself with respect to the challenge of jurors by either side, and so far as appears there was no embarrassment to the defendants growing out of the union of the plaintiffs. On the contrary, an examination of the evidence shows that all the witnesses for the defendants treated the plaintiffs as a unit. They were so regarded in business and in the neighborhood where the mines were.

Second. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable in their names? The United Mine Workers of America is a national organization. Indeed, because it embraces Canada it is called the International Union. Under its constitution, it is intended to be the union of all workmen employed in and around coal mines, coal washers and coke ovens on the American continent. Its declared purpose is to increase wages and improve conditions of employment of its members by legislation, conciliation, joint agreements and strikes. It demands not more than eight hours a day of labor. The union is composed of workmen eligible to membership and is divided into districts, sub-districts and local unions. The ultimate authority is a general convention to which delegates selected by the members in their local organizations are elected. The body governing the union in the interval between conventions is the International Board consisting of the principal officers, the president, vice-president and secretary-treasurer, together with a member from

each district. The president has much power. He can remove or suspend International officers, appoints the national organizers and subordinates, and is to interpret authoritatively the constitution, subject to reversal by the International Board. When the Board is not in session, the individual members are to do what he directs them to do. He may dispense with initiation fees for admission of new locals and members. The machinery of the organization is directed largely toward propaganda, conciliation of labor disputes, the making of scale agreements with operators, the discipline of officers, members, districts and locals, and toward strikes and the maintenance of funds for that purpose. It is admirably framed for unit action under the direction of the National officers. It has a weekly journal, whose editor is appointed by the president, which publishes all official orders and circulars, and all the union news. Each local union is required to be a subscriber, and its official notices are to be brought by the secretary to the attention of the members. The initiation fees and dues collected from each member are divided between the national treasury, the district treasury and that of the local. Should a local dissolve, the money is to be transmitted to the National treasury.

The rules as to strikes are important here. Section 27 of Article IX of the constitution is as follows:

"The Board shall have power between conventions, by a two-thirds vote, to recommend the calling of a general strike, but under no circumstances shall it call such a strike until approved by a referendum vote of the members."

Under Article XVI, no district is permitted to engage in a strike involving all or a major portion of its members without sanction of the International Convention or Board.

Section 2 of that article provides that districts may order local strikes within their respective districts "on

their own responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board."

Section 3 provides that in unorganized fields the Convention or Board must sanction strikes and no financial aid is to be given until after the strike has lasted four weeks, unless otherwise decided by the Board. The Board is to prescribe conditions in which strikes are to be financed by the International Union and the amount of strike relief to be furnished the striking members. In such cases, the president appoints a financial agent to assume responsibility for money to be expended from the International funds, and he only can make binding contracts. There is a uniform system of accounting as to the disbursements for strikes.

The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in travelling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.

Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett* v. *Walsh,* 192 Mass. 572; *Karges Furniture Co.* v. *Amalgamated Woodworkers Local Union,* 165 Ind. 421; *Baskins* v. *United Mine Workers of America,* 234 S. W. 464. But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their

existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. We insert in the margin an extended reference,[1] furnished by the industry of counsel, to

[1] 1. Legalization of labor unions and labor combinations:

The Clayton Act—approved October 15, 1914, § 6, 38 Stat. 730, 731. *California*—Penal Code, 1906, p. 581. *Colorado*—Rev. Stats. 1908, § 3924. *Maryland*—Supp. Anno. Code, 1914, Art. 27, § 40. *Massachusetts*—C. 778, Acts & Res. approved July 7, 1914. *Minnesota*—C. 493, approved April 21, 1917. *Nevada*—Rev. Laws, 1912, § 6801. *New Jersey*—Comp. Stats. 1910, § 128, p. 3051. *New York*—Consol. Laws 1909, c. 40, § 582. *North Dakota*—Rev. Code 1905, § 8770. *Oklahoma*—Rev. Laws 1910, § 3764. *Pennsylvania*—Dig. Statute Law 1920, § 21247. *Texas*—Rev. Civ. Stats. 1911, Arts. 5244–5246. *Utah*—C. 68, approved March 8, 1917; Laws of 1917, c. 68, § 1. *West Virginia*—Acts of 1907, c. 78, § 19.

2. Exemption from anti-trust laws by statute or judicial decision:

California—Acts of 1909, c. 362, § 13. *Iowa*—*Rholf* v. *Kasemeier*, 140 Ia. 182. *Louisiana*—Acts of 1892, Act No. 90, § 8; Rev. Laws, 1897, p. 205. *Michigan*—Comp. Laws, 1897, § 11382. *Montana*—Rev. Code 1907, § 8289; Acts of 1909, c. 97, § 2. *New Hampshire*—Laws of 1917, c. 177, § 7. *Nebraska*—*State* v. *Employers of Labor*, 102 Neb. 768. *Wisconsin*—Stats. of 1913, § 1747h.

3. Right given to labor unions to sue to enjoin infringement of registered union label or trademark:

Arkansas—Acts of 1905, Act 309, § 7. *Colorado*—Mills' Supp. 1904, § 2985; Rev. Stats. 1908, § 6848. *Florida*—Gen. Stats. 1906, § 3172. *Idaho*—Rev. Code of 1908, § 1453. *Illinois*—Rev. Stats.

legislation of this kind. More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued (Story Equity Pleadings, 8th ed., §§ 94, 97; *St. Germain* v. *Bakery, &c., Union,* 97 Wash. 282; *Branson* v. *Industrial Workers of the World,* 30 Nev. 270; *Barnes & Co.* v. *Chicago Typographical Union,* 232 Ill. 402); and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united

1908, c. 140, § 4. *Iowa*—Code of 1897, § 5050. *Kansas*—Gen. Stats. 1915, § 11657. *Kentucky*—Stats. 1903, c. 130, § 4750. *Louisiana*—Acts of 1898, Act No. 49, § 5. *Maryland*—Supp. Anno. Code, 1914, Art. 27, § 53. *Montana*—Rev. Code 1907, § 8455. *Nebraska*—Comp. Stats. 1913, § 3570. *Nevada*—Rev. Laws 1912, § 4636. *New Hampshire*—Laws of 1895, c. 42, § 4. *New York*—Consol. Laws 1909, c. 31, § 16. *Oregon*—Bellinger & Cotton's Anno. Stats. 1902, § 1845. *Pennsylvania*—Laws of 1901, Act No. 84, § 4; Dig. Statute Law, 1920, § 21241. *Rhode Island*—Gen. Laws 1909, c. 196, § 5. *South Dakota*—Rev. Code 1903, § 3194. *Tennessee*—Acts of 1905, c. 21, § 6. *Texas*—Civil Code, 1911, Art. 705. *Vermont*—Laws of 1908, Act No. 121, § 5. *Virginia*—Code of 1904, § 1906d, par. (5). *Washington*—Codes & Stats. 1910, § 9496. *West Virginia*—Acts of 1901, c. 5, § 5; Code of 1913, § 3582. *Wisconsin*—Stats. of 1911, c. 84a, § 1747a–5. *Wyoming*—Comp. Stats., 1910, c. 218, § 3441.

4. Unauthorized use of registered union label or trademark made an offense:

Alabama—Code of 1907, §§ 7322, 7323. *Arizona*—Penal Code, §§ 355–358. *Arkansas*—Acts of 1905, Act No. 309 (amended by c. 131, Acts of 1909). *California*—Political Code, 1906, §§ 3200–3201; Penal Code, 1906, §§ 349a–351 (amended by c. 181, Acts of 1911). *Colorado*—Mills' Supp. 1904, § 2985–l to 2985–s; Rev. Stats. 1908, § 6844. *Connecticut*—Gen. Stats. 1902, §§ 4907–4912 (amended by

action and functions as artificial persons capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possi-

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c. 151, Acts of 1907). *Delaware*—Acts of 1899, c. 266. *Florida*—Gen. Stats. 1906, §§ 3169–3172. *Georgia*—Code of 1910, §§ 1989–1992. *Idaho*—Rev. Codes of 1908, §§1449–1455. *Illinois*—Rev. Stats. 1908, c. 140, §§ 1–7. *Indiana*—Anno. Stats. 1901, §§ 8693–8703; 3 Burns Anno. Stats. 1908, §§ 10453–10463. *Iowa*—Code of 1897, §§ 5049–5051. *Kansas*—Gen. Stats. 1909, §§ 9675–9680; Gen. Stats. 1915, §§ 11654–11659. *Kentucky*—Stats. of 1903, §§ 4749–4755. *Louisiana*—Acts of 1898, Act No. 49. *Maine*—Rev. Stats. 1903, c. 40, §§ 30–36. *Maryland*—Pub. Gen. Laws 1903, Art. 27, §§ 43–48. *Massachusetts*—Rev. Laws 1902, c. 72, §§ 7–14. *Michigan*—Comp. Laws 1897, §§ 11681–11686 (amended by c. 279, Acts of 1913). *Minnesota*—Rev. Laws 1905, §§ 5072–5076. *Missouri*—Rev. Stats. 1909, §§ 11789–11796. *Montana*—Penal Code 1907, §§ 8452–8457. *Nebraska*—Comp. Stats. 1911, §§ 4169–4173. *Nevada*—Rev. Laws 1912, §§ 4635–4637. *New Hampshire*—Acts of 1895, c. 42. *New Jersey*—Comp. Stats. 1910, pp. 1802, 5643–5648. *New York*—Consol. Laws 1909, c. 31, §§ 15, 16. *Ohio*—Gen. Code 1910, §§ 6219–6227, 13102, 13103, 13153–13155; Acts of 1911, p. 420. *Oklahoma*—Rev. Laws 1910, §§ 8211–8217. *Oregon*—Anno. Codes and Stats. 1902, §§ 1841–1848. *Pennsylvania*—Dig. Statute Law, 1920, §§ 21236–21243. *Rhode Island*—Gen. Laws 1909, c. 196. *South Dakota*—Political Code 1903, §§ 3190–3195. *Tennessee*—Acts of 1905, c. 21. *Texas*—Rev. Civ. Stats. 1911, Arts. 705, 706; Rev. Crim. Code, Arts. 1395, 1396. *Utah*—Comp. Laws 1907, §§ 2720–2723, 4482, 4483. *Vermont*—Pub. Stats. 1906, §§ 4962–4967; Acts of 1908, No. 121. *Virginia*—Code of 1904, § 1906d. *Washington*—Codes and Stats. 1910, §§ 9492–9500. *West Virginia*—Acts of 1901, c. 5; Hogg's Code, §§ 3578–3585; Code of 1913, § 487. *Wisconsin*—Stats. 1911, § 1747a. *Wyoming*—Comp. Stats. 1910, §§ 3439–3444.

5. Unauthorized use of union card, badge, or insignia made an offense:

California—Acts of 1909, c. 331. *Connecticut*—Acts of 1907, c. 113, § 2. *Massachusetts*—Acts of 1909, c. 514, § 32. *Minnesota*—

ble, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless.

Rev. Laws 1905, § 5053, par. 4. *Montana*—Rev. Code 1907, § 8866. *New York*—Consol. Laws, 1909, c. 40, § 1278. *Ohio*—Gen. Code 1910, § 13163. *Oregon*—Acts of 1911, c. 73, §§ 1, 3. *Pennsylvania*—Dig. Statute Law 1920, § 1050. *Texas*—Rev. Crim. Stats. 1911, Art. 425. *Virginia*—Acts of 1908, c. 54, § 1.

6. Right to participate in selection of membership of boards of arbitration in labor controversies:

Alabama—Acts of 1911, p. 320, § 6. *Alaska*—Acts of 1913, c. 70, § 2. *Iowa*—Acts of 1913, c. 292, §§ 1, 2. *Indiana*—Anno. Stats. 1901, § 7050 e, f. *Idaho*—Rev. Code 1909, §§ 1430, 1431. *Louisiana*—Rev. Stats. 1897, Act No. 139, Acts of 1894, § 1. *Minnesota*—Rev. Laws 1905, § 1828. *Nevada*—Rev. Laws 1912, § 1930. *Nebraska*—Rev. Stats. 1913, § 3638. *Texas*—Rev. Civ. Stats. 1911, Art. 71.

7. Right to have member of union on board of arbitrators:

Connecticut—Gen. Stats. 1902, § 4708. *Illinois*—Hurd's Rev. Stats. 1906, c. 10, § 19. *Indiana*—Anno. Stats. 1901, § 1750b. *Idaho*—Rev. Code 1909, § 1427. *Massachusetts*—Acts of 1909, c. 514, § 10. *Maine*—Acts of 1909, c. 229, § 2. *Missouri*—Rev. Stats. 1909, § 7802. *Montana*—Rev. Code 1907, §§ 1670, 1671. *Nebraska*—Rev. Stats. 1913, § 3633. *New Hampshire*—Acts of 1911, c. 198, § 3, as amended by c. 186, Acts of 1913. *South Carolina*—Acts of 1916, Act No. 545, § 8. *Utah*—Comp. Laws 1907, § 1324. *Vermont*—Acts of 1912, Act No. 190, § 1.

8. Embezzlement of funds of labor union made a special offense:

Nebraska—Rev. Stats. 1913, § 8659. *New Hampshire*—Pub. Stats. 1891, c. 273, § 17, as amended by Acts of 1905, c. 1. *Pennsylvania*—Dig. Statute Law 1920, § 21252.

9. Bribery of union representative made an offense:

Nevada—Rev. Laws 1912, § 6794. *New Jersey*—Acts of 1911, c. 94, § 1. *New York*—Consol. Laws 1909, c. 40, § 380.

10. All public printing to bear union label:

Maryland—Pub. Gen. Laws 1911, Art. 58, § 9. *Montana*—Rev. Code 1907, § 254. *Nevada*—Rev. Laws 1912, § 4309.

In the case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants,* [1901] A. C. 426, an English statute provided for the registration of trades unions, authorized them to hold property through trustees, to have agents, and provided for a winding up and a rendering of accounts. A union was sued for damages growing out of a strike. Mr. Justice Farwell, meeting the objection that the union was not a corporation and could not be sued as an artificial person, said:

"If the contention of the defendant society were well founded, the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents."

He therefore gave judgment against the union. This was affirmed by the House of Lords. The legislation in question in that case did not create trade unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue, nor imposed liability to be sued. See also *Hillenbrand* v. *Building Trade Council,* 14 Ohio Dec. (N. P.) 628. Holland Jurisprudence, 12th ed., 341; Pollock's First Book on Jurisprudence, 2nd ed., 125.

Though such a conclusion as to the suability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-

acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose. Trade unions have been recognized as lawful by the Clayton Act; they have been tendered formal incorporation as National Unions by the Act of Congress, approved June 29, 1886, c. 567, 24 Stat. 86. In the Act of Congress, approved August 23, 1912, c. 351, 37 Stat. 415, a commission on industrial relations was created providing that three of the commissioners should represent organized labor. The Transportation Act of 1920, c. 91, §§ 302–307, 41 Stat. 469, recognizes labor unions in creation of railroad boards of adjustment, and provides for action by the Railroad Labor Board upon their application. The Act of Congress, approved August 5, 1909, c. 6, § 38, 36 Stat. 112, and the Act approved October 3, 1913, c. 16, subd. G(a), 38 Stat. 172, expressly exempt labor unions from excise taxes. Periodical publications issued by or under the auspices of trade unions are admitted into the mails as second-class mail matter. Act of 1912, c. 389, 37 Stat. 550. The legality of labor unions of postal employees is expressly recognized by Act of Congress, approved August 24, 1912, c. 389, § 6, 37 Stat. 539, 555. By Act of Congress, passed August 1, 1914, no money was to be used from funds therein appropriated to prosecute unions under the Anti-Trust Act (c. 223, 38 Stat. 609, 652).

In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. The fact that the Supreme Court of Arkansas has since taken a different view in *Baskins* v. *United Mine Workers of America, supra,* can not under the Conformity Act operate as a limitation on the federal procedure in this regard.

Our conclusion as to the suability of the defendants is confirmed in the case at bar by the words of §§ 7 and 8 of the Anti-Trust Law. The persons who may be sued under § 7 include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country" [§ 8]. This language is very broad, and the words given their natural signification certainly include labor unions like these. They are, as has been abundantly shown, associations existing under the laws of the United States, of the Territories thereof, and of the States of the Union. Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any persons or combinations of persons should escape its application. Their thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions recognized by the statutes of the United States or the States or the Territories, or foreign countries as lawfully existing; and this, of course, includes labor unions, as the legislation referred to shows. Thus it was that in the cases of *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, *United States* v. *Joint Traffic Association,* 171 U. S. 505, *Montague & Co.* v. *Lowry,* 193 U. S. 38, and *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, unincorporated associations were made parties to suits in the federal courts under the Anti-Trust Act without question by anyone as to the correctness of the procedure.

For these reasons, we conclude that the International Union, the District No. 21 and the twenty-seven Local Unions were properly made parties defendant here and properly served by process on their principal officers.

Third. The next question is whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business which began April 6, 1914, and continued at intervals until July 17, when the matter culminated in a battle and the destruction of the Bache-Denman properties. The strike was a local strike declared by the president and officers of the District Organization No. 21, embracing Arkansas, Oklahoma and Texas. By Art. XVI of the International constitution, as we have seen, it could not thus engage in a strike if it involved all or a major part of its district members without sanction of the International Board. There is nothing to show that the International Board ever authorized it, took any part in preparation for it or in its maintenance. Nor did they or their organization ratify it by paying any of the expenses. It came exactly within the definition of a local strike in the constitutions of both the National and the District organizations. The District made the preparations and paid the bills. It does appear that the president of the National body was in Kansas City and heard of the trouble which had taken place on April 6 at Prairie Creek and that at a meeting of the International Board he reported it as something he had learned on his trip for their official information. He said that a man named Bache had demanded in a suit an accounting of the funds of the Southwestern Coal Operators' Association, that when he secured the information, he " went down to Arkansas and started to run his mine non-union. The boys simply marched in on him in a day down there and kicked his Colorado guards out of there and broke their jaws and put the flag of the United Mine Workers on top of the tipple and pulled the fires out of the boilers, and that was all there was to it, and the mines have been idle ever since. I do not say our boys did this, but I mean the people from all through that country marched in and

stopped the work, and when the guards offered resistance, several of them were roughly handled but no lives were lost as I understand it." Later in May he made a long speech at a special convention of District No. 21 held at Fort Smith for a purpose not connected with this matter in which he referred especially to the Colorado and West Virginia strikes in which the International Union was engaged with all its might, but he made no specific allusion to the Prairie Creek difficulty. It does appear that in 1916, after Stewart, the president of District No. 21, had been convicted of conspiracy to defeat the injunction issued to protect the Prairie Creek mines in this conflict, and had gone to the penitentiary and was pardoned, White, the national president, wrote a letter thanking the President for this, and that subsequently he appointed Stewart to a position on a District committee. It would be going very far to consider such acts of the president alone a ratification by the International Board creating liability for a past tort. The president had not authority to order or ratify a local strike. Only the Board could do this. White's report in an executive meeting of the Board of the riot of April 6 shows sympathy with its purpose and a lack of respect for law but does not imply or prove on his part any prior initiation or indicate a desire to ratify the transaction as his work. The Board took no action on his report. He did not request it.

Communications from outsiders and editorials published in the United Mine Workers journal giving accounts of the occurrences at Prairie Creek and representing that the troubles were due to the aggression of the armed guards of the mine owners and that the action of the union men was justified because in defense of their homes against night attacks, do not constitute such ratification by the Board or the president after the fact as to make the International Union liable for what had been done.

The argument of counsel for the plaintiffs is that because the National body had authority to discipline District organizations, to make local strikes its own and to pay their cost, if it deemed it wise, the duty was thrust on it when it knew a local strike was on, to superintend it and prevent its becoming lawless at its peril. We do not conceive that such responsibility is imposed on the National body. A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen.

Counsel cite § 2 of Art. XII of the constitution of District No. 21 to show that questions of all strikes must be referred by District officers to the National president for his decision, and suggest that in the absence of a showing it is to be inferred that they did so here and the strike was approved by him. They misconstrue the section. It applies only to a proposed strike which would affect two Districts and to which one District is opposed. It does not apply to local strikes like this.

But it is said that the District was doing the work of the International and carrying out its policies and this circumstance makes the former an agent. We can not agree to this in the face of the specific stipulation between them that in such a case unless the International expressly assumed responsibility, the District must meet it alone. The subsequent events showing that the District did meet

the responsibility with its own funds confirm our reliance upon the constitution of the two bodies.

We conclude that the motions of the International Union, the United Mine Workers of America, and of its president and its other officers, that the jury be directed to return a verdict for them, should have been granted.

Fourth. The next question is twofold: (a) Whether the District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their properties, and, (b), whether they did these things in pursuance of a conspiracy to restrain and monopolize interstate commerce.

The case made for the plaintiff was as follows:

(a) In March of 1914, when the Prairie Creek No. 4, Mammoth Vein Coal Mine, and the Coronado mines were operating with union labor and under a District No. 21 contract and scale of wages and terms which did not expire until July 1 following, Bache, the manager of all the properties, determined to run his mines thereafter on a non-union or open basis. He had his superintendent prepare a letter setting forth his reasons for the change and forwarded it to his principals in the East to justify the change of policy which he insisted would result in a substantial reduction in the cost of production. To avoid the charge of a breach of the union scale, he had a contract made between the Mammoth Vein Coal Mining Company, which he controlled, and the Prairie Creek Coal Company and the Mammoth Vein Coal Company, by which the Mammoth Vein Coal Mining Company, a corporation with $100 capital, agreed to run the mines. As it had signed no scale, he considered it free from obligation to the union. He then shut down the mines and prepared to open them on a non-union basis on April 6. He anticipated trouble. He employed three guards from the Burns Detective Agency, and a number of others to aid them. He bought

a number of Winchester rifles and ammunition. He surrounded his principal mining plant at Prairie Creek No. 4 with a cable strung on posts. He had notices prepared for his former employees, who occupied the Company's houses, to vacate. He had notices warning trespassers from the premises posted at the entrance to the tract that was enclosed within the cable. He sent out for non-union men and had gathered some thirty or more at the mine by the day fixed for the opening.

The mines of the plaintiffs lie in the County of Sebastian on the west border of Arkansas, next to Oklahoma, in a hilly country. The whole country is full of coal mines. The annual coal-producing capacity of Arkansas is about 2,000,000 tons. The product is a smokeless coal like the Pocahontas of West Virginia. All the Arkansas mines but one small one were union. The towns in the neighborhood, Hartford, Huntington, Midland, Frogtown, and others were peopled by union miners and the business done in them was dependent on union miners' patronage. Hartford, a town of twenty-five hundred, was about three miles from Prairie Creek, Midland, less in size, lay about the same distance away in another direction, and Huntington was a mile or two further in still another direction. Frogtown was a small village about a mile and a half from Prairie Creek. Stewart, the president of the District No. 21, and the other officers promptly declared a local strike against the Prairie Creek and Mammoth Vein mine and the union miners who had not been discharged from the Coronado mine of the plaintiffs left. Through the agency of the officers of District No. 21 and the local unions, a public meeting was called at the school house, about a quarter of a mile from the Prairie Creek mine. The influence of the union men was exerted upon the shopkeepers of the towns above named to close their stores and attend the meeting. It was given a picnic character and women and children attended. The meeting, after listening to

speeches, appointed a committee to visit the superintendent in charge of the mine. On this committee was one Slankard, a constable of the town of Hartford, and a union man, together with two other union miners. They asked the superintendent that the non-union men be sent away and the mine resume operations with union men. The committee was attended by a very large body of union miners. They were met at the entrance to the enclosure by two guards with guns carried behind them. The committee was admitted to see the superintendent and the crowd dealt with the guards. The guards had been directed not to use their guns save to defend their own lives or another's. The union miners assaulted the guards, took the guns away, and so injured a number of the employees, that four or five had to be sent to a hospital. The crowd swarmed over the premises, forced the pulling of the fires and hurled stones at the fleeing guards. The result was that all the employees deserted the mine, and it was completely filled with water which came in when the pumps stopped. One of the crowd went up to the top of the coal tipple and planted a flag on which was the legend, "This is a union man's country."

Mr. Bache, after the riot and lawless violence of April 6, secured from the Federal District Court an injunction against those union miners and others whom his agents could identify as having been present and having taken part. This included the president and secretary-treasurer of the District No. 21 and others. Bache then made preparations to resume mining. The mine was full of water and it required a considerable time to pump it out and get things into proper condition. Because of further threats, the court was applied to to send United States Deputy Marshals to guard the property, and they were sent. Meantime the work of reparation progressed, and Bache's agents were engaged in securing the coming of miners and other employees from in and out of the State

to enlarge his force. The attitude of the union miners continued hostile, and constant effort was made by them to intercept the groups of men and women who were brought in by Bache from Tennessee and elsewhere, and to turn them away either by peaceable inducement or by threats and physical intimidation. The vicinage was so permeated with union feeling that the public officers did not hesitate to manifest their enmity toward the non-union men, and made arrests of the guards and others who were in Bache's employ upon frivolous charges. Rumors were spread abroad through the county that the guards employed by Bache were insulting and making indecent proposals to very young girls in and about Prairie Creek, and P. R. Stewart, the president of District No. 21, in the presence of some ten persons on the public street of Midland, in the latter part of May, denounced the guards for these insults and proposals, and said that he would furnish the guns if the people would take them. The evidence also disclosed that through the secretary-treasurer of District No. 21, some forty or more rifles were bought from the Remington Arms Company and secretly sent to Hartford for the purpose intended by Stewart. They were paid for by a check signed by Holt, the secretary-treasurer of District No. 21, and countersigned by Stewart, the president. Conversations with Stewart, which Stewart did not take the stand to deny, were sworn to, in which he announced that he would not permit the Prairie Creek mine to run "non-union" and intended to stop it. McLachlin, who was a member of the Executive Board of District No. 21, in the first week of July gathered up some of the guns, exactly how many does not appear, and shipped them sixty miles to McAlester, Oklahoma, the headquarters of District No. 21. It appeared that guns of like make and caliber were used by the assailants in the attack on the Prairie Creek mine on July 17. The United States marshals had been with-

drawn from the premises of Prairie Creek Mine No. 4, before July 1, though the guards were retained.

The evidence leaves no doubt that during the month of June there was a plan and movement among the union miners to make an attack upon Prairie Creek Mine No. 4. By this time the number of men secured by Bache had increased to seventy or eighty, and preparations were rapidly going on for a resumption of mining. The tense feeling in respect to the coming attack increased. On Sunday night, July 12, about midnight, there was a fusillade of shots into the village of Frogtown, a small collection of houses, already mentioned, about a mile and a half from Prairie Creek mine. A number of people in fright at the cry that "the scabs were surrounding the town" left and went to Hartford, about two miles away, and thereafter guards were put out at Hartford to defend that town against attack by the guards at Prairie Creek. The ridiculous improbability that the guards at Prairie Creek who were engaged in protecting themselves and the property and in constant fear of attack should make this unprovoked assault upon the town of Frogtown, is manifest from the slightest reading of the evidence, and there crept in through a statement of one of the defendants, an active union man, to a witness who testified to it, that this shooting had been done by the Hartford constable Slankard, and himself, in order to arouse the hostility of the neighborhood against the men at Prairie Creek. On the night of the 16th, the union miners' families who lived in Prairie Creek were warned by friends to leave that vicinity in order to avoid danger, and at 4 o'clock the next morning the attack was begun by a volley of many shots fired into the premises. A large force with guns attacked the mining premises from all sides later on in the day.

The first movement toward destruction of property was at Mine No. 3, a short distance from No. 4, where the coal washhouse was set on fire. The occupants of the prem-

ises were driven out except a few who stayed and entrenched themselves behind coal cars or other protection. Most of the employees and their families fled to the ridges behind which they were able to escape danger from the flying bullets. The forces surrounding the mine were so numerous that by one o'clock they had driven out practically all of the defenders and set fire to the coal tipple of Mine No. 4, and destroyed all the plant by the use of dynamite and the match.

The assailants took some of Bache's employees prisoners as they were escaping, and conducted them to a log cabin behind the school house near the mine to which reference has already been made, and where the first riot meeting was held. The four or five prisoners were taken out of the cabin where they had been for a short time confined, and two of them, one a former union man, were deliberately murdered in the presence of their captors, by a man whose identity it was impossible to establish. The evidence in this case clearly shows that Slankard, the constable of Hartford, was present at the killing, and that the men who were killed were in his custody on the way, as he said, to the grand jury. He was subsequently tried before a Sebastian County jury for murder, and was acquitted on an alibi. Slankard, though a defendant and in court, did not take the stand in this case. The overwhelming weight of the evidence establishes that this was purely a union attack, under the guidance of District officers.

The testimony offered by defendants to show that it was only an uprising of the indignant citizens of the countryside really tended to confirm the guilt of the District No. 21. Its palpably artificial character showed that basis for it had been framed in advance for the purpose of relieving the officers of District No. 21 and the union miners of that neighborhood from responsibility for the contemplated execution of their destructive and criminal purpose. It is a doubtful question whether this responsibility

was not so clearly established that, had that been the only element needed to justify a verdict, the court properly might have directed it. The president of District No. 21 and the union miners, including Slankard, whose agency in and leadership of this attack were fully proven, were present in the courtroom at the trial, but did not take the stand to deny the facts established. Indeed they had been previously brought to trial for conspiracy to defeat the federal administration of justice and for contempt because of these very acts, had pleaded guilty to the charges made, and had been sentenced to imprisonment, and their expenses as defendants in and out of jail had been paid by the District out of the District treasury and the disbursements approved by the District in convention.

It is contended on behalf of District No. 21 and the local unions that only those members of these bodies whom the evidence shows to have participated in the torts can be held civilly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and, in view of our finding that District No. 21 and the unions are suable, we can not yield to the argument that it would be necessary to show the guilt of every member of District No. 21 and of each union in order to hold the union and its strike funds to answer. District No. 21 and the local unions were engaged in a work in which the strike was one of the chief instrumentalities for accomplishing the purpose for which their unions were organized. By § 1 of Art. XII of the constitution of District No. 21, it is provided that:

"When trouble of a local character arises between the members of local unions and their employer, the mine committee and officers shall endeavor to effect an amicable adjustment, and failing they shall immediately notify the officers of the district and said district officers shall immediately investigate the cause of the complaint,

and failing to effect a peaceful settlement upon a basis that would be equitable and just to the aggrieved members, finding that a strike would best subserve the interests of the locality affected, they may with the consent and approval of the district officers, order a strike."

Thus the authority is put by all the members of the District No. 21 in their officers to order a strike, and if in the conduct of that strike unlawful injuries are inflicted, the District organization is responsible and the fund accumulated for strike purposes may be subjected to the payment of any judgment which is recovered.

(b) It was necessary, however, in order to hold District No. 21 liable in this suit under the Anti-Trust Act, to establish that this conspiracy to attack the Bache-Denman mines and stop the non-union employment there, was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union. The evidence upon which the plaintiffs relied to establish this and upon which the judgment of the trial court and of the Court of Appeals went, consisted of a history of the relations between the International Union and the union coal operators of certain so-called competitive districts from 1898 until 1914. The miners of Ohio, Indiana and Illinois, large bituminous coal producing States, were members of the union and the coal operators of those States, in spite of strikes and lockouts from time to time, were properly classed as union operators. They met yearly in conference with the union's representatives to agree upon terms of employment from April 1st to April 1st. In these conferences the operators frequently complained that the competition of many non-union mines in Western Pennsylvania and the whole of West Virginia was ruinous to their business because of the low cost of production of coal in such mines due to the lower wages and less expensive conditions of working than

in union mines, and urged that something must be done to stop this, or that the union scale of wages be reduced. By section 8 of the contract between the operators of the Central Competitive Coal Field and the United Mine Workers of America, dated Chicago, January 28, 1898, it was stipulated "That the United Mine Workers' organization, a party to this contract, do hereby further agree to afford all possible protection to the trade and to other parties hereto against any unfair competition resulting from a failure to maintain scale rates."

From this time on in every annual conference until after the controversy in the case before us in 1914, the subject recurred. It does not appear when, if at any time, wages were reduced because of this plea by the operators. Sometimes the contention of the operators as to the effect of non-union competition was conceded and greater activity in unionizing non-union territory was promised. Again pleas were made by the miners' representatives of the great amount of money expended by the union and, in one or two instances, of the sacrifice of human lives to effect this result. Again the union leaders flatly refused to be further affected by the argument and charged that the non-union competition of West Virginia, which was always the principal factor, was only possible because some of the most important union operators in Ohio and the central competitive field really were interested as non-union operators in West Virginia. There was considerable discussion as to the non-union competition of Kentucky fields as a basis for the operators' complaints. At times, there were suggestions from the miners' side that the operators ought to contribute funds to enable the campaign of unionizing to go on, but they never seem to have met with favor.

In general convention of the union of 1904, a local union from the Indian Territory in District No. 21 submitted a resolution which was adopted in respect to the then Colorado strike:

"Resolved, That in strict compliance with our obligations and teachings, we accord a hearty approval to our National Board on its action in regard to District No. 15 strike, now on, in Colorado, and whatever action taken by the National that in their judgment is necessary to the successful ending in the elevating of the craft in District No. 15, meets our entire approval, for which we pledge our unqualified support, as our knowledge of the field of southern Colorado in the event of an unsuccessful issue of the trouble now pending would work almost unsurmountable and incalculable damage to District No. 21, as it would be an unjust competition in the same commercial field and could with very little effort undersell and supersede us in the Oklahoma and southwestern Kansas markets."

In a joint conference between the union leaders and the coal operators, in 1904, Mr. Mitchell, the president of the union, spoke as follows:

"I believe the discussion of this matter should be carried on with perfect frankness and candor on both sides. I don't think we should disguise our position at all; and I want to state for our side of the house just where we are, as I understand it. We don't believe that a reduction in the mining rate will help you. We know that it will do us incalculable injury. We don't believe that a reduction in the mining rate will secure for you a larger amount of trade than you now have. We don't believe that the industry will be benefited by reducing wages. We know that in the past every reduction in wages has been given to the large consumers of coal—not to the domestic trade, not to those who can ill afford to pay high rates for coal, but to the railroad companies and the great manufacturers. We know that when the mining rate is lowest your profits have been least.

"Now, gentlemen, it has required many many years of work and effort and sacrifice to make wages at the

mines compare favorably with wages in other industries. We are not going back to the old conditions; we are not going to consent to a reduction in wages. We believe the best thing to do is to renew our present wage scale; to make such modifications of internal questions as seem right, and then return and work out the coming scale year as we have the past scale year. I think we may as well understand now as at any other time that we are not going to consent to a reduced mining rate."

At the convention in 1906, a resolution that Districts 13, 14, 21, 24 and 25, be admitted to the interstate joint conferences, was adopted. This was urged by President Mitchell of the Union, and the Secretary, W. B. Wilson. The latter said:

"If I understand the principle upon which this movement is based, it is to bring into the joint conference those operators and those miners [of the Southwestern District] whose competitive business is closely related to each other; and in asking that the operators and miners of the Southwestern District be admitted to this conference, we are simply carrying out that principle. The coal mined in Western Pennsylvania comes in immediate and direct competition with Ohio; that mined in Ohio, as well as that in Pennsylvania, comes in competition with Indiana and Illinois; that mined in Illinois comes in competition with Iowa; that mined in Iowa comes in competition with Missouri, and coal mined in Missouri comes in competition with Kansas, Arkansas and the Indian Territory. They are all related to one another; they are all competitors with one another, and it is but just and fair that each of these fields should have a representation in the joint conference that sets a base for the prices of the ensuing year. This is the first conference that is held. Whatever wages are agreed upon here, whether it is an increase in wages, a decrease in wages, improved conditions or otherwise, it sets the pace for other districts, and those

other districts have no voice in saying what that price shall be. In order to avoid that condition of affairs, in order to give justice to the operators and miners in other fields not represented here at the present time, we ask you, as a matter of fairness and justice, to permit those whose operators and miners are represented here, to participate in this joint conference."

In 1910, Bache, as a union operator, took part for his mines in fixing the scale of wages in District No. 21. Later on, at the time of a conference, he made a separate scale with the District No. 21 more favorable in some respects than that subsequently agreed on in the conference with the other operators, and he was for that reason expelled from the operators' association. He was permitted at a later time to rejoin it, but he had some litigation with it in respect to their funds, the nature of which is not disclosed by the record.

In 1913 and 1914, and in the years preceding, the International Union had carried on two strikes of great extent covering the Colorado fields, and the Ohio and West Virginia fields, in which very large sums of money had been expended and there was much lawlessness and violence. Its treasury had been drained and it borrowed $75,000 from District No. 21 during this period.

The foregoing will enable one to acquire a fair idea of the national situation, shown by the record, in respect to the mining and sale of coal so far as it bears upon this case and upon this state of fact. The plaintiffs charge that there has been and is a continuously operating conspiracy between union coal operators and the International Union to restrain interstate commerce in coal and to monopolize it, and that the work of District No. 21 at Prairie Creek was a step in that conspiracy for which it can be held liable under the Anti-Trust Act.

Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In

Hammer v. *Dagenhart,* 247 U. S. 251, 272, we said: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439." Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *United States* v. *Ferger,* 250 U. S. 199; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; and *Stafford* v. *Wallace,* 258 U. S. 495. It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances.

What really is shown by the evidence in the case at bar, drawn from discussions and resolutions of conventions and conference, is the stimulation of union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase. The latter is a

secondary or ancillary motive whose actuating force in a given case necessarily is dependent on the particular circumstances to which it is sought to make it applicable. If unlawful means had here been used by the National body to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce, the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the Anti-Trust Act. This principle is involved in the decision of the case of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, and is restated in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184. But it is not a permissible interpretation of the evidence in question that it tends to show that the motive indicated thereby actuates every lawless strike of a local and sporadic character, not initiated by the National body but by one of its subordinate subdivisions. The very fact that local strikes are provided for in the union's constitution, and so may not engage the energies or funds of the National body, confirms this view. Such a local case of a lawless strike must stand on its own facts and while these conventions and discussions may reveal a general policy, the circumstances or direct evidence should supply the link between them and the local situation to make an unlawful local strike, not initiated or financed by the main organization, a step in an actionable conspiracy to restrain the freedom of interstate commerce which the Anti-Trust Act was intended to protect.

This case is very different from *Loewe* v. *Lawlor,* 208 U. S. 274. There the gist of the charge held to be a violation of the Anti-Trust Act was the effort of the defendants, members of a trades union, by a boycott against a manufacturer of hats to destroy his interstate sales in hats. The direct object of attack was interstate commerce.

So, too, it differs from *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, where

the interstate retail trade of wholesale lumber men with consumers was restrained by a combination of retail dealers by an agreement among the latter to blacklist or boycott any wholesaler engaged in such retail trade. It was the commerce itself which was the object of the conspiracy. In *United States* v. *Patten,* 226 U. S. 525, running a corner in cotton in New York City by which the defendants were conspiring to obtain control of the available supply and to enhance the price to all buyers in every market of the country was held to be a conspiracy to restrain interstate trade because cotton was the subject of interstate trade and such control would directly and materially impede and burden the due course of trade among the States and inflict upon the public the injuries which the Anti-Trust Act was designed to prevent. Although running the corner was not interstate commerce, the necessary effect of the control of the available supply would be to obstruct and restrain interstate commerce and so the conspirators were charged with the intent to restrain. The difference between the *Patten Case* and that of *Ware & Leland* v. *Mobile County,* 209 U. S. 405, illustrates a distinction to be drawn in cases which do not involve interstate commerce intrinsically but which may or may not be regarded as affecting interstate commerce so directly as to be within the federal regulatory power. In the *Ware & Leland Case,* the question was whether a State could tax the business of a broker dealing in contracts for the future delivery of cotton where there was no obligation to ship from one State to another. The tax was sustained and dealing in cotton futures was held not to be interstate commerce, and yet thereafter such dealings in cotton futures as were alleged in the *Patten Case* where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of interstate commerce. And so in the case at bar, coal mining is not interstate commerce and obstruc-

tion of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred.

In the case at bar, there is nothing in the circumstances or the declarations of the parties to indicate that Stewart, the president of District No. 21, or Hull, its secretary-treasurer, or any of their accomplices had in mind interference with interstate commerce or competition when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with non-union men. The circumstances were ample to supply a full local motive for the conspiracy. Stewart said: "We are not going to let them dig coal—the scabs." His attention and that of his men was fastened on the presence of non-union men in the mines in that local community. The circumstance that a car loaded with coal and billed to a town in Louisiana was burned by the conspirators has no significance upon this head. The car had been used in the battle by some of Bache's men for defense. It offered protection and its burning was only a part of the general destruction.

Bache's breach of his contract with the District No. 21 in employing non-union men three months before it expired, his attempt to evade his obligation by a manipulation of his numerous corporations, his advertised anticipation of trespass and violence by warning notices, by enclosing his mining premises with a cable and stationing guards with guns to defend them, all these in the heart of a territory that had been completely unionized for years, were calculated to arouse a bitterness of spirit entirely local among the union miners against a policy that brought in strangers and excluded themselves or their union colleagues from the houses they had occupied and

the wages they had enjoyed. In the letter which Bache dictated in favor of operating the mines on a non-union basis, he said, "To do this means a bitter fight but in my opinion it can be accomplished by proper organization." Bache also testified that he was entering into a matter he knew was perilous and dangerous to his companies because in that section there was only one other mine running on a non-union basis. Nothing of this is recited to justify in the slightest the lawlessness and outrages committed, but only to point out that as it was a local strike within the meaning of the International and District constitutions, so it was in fact a local strike, local in its origin and motive, local in its waging, and local in its felonious and murderous ending.

But it is said that these District officers and their lieutenants among the miners must be charged with an intention to do what would be the natural result of their own acts, that they must have known that obstruction to mining coal in the Bache-Denman mines would keep 75 per cent. of their output from being shipped out of the State into interstate competition, and to that extent would help union operators in their competition for business. In a national production of from ten to fifteen million tons a week, or in a production in District No. 21 of 150,000 tons a week, 5,000 tons a week which the Bache-Denman mines in most prosperous times could not exceed, would have no appreciable effect upon the price of coal or non-union competition. The saving in the price per ton of coal under non-union conditions was said by plaintiffs' witnesses to be from seventeen to twenty cents, but surely no one would say that such saving on 5,000 tons would have a substantial effect on prices of coal in interstate commerce. Nor could it be inferred that Bache intended to cut the price of coal. His purpose was probably to pocket the profit that such a reduction made possible. If it be said that what District No. 21 feared

was that, if Bache were successful, the defection among union operators would spread and ultimately the whole District field of District No. 21 in Arkansas, Oklahoma and Texas would become non-union, and interstate commerce would then be substantially affected, it may be answered that this is remote and no statement or circumstance appears in the record from which it can be inferred that the participants in the local strike had such a possibility in mind or thought they were thus protecting union operators in a control or monopoly of interstate commerce. The result of our consideration of the entire record is that there was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The motion to direct the jury to return a verdict for the defendants should have been granted.

Fifth. These conclusions make it unnecessary to examine the objection which the plaintiffs in error make to the supplemental charge of the court.

The case has been prepared by counsel for the plaintiffs with rare assiduity and ability. The circumstances are such as to awaken regret that, in our view of the federal jurisdiction, we can not affirm the judgment. But it is of far higher importance that we should preserve inviolate the fundamental limitations in respect to the federal jurisdiction.

The judgment is reversed, and the case remanded to the District Court for further proceedings in conformity to this opinion.

EX PARTE IN THE MATTER OF HARLEY-DAVIDSON MOTOR COMPANY ET AL., PETITIONERS.

PETITION FOR A WRIT OF MANDAMUS.

No. 26, Original. Motion for judgment notwithstanding rule to show cause. Submitted April 24, 1922.—Decided June 5, 1922.

1. The granting by the District Court with the acquiescence of the parties of an order of interlocutory injunction, merely that it may be appealed to the Circuit Court of Appeals and the cause thus in effect be submitted to that court as though it were a court of original jurisdiction, is not a compliance with § 129, Jud. Code, which contemplates review after the District Court has itself heard and considered. P. 416.
2. An appeal in such case gives jurisdiction to the Circuit Court of Appeals; and, although that court may decline to consider the merits and may reverse and remand the cause for proper proceedings because of the *pro forma* character of the order appealed from, it cannot dismiss the appeal for that reason, and thus leave the interlocutory injunction in force. P. 418.

Mandamus issued.

MANDAMUS to require the Circuit Court of Appeals and its judges to entertain and determine an appeal from an order of the District Court granting an interlocutory injunction.

Mr. Melville Church, Mr. William S. Hodges and *Mr. Edwin B. H. Tower, Jr.*, for petitioners, in support of the motion.

MR. JUSTICE DAY delivered the opinion of the court.

Harley-Davidson Motor Company and Alexander Klein filed a petition for a writ of mandamus to the judges of the Circuit Court of Appeals for the Third Circuit. In substance it sets forth: That in a suit for infringement of letters patent relating to clutches for motorcycles, brought in the District Court of the United States for the Eastern

District of Pennsylvania by the Eclipse Machine Company and Frederick E. Ellett against the petitioners, a decree was entered by the District Court dismissing the plaintiffs' bill, 244 Fed. 463. Upon appeal to the United States Circuit Court of Appeals for the Third Circuit the decree of the District Court was reversed, 252 Fed. 805. The District Court pursuant to the mandate of the Circuit Court of Appeals entered an interlocutory decree adjudging claims 1, 8, 11 and 12 of letters patent No. 1,018,890, and claim 1 of letters patent No. 1,071,992 to be valid and infringed by the petitioners; and granted an injunction, with reference to a master to take and state an account. Subsequently, in the proceedings before the master, petitioners insisted that the master should exclude from consideration certain other types of clutches, which are described. The later types, it is averred, were devised after and in view of the decision of the Circuit Court of Appeals, and were being largely manufactured and sold by the petitioners. But the master overruled the petitioners' contention and ordered that the accounting proceed as to said types of clutches. The petitioners filed a petition in the District Court asking the court to direct the master to exclude from the accounting the clutches aforesaid, but the District Court denied the petition and confirmed the order of the master. Plaintiffs made and submitted a motion to the District Court asking that petitioners be enjoined from manufacturing, using or selling the types of clutches in controversy. The District Court entered an interlocutory order granting an injunction and allowing an appeal from the order to the Circuit Court of Appeals. Petitioners thereafter duly perfected their appeal to the Circuit Court of Appeals, consisting of the judges named in the present petition. That court dismissed the appeal without passing upon the merits thereof, although it was properly taken under § 129 of the Judicial Code. Petitioners prayed for the writ of

mandamus to the judges constituting the Circuit Court of Appeals, and to that court, commanding them and it to entertain and determine the appeal, and for such other relief as might seem appropriate and in conformity to law.

An order to show cause was issued, and a return made by the judges. The cause now comes on for hearing on motion for judgment for the petitioners notwithstanding the return.

The return sets forth that the order in the District Court granting the interlocutory injunction was entered *pro forma* as a means of propounding certain questions of infringement to the Circuit Court of Appeals which the District Court failed to pass upon. It recites the proceedings in the District Court in the attempt to exclude from the accounting the disputed types of clutches, and avers that in the course of the proceedings the District Court ruled that while ordinarily it would be its duty to determine the question raised as to whether or not the particular types were within the decree of infringement, it suggested that the plaintiffs move for an injunction restraining petitioners (then defendants) from making, using or vending the same, and that the District Court *pro forma* allow or deny the writ, that an appeal be promptly taken. A stipulation of counsel was filed in accordance with this suggestion. The District Court denied the motion to direct the course of accounting before the master, and allowed the interlocutory injunction *pro forma*. The return further sets forth that upon this record, supplemented by the frank statements of counsel to the same effect, the court declined to hear the appeal and dismissed it, leaving the order in question wholly within the control of the District Judge.

Section 129 of the Judicial Code provides:

"Where upon a hearing in equity in a district court, . . . an injunction shall be granted, . . . an appeal may be taken from such interlocutory order or decree granting . . . an injunction."

In a memorandum accompanying the return the judges of the Circuit Court of Appeals set forth that the order below having been made *pro forma,* without the exercise of judicial discretion by the District Court, did not present in any real sense an appealable order. The return further states that the order made was not in accord with the established practice in the Third Circuit. That the remedy to prevent the use of the clutches made after the decree, and claimed to have been in violation thereof, should have been sought by attachment for contempt, a proceeding for an accounting, or an original bill.

We have examined the record before us on this application, which includes the opinions of the District Court and the Circuit Court of Appeals. As this is an application for the writ of mandamus, we have no authority to review the judgment of the Circuit Court of Appeals such as we would have in cases brought before this court on appeal or writ of error. We accept, indeed there is little room to question, the conclusion and judgment of the Circuit Court of Appeals that the order of the District Court was made *pro forma* for the purpose of laying the foundation for an appeal to the Circuit Court of Appeals.

The Circuit Court of Appeals, upon abundant showing, found that the District Judge, not wishing to exercise an independent judgment upon the questions raised, made a *pro forma* order granting the injunction to the end that an appeal might be prosecuted. This was done with the acquiescence of counsel. We agree with the Circuit Court of Appeals that the effect of this method of procedure was to submit the cause to it as though it were a court of original jurisdiction, and to put upon it a labor of examination and consideration not imposed by the statute. The purpose of the statute is to enable the Circuit Court of Appeals to review the order of the District Court after that court has itself heard and considered the application. The practice of thus entering *pro forma* judgments or de-

crees has been disapproved by this court in *William Cramp & Sons Co.* v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645. See also *United States* v. *Gleeson*, 124 U. S. 255.

We agree with the Circuit Court of Appeals that it was not required to consider the order, thus made by the District Court, as one properly before it on its merits. But the Circuit Court of Appeals had acquired jurisdiction by the appeal, and did not reverse the order of the District Court and remand the cause for proper proceedings, as it might have done. It dismissed the appeal. The effect of such dismissal was to leave the interlocutory injunction in full force. In this respect the Circuit Court of Appeals failed to exercise the jurisdiction conferred by law. The statute gave an appeal; the appellant had the right to have it decided. By the order of dismissal that right was denied.

We conclude that a writ of mandamus should issue requiring the Circuit Court of Appeals to decide the appeal presented. That course will leave it within its power to reverse and remand the cause to the District Court for further proceedings in accordance with law, because of the view it took of the record growing out of the *pro forma* character of the order appealed from.

Mandamus issued.

Syllabus.

STATE OF WYOMING *v.* STATE OF COLORADO ET AL.

IN EQUITY.

No. 3, Original. Argued December 6, 7, 8, 1916; restored to docket for reargument March 6, 1917; reargued January 9, 10, 11, 1918; restored to docket for reargument June 6, 1921; reargued January 9, 10, 1922.—Decided June 5, 1922.

1. The waters of an innavigable stream rising in one State and flowing into a State adjoining may not be disposed of by the upper State as she may choose, regardless of the harm that may ensue to the lower State and her citizens. P. 466.
2. The relative rights of two adjoining States tc the use of an innavigable interstate stream, must be determined in accordance with right and equity and in harmony with the constitutional principle of state equality. Pp. 465, 470.
3. This does not imply an equal division of the water between the two States. P. 465. *Kansas* v. *Colorado,* 206 U. S. 46.
4. The doctrine of appropriation, by which priority of appropriation gives superiority of right, affords the only equitable basis for determining this controversy, in which Wyoming seeks to prevent diversion of water from the headwaters of the Laramie River in Colorado for use in irrigating Colorado lands, to the detriment of prior irrigation appropriations made from the same stream in Wyoming. P. 467.

So *held,* in view of the early adoption and continual practice of the doctrine in both jurisdictions alike, sanctioned by the United States as owner of the public lands, its perpetuation in the constitutions of both States at the times of their creation as a doctrine already existing and essential to their natural conditions, its relation to the settlement and irrigational and agricultural enterprises in both, and the recognition in both of the right to appropriate water from interstate streams.

5. In applying the doctrine of appropriation in this case, private appropriations should be recognized in the order of their priority, as they would be if the stream lay wholly in either State. Pp. 468, 470.

6. Such recognition of private rights *held* not inappropriate in a suit between the two States, in view of the relation of the appropriations to taxable values, and to the welfare, prosperity and happiness of people in each State. P. 468.
7. In as much as the doctrine of appropriation, as it exists within these two States, was adopted, and practised from the beginning, with the sanction of the United States as owner of the public lands, and in as much as the United States does not now seek to impose any policy of its own choosing on either State, the question whether, in virtue of such ownership, it might do so, is not here considered. P. 465.
8. The fact that the proposed diversion is to another watershed from which Wyoming can receive no benefit is not in itself a valid objection, since like diversions are made and recognized as lawful in both States. P. 466.
9. The doctrine of appropriation lays upon each State a duty to exercise her right reasonably and in a manner calculated to conserve the common supply. P. 484.
10. The evidence establishes:

(*a*) The average yearly flow of the Laramie River, in Wyoming, is not a proper measure of the supply practically available there from year to year. P. 471.

(*b*) Computation should be based on the unalterable need for a supply that is fairly constant and dependable, or susceptible of being made so by storage and conservation within practicable limits; substantial stability of supply being essential to successful reclamation and irrigation. P. 480.

(*c*) The reasonable measure of the supply available in Wyoming for practical use is not the lowest natural yearly flow, but something considerably greater, obtainable by storage. P. 484.

(*d*) So measured, the entire supply, from the Laramie and from certain tributaries in Wyoming, available for Wyoming appropriations here involved and for the proposed Colorado appropriation, is 288,000 acre-feet per annum. P. 488.

(*e*) The Wyoming appropriations senior to the proposed Colorado appropriation require 272,500 acre-feet, and the overplus available for that appropriation is therefore restricted to 15,500 acre-feet, per annum. P. 496.

11. Permits, issued by the State Engineer of Wyoming, to appropriate water in specified quantity from the stream, are mere licenses, and not adjudications that a surplus subject to appropriation exists. P. 488.

12. The proposed Colorado appropriation is to be dated from the time when the project became a fixed plan with a definite purpose, and when work upon it was begun; not related back to an earlier date, when the project was inceptive and uncertain; and, by the same rule, several of the Wyoming appropriations are treated as relating to dates later than those claimed for them. Pp. 490–495.

THIS was an original suit, brought in this court by the State of Wyoming against the State of Colorado and two Colorado corporations, for the purpose of preventing a diversion of part of the water of the Laramie River, a stream flowing from Colorado into Wyoming. The facts are fully stated in the opinion, *post,* 455. The bill was filed on May 29, 1911. A motion to dismiss, equivalent to a demurrer, was argued and, on October 21, 1912, was overruled without prejudice. The case was argued, and twice reargued, on final hearing, the United States participating in the last two arguments, by leave of the court.

In the following summaries of the arguments made upon the last occasion, discussion of the facts is for the most part omitted.

Mr. N. E. Corthell and *Mr. John W. Lacey,* with whom *Mr. Douglas A. Preston,* Attorney General of the State of Wyoming, *Mr. John D. Clark* and *Mr. Herbert V. Lacey* were on the briefs, for complainant.

In Colorado and Wyoming, and in every other State where irrigation is practiced, it is held to be the only equitable rule that the rights of a prior appropriator shall be considered exclusive, and that he shall at all times take from the stream such amount of water as he needs up to the full amount of his appropriation, without any requirement that he divide with other appropriators in times of scarcity. He is not obliged to build reservoirs, nor store the water, but may take it from the stream as it was running when he first appropriated; he is not required to

make any expenditures whatever, in order that others may have water. Indeed, to require that he shall incur the expense necessary in storing water would often be to destroy his priority, since the expense would be more than the value of his prior right. 1 Wiel, Water Rights, 3d ed., § 279; 2 Kinney, Irrigation, 2d ed., § 801, p. 1398; *Conant* v. *Deep Creek Co.*, 23 Utah, 627; *Hill* v. *Smith*, 27 Cal. 476, 482; *Smith* v. *Denniff*, 24 Mont. 20; *Phoenix Water Co.* v. *Fletcher*, 23 Cal. 482; *Wyatt* v. *Larimer & Weld Co.*, 18 Colo. 298; *Comstock* v. *Ramsey*, 55 Colo. 244; *Barnes* v. *Sabron*, 10 Nev. 217; *Willey* v. *Decker*, 11 Wyo. 496; Rev. Stats. § 2339; *United States* v. *Rio Grande Co.*, 174 U. S. 704.

The rights of the prior appropriator are especially active in time of water deficiency. *Avery* v. *Johnson*, 59 Wash. 332; *Huning* v. *Porter*, 6 Ariz. 171; 1 Wiel, Water Rights, § 301.

In accordance with these principles, Wyoming, during the irrigation season of each year, is entitled to the flow of the stream as it may at the time naturally flow, up to the amount necessary to supply the Wyoming appropriations that are prior in time to the inception of the Colorado attempt at diversion. All of the evidence, without contradiction, shows that, in practically every year during the irrigation season, the entire stream flow is not only taken by the Wyoming prior appropriators but is necessary for the purposes of irrigating their lands; and in many of the years—dry years as they are called,—the water in the stream is insufficient for the concededly prior Wyoming appropriations. If the water were being diverted by Colorado into reservoirs within the watershed, then the objection to such diversion would be less serious. If it were diverted within the watershed, it would not be difficult, under the Wyoming system, or indeed under any system, to require the owners of the reservoir in the watershed into which the water is diverted to turn it back into

the stream for the use of the prior appropriators. But in the case at bar, Colorado's diversion will take the water to a place where it will be impossible to return it to the stream, and therefore in every year when the water in the stream may turn out to be less than the amount of the prior Wyoming appropriations plus the Colorado diversion, irreparable wrong will be done to the Wyoming appropriators, and in most of the years the wrong will go to the extent of entirely depriving many of the Wyoming appropriators of water. But in not more than one year in seven could any substantial fraction of seventy thousand acre-feet of water be taken during the irrigating season without depriving the Wyoming prior appropriators of necessary water.

We submit, therefore, that, if the state line between Colorado and Wyoming leaves the rights of appropriators as if all were in the same State, it is clear that the Wyoming appropriators have the right to the water during practically every year; that the years when they will not need it all cannot be ascertained in advance, and that the diversion as intended by Colorado, because of its character and the place to which it will take the water, will in most years cause such injury and damage as entitle the Wyoming appropriators to injunctive relief.

The question of the effect of state lines upon the rights of appropriators in different States has been before the courts of the arid region in a number of cases. The universal holding is, that priority of appropriation gives priority of right on interstate streams, the same as on streams wholly within one State. *Hoge* v. *Eaton,* 135 Fed. 411, 414 (reversed on another point, 141 Fed. 64); *Taylor* v. *Hulett,* 15 Idaho, 265; *Conant* v. *Deep Creek Co.,* 23 Utah, 627; *Willey* v. *Decker,* 11 Wyo. 496, 533; *Farm Investment Co.* v. *Carpenter,* 9 Wyo. 110; *Howell* v. *Johnson,* 89 Fed. 556; *Anderson* v. *Bassman,* 140 Fed. 14; *Morris* v. *Bean,* 123 Fed. 618; 146 Fed. 423; 159 Fed. 651,

655; *Miller* v. *Rickey*, 127 Fed. 573; 152 Fed. 11, 17; s. c. 218 U. S. 258; *Bean* v. *Morris*, 221 U. S. 485; 3 Kinney, Irrigation, § 1225.

Both Colorado and Wyoming are at the crest of the continent. They have both adopted to its broadest extent the doctrine of prior appropriation. And, whether it can stand alongside the doctrine of riparian rights in the same jurisdiction, (as it actually does in a majority of the irrigation States), or is so antagonistic as to exclude the latter, we believe that, for the purposes of the decision of this case, the doctrine of prior appropriation must furnish the rule. The people of both States, by their constitutions, have declared that doctrine to be the just and reasonable doctrine throughout the area involved in this litigation, and, by their legislatures, have reiterated the same doctrine, and provided numerous rules and regulations for carrying it out in both States. The courts in both States have given their adherence, even to the extent of saying that the rule was in force in each State long prior to any constitutions or statutes on the subject. Therefore, so far as the parties here are concerned, that rule and doctrine must be held reasonable and just, and neither State could complain of its use in settling the controversy here.

The facts in the case at bar would permit, and even justify, a decision of this cause on the general principles of prior appropriation, without deciding anything as to the rights of different States whose differing climates have caused the adoption of rules and principles differing in the one State from those in the other.

We realize that the doctrine of prior appropriation is not recognized in all the States, and that, if general principles are to be here decided, such as shall apply to all interstate streams, and boundaries shall be here fixed to the rights of differing States in interstate streams applicable to all circumstances, in reaching such universal prin-

ciples and conclusions there are many and serious problems entirely outside of mere appropriation problems.

Waters falling in Colorado flow out of that State, some to the Gulf of California, and some to the Gulf of Mexico; and it would be entirely possible within that State to construct diverting systems which would turn waters, naturally tributary to the flow into the Gulf of Mexico, into the streams emptying into the Gulf of California. The States through which the waters would run, in case of such diversion, would be different from those through which they would run naturally. The same situation exists in Wyoming, even to a greater degree. It would be entirely possible in Wyoming to construct diversion works such as would turn large bodies of the water from one great river system into another. Each State receiving water from Wyoming has great need for the water. In the case of at least two of the systems, the water from Wyoming flows into and through States which refuse to recognize rights by prior appropriation as superior to riparian rights. In some cases the needed flow from Wyoming is into States which fully recognize the doctrine of prior appropriation. We recognize that Wyoming, if allowed to divert the waters from one stream and one system to another, could inflict vast injury upon sister States. It may not be amiss, therefore, for this court to consider in the decision of this case, the general question of the effect of its decision on the problems which would naturally grow out of the attempt upon the part of Wyoming or Colorado to use within their own boundaries methods of diverting water such as will become injurious to sister States.

The streams rising in Colorado and Wyoming but illustrate the very general character of the questions involved, if rules are sought applicable universally to rights on interstate streams. The stream in the case at bar rises in Colorado, and flows into and through Wyoming, and thence into Nebraska, and on down into other States where

the riparian-rights doctrine pure and simple is adopted. The rights of Wyoming might easily be ground between the upper and nether millstone, if Colorado should be permitted to take a large share of the water on some general principle of prior appropriation, while at the same time Nebraska and lower States could require Wyoming to permit the waters to flow on down into the lower States, practically undiminished in quantity.

The situation for Wyoming will be still worse—far worse—if Colorado shall be permitted to ignore the Wyoming rights acquired by prior appropriation, and, also at the same time all riparian rights, by taking waters for use not only within the watershed, but also without, while leaving Nebraska and lower States the power to compel Wyoming to yield to Nebraska riparian rights.

[Counsel then referred to decisions of the court in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Kansas* v. *Colorado*, 206 U. S. 46; *Rickey Land Co.* v. *Miller & Lux*, 218 U. S. 258; *Bean* v. *Morris*, 221 U. S. 485; also to 3 Kinney, Irrigation, §§ 1225, 1227, 1230; to the opinion of Attorney General Harmon, 21 Ops. Atty. Gen. 274, and a letter of Mr. Evarts, 1 Moore, Int. Law Dig., 653, concerning the rights of this country and of Mexico to the waters of the Rio Grande, and to the case of *United States* v. *Rio Grande Co.*, 174 U. S. 690, and the Treaty with Mexico of May 21, 1906, 34 Stat. 2953.]

It is apparent that nothing in any of these quotations or discussions draws in any clear way the lines bounding the rights of a State, as distinguished from those of its citizens, in the waters of an interstate stream. Nor is there anything in any clear way marking out the principles upon which equitable division of waters shall be made in such streams. These matters are left to be determined by rules that may be worked out, or by analogies from rules governing such matters where the adjoining proprietors, instead of being States, are individuals. Some of the

suggestions of this court seem to hint that such rules "may be more or less analogous to common-law rights between upper and lower proprietors." (218 U. S. 258.)

A just criticism has often been made on precedents established in interstate relations, to the effect that many such precedents are almost solely the result of *vis major*. It is to be hoped that the tendencies in dealings between States are in the direction of principles of right and justice; in other words, equitable principles. When such principles are sought and applied in international relations, they are found to approximate more and more closely the equitable principles governing relations between individuals.

The parties to this controversy are not permitted to make war upon, nor even to make treaties with, one another. Their controversy is, therefore, brought to this court to be here determined. If the case is to be ruled by principles of law already discovered, so far as we can see they are ruled by principles governing between private persons. The precedents as to international rights on international streams are scarcely sufficient upon which to base any rule, and, such as they are, they are contradictory; even this Government contending, now that riparian rights govern when diversions of water were made within the boundaries of a foreign government, and again contending that the foreign government has no right to complain when diversions were made within the boundaries of this country, and still later, while in words protesting that it was not doing so, in deeds recognizing the rights of those injured by diversions within our territories.

The Roman law, as appears from the Pandects of Justinian, adopted the principles of riparian rights, and apparently allowed something in the way of irrigation and of equitable division of waters for that purpose. The same is true of the Code Napoleon, Art. 644, and of the

Mexican law at the time of the acquisition of our Mexican territory, including Colorado and large parts of Wyoming. 1 Wiel, Water Rights, pp. 68, 685, 1026. But in all these jurisdictions, while water was to an extent used for irrigation, riparian rights were held superior to rights for irrigation.

It is needless to cite authority to show that in Great Britain, and in most of the States of the Union, while there has been some limited right to use water for irrigation, still the rights of the riparian proprietor are superior. In all the jurisdictions above mentioned, the riparian proprietor had the right to insist that the use of water should not unreasonably reduce the flow of the stream, should be confined within the watershed, and the surplus be returned to the stream.

There are eighteen of our own States and Territories which may be denominated generally the irrigation States, inasmuch as in each there is more or less of arid land requiring irrigation, and the laws recognize, more or less, irrigation rights. In ten of these, while the use of waters of streams for irrigation is permitted, the riparian proprietor is recognized as having the superior right, and the waters are not permitted to be diverted by the irrigators beyond the watershed; but the surplus must be returned to the original stream. 1 Wiel, Water Rights, p. 849; 1 Kinney, Irrigation, p. 782; 2 Farnham, Waters, p. 1572; 3 *id.*, p. 1903; *Wiggins* v. *Water Co.*, 113 Cal. 182; *Bathgate* v. *Irvine*, 125 Cal. 135; *Southern California Co.* v. *Wilshire*, 144 Cal. 68; *Anaheim Water Co.* v. *Fuller*, 150 Cal. 327; *Clark* v. *Allaman*, 71 Kans. 206; *Watkins Land Co.* v. *Clements*, 98 Tex. Civ. App. 578; *Matagorda Co.* v. *Markham Co.*, 154 S. W. 1176.

In the other seven irrigating States, viz., Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming, fuller rights of appropriation are recognized, and apparently the right is recognized to take water outside the

watershed, even over the objections of those within it. But in none of these States is any diversion from the watershed permitted on any principle of equitable division, even remotely expressed or implied. On the contrary, each of these States insists upon the doctrine that the rights of a prior appropriator are exclusive, even to the full extent of his prior appropriation. No division of the waters which would take anything from the prior appropriator to his injury is recognized as in any sense equitable.

This court, in *Kansas* v. *Colorado,* reached a conclusion that, on the facts in that case, equitable division of the waters was a reasonable principle, as between adjoining States on an interstate stream. As we understand that case, this principle of equitable division was not evolved as a new principle, but was a mere application of the doctrine of equitable division as between private riparian owners. No rules for equitable division were there laid down, nor were any such rules even discussed, excepting by a reference to rules of division between riparian owners.

The equitable division was all within the watershed. No question arose there of permitting such division as would carry waters without the watershed. One would search in vain for any doctrine of equitable division of waters which would permit one proprietor to carry the waters without the watershed, with no obligation to return them to the stream, in any State or country administering the rule of riparian rights. In the seven States, possibly the most arid, as we have seen, no doctrine of equitable division of the waters is allowed.

It is interesting, moreover, to note that there are at least tendencies in some of these States, constituting the seven last above mentioned, to recognize rights of owners along the stream and to restrict the diversion beyond the watershed. Nevada Laws, 1907, c. 18, § 4, p. 31; New Mexico

Laws, 1907, c. 49, § 72, p. 95; *Hutchison* v. *Watson Ditch Co.*, 16 Idaho, 484; *Anderson* v. *Bassman*, 140 Fed. 14.

This court has in many cases considered the rights of States as against one another. *Missouri* v. *Illinois*, 180 U. S. 208; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Kansas* v. *Colorado*, 185 U. S. 125; 206 U. S. 46, and cases cited by these. It is clearly established by this court that a State does not have a right to do acts within her own borders which shall affirmatively cause injury in another State. The question of the sovereign right of Colorado to take the waters as she will, is one so fully settled by this court that, even if the principle claimed by Colorado were much better founded, in reason, we should not feel it necessary to discuss it further.

Mr. Victor E. Keyes, Attorney General of the State of Colorado, *Mr. Delph E. Carpenter* and *Mr. Platt Rogers*, with whom *Mr. Leslie E. Hubbard, Mr. Fred Farrar, Mr. Julius C. Gunter* and *Mr. Ralph E. C. Kerwin* were on the briefs, for defendants.[1]

The rights of the States here involved necessarily include the rights and claims of their respective citizens. *Kansas* v. *Colorado*, 206 U. S. 46, 85. It is as though the controversy were between independent Nations. *Missouri* v. *Illinois*, 180 U. S. 208; 200 U. S. 496; *Kansas* v. *Colorado*, 185 U. S. 125; 206 U. S. 46; *Rickey Land Co.* v. *Miller & Lux*, 218 U. S. 258; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, 238. Nations have absolute dominion of everything within their boundaries, including the waters, and the property rights of the individual are

[1] The case was argued on behalf of the defendants, at the hearing in 1916, by *Messrs. Farrar* (then Attorney General of Colorado), *Carpenter* and *Gunter;* and at the hearing in 1918, by *Messrs. Hubbard* (then Attorney General of Colorado), *Farrar, Carpenter* and *Rogers.*

such only as the State may grant him. Vattel, Law of Nations (Chitty ed., 1872) pp. 53, 120, 123, 125, 148, 149, 163, 164; *The Exchange,* 7 Cr. 116, 136; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 733, 734.

Each State of the Union, new or original, has the same unlimited jurisdiction over persons and things within its territorial limits as any Nation, where that jurisdiction has not been surrendered to the United States by the Constitution. *New York* v. *Miln,* 11 Pet. 102, 139; *Chisholm* v. *Georgia,* 2 Dall. 419, 435; *Texas* v. *White,* 7 Wall. 700, 725; Taylor, Int. Law, § 124; Whart. Dig. Int. Law, § 1; *Pennoyer* v. *Neff,* 95 U. S. 722; *Kansas* v. *Colorado,* 206 U. S. 46, 93.

Each of the new States is possessed of the same powers and jurisdiction over the streams within its borders as were retained by the original States, and the sovereign powers exercised by Congress over the Territories passed to the new States upon their admission, including jurisdiction of streams within their borders, with the right to determine the use that may be made of their waters by individuals, except as Congress may control navigation. The uses recognized as limited property rights in the citizen have been determined by each State according to its own necessities, and fixed by its local laws and decisions; and the United States and its courts have adopted the state laws, regulations and court decisions, as the rules controlling within their respective jurisdictions. Congress, whenever it has legislated upon the subject with respect to public lands, has specifically recognized these local laws, customs and court decisions as controlling the regulation of streams within the States.

From the earliest decisions of this court to the present time, all uses of water for navigation, fisheries, power, domestic, irrigation, and other beneficial purposes, have been treated as within the sovereign jurisdiction and con-

trol of the several States, save alone for the federal control of navigation.[1]

Acts of Congress and decisions of the courts and the Land Department, declare the jurisdiction of the public land States over the waters within their domain, in so far as the United States is concerned.[2]

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[1] *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Martin* v. *Waddell*, 16 Pet. 367, 409, 410; *Pollard* v. *Hagan*, 3 How. 212, 220, 221; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Barney* v. *Keokuk*, 94 U. S. 324; *McCready* v. *Virginia*, 94 U. S. 391; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *St. Louis* v. *Myers*, 113 U. S. 566; *Hamilton* v. *Vicksburg, S. & P. R. R.*, 119 U. S. 280; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Race Horse*, 163 U. S. 504; *Manchester* v. *Massachusetts*, 139 U. S. 240; *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254; *Shively* v. *Bowlby*, 152 U. S. 1, and cases cited; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87; *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S. 365; *St. Anthony Falls Co.* v. *Water Commissioners*, 168 U. S. 349; *United States Freehold Land & Emigration Co.* v. *Diego Gallegos*, (U. S. C. C., Colo., 1898); *United States* v. *Rio Grande Co.*, 174 U. S. 690, 702–6; *Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545, 552, 553; *Clark* v. *Nash*, 198 U. S. 361; *Manigault* v. *Springs*, 199 U. S. 473; *Whitaker* v. *McBride*, 197 U. S. 510; *Bacon* v. *Walker*, 204 U. S. 311; *Kansas* v. *Colorado*, 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Hudson Water Co. v. McCarter*, 209 U. S. 349; s. c. 70 N. J. Eq. 525, 695; 3 Kinney, Irrigation, 2d ed., p. 2224; *Waldbridge* v. *Robinson*, 22 Idaho, 240; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339; *McGilvra* v. *Ross*, 215 U. S. 70; *Synder* v. *Gold Dredging Co.*, 181 Fed. 62; *Marshall Dental Co.* v. *Iowa*, 226 U. S. 460; *Scott* v. *Lattig*, 227 U. S. 229; *United States* v. *Cress*, 243 U. S. 316.

[2] Acts of July 26, 1866, 14 Stat. 253; July 9, 1870, 16 Stat. 218; March 3, 1877, 19 Stat. 377; March 3, 1891, 26 Stat. 1095; August 18, 1894, 28 Stat. 422; March 2, 1897, 29 Stat. 603; February 26, 1897, 29 Stat. 599; June 17, 1902, 32 Stat. 388; February 21, 1911, 36 Stat. 925; *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670; *Broder* v. *Water Co.*, 101 U. S. 274; *Jennison* v. *Kirk*, 98 U. S. 453, 456; *United States* v. *Rio Grande Co.*, 174 U. S. 690;

The Colorado enabling act and the proclamation of the President, admit the State to the Union "on an equal footing with the original States in all respects whatsoever." 18 Stat. 474; 19 Stat. 665. The constitution, made in pursuance of the enabling act, and approved by the proclamation, declares that the water of every natural stream, not already appropriated, is the property of the public and dedicated to use of the people of the State, subject to appropriation as provided. It thus appears that, on her very admission, and as a part of the solemn transaction, Colorado asserted her full sovereign dominion over the waters of her streams, and that this assertion was then and there approved by the United States. These provisions of her constitution have been many times upheld by her courts;[1] and her claim to full jurisdiction over the waters within her borders has been repeatedly asserted by her legislature. (Citing many acts.) Wyoming has assumed the same attitude.[2] She, likewise, refuses to permit the diversion of waters in Wyoming for use in other jurisdictions.

The two States, therefore, are at one, in asserting full and exclusive sovereign control; in permitting usufructuary rights to their citizens according to the appropriation doctrine; and in denying these privileges to other States and their citizens.

Gutierres v. *Albuquerque Land Co.*, 188 U. S. 545; *Kansas* v. *Colorado*, 206 U. S. 46; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339; *Twin Falls Canal Co.* v. *Foote*, 192 Fed. 583; *Stanfield* v. *Umatilla River Water Users Assn.*, 192 Fed. 596; *Withdrawal of Public Lands for Irrigation Purposes*, 32 L. D. 254.

[1] See *Wheeler* v. *Northern Colorado Irrig. Co.*, 10 Colo. 582; *Ft. Morgan Co.* v. *South Platte Co.*, 18 Colo. 1; *Stockman* v. *Leddy*, 55 Colo. 24.

[2] Wyo. Const., Art. VIII, §§ 1–5; Wyo. Comp. Stats. 1910, § 724, p. 247; *Farm Investment Co.* v. *Carpenter*, 9 Wyo. 110; (distinguishing *Willey* v. *Decker*, 11 Wyo. 496); *Grover Irrig. Co.* v. *Lovella Ditch Co.*, 21 Wyo. 204.

It might be said that the United States, in admitting these States with their constitutions as they are, gave recognition to their claims amounting to a grant. *Farm Investment Co.* v. *Carpenter,* 9 Wyo. 110. But their jurisdictions and rights are not so dependent, but rest directly on the Federal Constitution. *Stockman* v. *Leddy,* 55 Colo. 24; *Kansas* v. *Colorado,* 206 U. S. 46; *United States* v. *Hanson,* 167 Fed. 881.

The doctrines of riparian rights and of appropriation are local rules for determining the private rights of citizens in particular States—usufructuary rights in the property of the State, which, in the final analysis, must yield to the will of the State and her eminent domain.[1]

They have no extra-territorial force, either for or against the State. Story, Conflict of Laws, c. 2, pp. 19–34; *Pennoyer* v. *Neff,* 95 U. S. 714, 720. The State has an interest, independent of and behind the title of its citizens. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *Kansas* v. *Colorado,* 206 U. S. 46, 99; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 354–357.

That private rights in waters of interstate streams cannot determine the rights of States *inter sese,* is recognized in *Rickey Land Co.* v. *Miller & Lux,* 218 U. S. 258, 260, 261; and *Bean* v. *Morris,* 221 U. S. 485. The assumption of concurrence or acquiescence made in those cases, whereby rights might be acquired in one State for enjoyment or use in another, cannot be applied in the case of Colorado. And the question of constitutional protection, passed in *Bean* v. *Morris, supra,* 488, cannot arise here, since, with the exception of one small appropriation, no

[1](*a*) Riparian rights. 3 Kent Com., § 439; 2 Black. Com., pp. 14, 18; *McCarter* v. *Hudson Water Co.,* 70 N. J. Eq. 525; 70 N. J. Eq. 695; s. c. 209 U. S. 349, 355; *St. Anthony Falls Co.* v. *Water Commissioners,* 168 U. S. 349; *Whitaker* v. *McBride,* 197 U. S. 510, 511.

(*b*) Rights by appropriation. *United States* v. *Rio Grande Co.,* 174 U. S. 690, 702; *Kansas* v. *Colorado,* 206 U. S. 46, 94.

use whatever had been made of the waters of the Laramie River prior to the admission of Colorado, in 1876; and substantially all of the Wyoming development has occurred since that date, and a large part subsequent to the Colorado project here complained of.

Even were we to assume that Colorado had not, since 1876, expressly denied recognition of all extra-territorial claims, the fact remains that there is no concurrence of laws upon which to base a presumption of interstate servitudes. Both States assert full ownership and control over the waters within their borders and abolish the system of riparian rights. Beyond this the systems diverge.

The doctrines of riparian rights and of appropriation both are fundamentally inapplicable to the regulation of rights between States, which stand upon an equality "in all respects whatever," to the same degree as independent Nations. Each State depends for its existence primarily upon its natural resources, of which water, in the arid regions, is frequently the most valuable. Self defense compels the State to withhold its resources for the benefit of future as well as present generations and for the welfare and perpetuity of the State. With independent Nations, these natural resources, if need require, must be defended by the sword. But with States of the Union this court must determine the controversy. *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46; *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496.

If the rule of riparian rights were to control the settlement of this controversy, Colorado would be forever deprived of all but the most insignificant use of her own waters in the Laramie, and her fertile but arid lands would remain forever unproductive, by reason of the fact that only the lands of the narrow mountain valleys in Colorado are riparian; and these waters, imperative to her present and future development and welfare, would

pass forever into Wyoming, there to be used, enjoyed or wasted, or pass to the sea. On the other hand, by the doctrine of appropriation, if physical conditions had permitted, all waters of this stream, those rising in Wyoming included, might have been diverted within the latter State, and carried into and applied to land in Colorado; and, if all this were prior to Wyoming developments, Colorado could forever after prevent Wyoming from the use, not only of the Colorado waters, but of those rising in Wyoming as well.

Canals and diversion works are usually first constructed where no natural obstacles interfere. Infant Nations or States can little afford to undertake projects which, in their later history, their accumulated energies often accomplish with apparent ease. Prior appropriation is very frequently the accident of physical location; and, were the rule to apply between States, their destiny would be determined, not by their present or future necessities for use of their natural resources, but rather by accident. While, to be sure, the rule does apply to individuals within the State, in their case the preference of the first taker is within the governmental powers of the State; and, in disposing of its resources to the most ultimate good, inasmuch as the water, if parceled among the many, would benefit no one, the State may determine to whom the exclusive use may be given, in order ultimately to bring to the State and its people the greatest benefit with the least waste; and, furthermore, the State, whenever it may so desire, by the power of eminent domain, may take away all vested usufructuary rights and establish some new plan adapted to future conditions, only perhaps in the future to again condemn and establish still a different order of things.

But we can not agree that among Nations or States, with equal powers and sovereign rights, one may claim through its citizens, by mere first use, a preferred and

exclusive right perpetually to use for its benefit waters rising within and flowing from the domain of its neighbor, thereby to deny forever to the Nation or State of origin a part or all of the benefit of its own stream, be its necessities ever so great. Waters that rise and flow from one State into another are forever lost to the former unless there used, and any rule which forbids this use denies to that State the benefit of its inherent sovereign right to enjoy its own and maintain itself within its domain. It would be, in effect, to invade and take the domain of one State and to give it to another, without consent or compensation. It would be the assertion by a foreign State of jurisdiction over a portion of the domain of another State.

The usufructuary rights of the individual citizen of Wyoming are defined by the constitution, laws and decisions of the courts of that State. But the local law of Wyoming can have no extra-territorial effect, and especially when prejudicial to the rights of other States. Story, Conflict of Laws, § 32, p. 29; *Farnum* v. *Blackstone Canal Co.*, 1 Sumner, 46, 62; *The Exchange*, 7 Cr. 116, 136; Cooley, Const. Lim., 7th ed., p. 176; *Hilton* v. *Guyot*, 159 U. S. 113. One State cannot expropriate property within the territory of another State. I Whart. Int. Law Digest, pp. 38, 39; *Crosby* v. *Hanover*, 36 N. H. 404, 423; *Holyoke Water Co.* v. *Connecticut River Co.*, 52 Conn. 570, 575, 576; *McCarter* v. *Hudson Water Co.*, 70 N. J. Eq. 695, 717.

The fundamental rule that one Nation cannot exercise its sovereign power and jurisdiction over the waters or domain of another Nation without its consent and cannot expropriate the waters of an upper Nation for the use of the lower Nation by claim of prior appropriation, even on an international river, has been recognized and followed by the United States in its relations with Mexico. 21 Ops. Atty. Gen. 280–283. When the United States, as a

matter of international policy but not of international law, settled the differences over the Rio Grande with Mexico, it took the precaution so to word the treaty that the adjustment could never be taken as a recognition of any lawful claims by Mexico. Treaty of May 1, 1906, Art. V, 34 Stat. 2953.

As we understand the term "equal," when used with reference to the States, it refers to that equality in the family of States which obtains with Nations in the family of Nations. Each State has an equal right, not only to govern itself, but as well to maintain itself and improve its domain, increase in population and promote for the present and for all time the general welfare of itself and its citizens. But if, (purely by way of illustration) we were to use a narrower construction, and say that equal States have the right to enjoy an equal part of an interstate stream, even then the doctrine of appropriation is inapplicable, for it takes from one State an exclusive (not equal) portion of the waters of the stream, and gives it to the other without remuneration.

Priority is a rule of the past and not of the future. States must look to the future more than to the past. *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355. The State may find its future needs so imperative that it must extinguish, by eminent domain, even the usufructuary property rights it has permitted its citizens, and take the waters for a greater need. How, then, could the limited right of a State, determined upon rules of priority of appropriation, as regards another State, be reconciled with its future imperative necessities?

How solve the problem, if one State has adopted the law of appropriation and the other the modified doctrine of riparian rights? What would be the result, if the principle of appropriation were applied as between two appropriation States and, thereafter, one should change and adopt the common-law doctrine of riparian rights? De-

termination of the rights of the various appropriators in the two States upon the basis of priority would be thrown into complete confusion. Neither State can legislate for or impose its own policy upon the other; Congress cannot enforce either rule upon any State.

The unnecessary loss, occasioned by depriving the State of origin of control of its waters, and by causing the water to pass down losing streams in order to supply some prior appropriator in another State, would appear to be wasteful, and inept, and so inequitable and unjust.

Could any advocate of the doctrine of appropriation regardless of state lines advance any hypothesis upon which a stream and its tributaries, like the Colorado River, flowing within or bordering six States and a foreign country, could be administered, and the water apportioned to the various appropriators in the seventeen hundred or more miles of its length, upon the basis of priority of appropriation?

If priority of right regardless of state lines is the principle which governs this controversy, how are the rights of the respective individuals in Wyoming and Colorado to be determined, having due regard to the conflicting laws of each State; and, after determination, how are they to be enforced? Possibly this court might appoint an officer or direct a United States marshal to organize a body of men to police the stream and divide the water according to the priorities which this court might undertake to adjudicate; but the very suggestion shows the absurdity of the contention. No such procedure was ever in contemplation either by Congress or by the respective States where water is used for irrigation. The entire adjudication and administration of priorities is founded, and has been constructed, on the theory of state control, and is utterly in conflict with any other theory. Manifestly, the doctrine of priority of appropriation does not adapt itself to interstate questions. Diversion and uses of water under the rule of priority require the most rigid police regulation.

The state courts, understanding as they do the local conditions and necessities, are in the best position to adjust conflicts between individual appropriators. But, if priorities must obtain irrespective of state lines, local courts will be shorn of their jurisdiction and some other court or tribunal will of necessity assume the task. The difficulties are greatly enlarged when appropriations by reservoirs and the complicated system of exchanging water are taken into the account. Taking the Platte River and its branches, for illustration, it may be estimated that administration under the rule of priority, irrespective of state lines, would require readjudication and police regulation of upwards of 4,000 diversions already established and decreed by state authorities in Colorado, Wyoming and Nebraska, and, in the years to come, probably a like number of new and now more or less incomplete enterprises. In view of the fact that the right of each appropriator is limited to his actual necessities each day, and that his diversions must constantly be regulated and restricted accordingly; and in view of the complications arising from exchanges and other administrative features existing upon each of the tributaries, as well as upon the stream itself; it is self-evident that the difficulties confronting interstate administration of the Platte River would become so involved that, to give each appropriator his just dues, and no more, and at the particular time his necessities demanded, would be next to impossible. If such should be declared to be the rule, the rights of all must be protected and enforced, the least must receive the same consideration as the greatest, and that, too, at the particular time when the crop demands water in order that loss may be avoided.

Yet state officials and tribunals are confined in power to their own borders, and bound by local laws, rules and regulations. They can not adjust conflicting claims or determine rights of foreign users. Different systems in

different States invite irreconcilable conflict and insoluble administrative problems.

If this court should decide that the private usufructuary rights of the individual appropriators preclude the States from asserting greater rights to the river, and that priority shall obtain irrespective of state lines, then such rights must be adjudicated by the court in this and similar cases. This would necessitate a determination not of the rights of the States, but of each individual claimant; and the rights of each, great or small, would have to be separately considered and passed upon. The mere suggestion of the problem portrays the insurmountable obstacles to be encountered.

Then, too, conditions are constantly changing. New and conflicting rules and laws may become imperative in Colorado, Nebraska and Wyoming. Who then shall enact these laws? The subject is no longer within the control of the States, because their jurisdiction has been denied them. Congress cannot legislate, for it has no power so to do. 206 U. S. 90–92. The canals divert waters from streams washing lands long since passed into private hands, and not public lands of the United States. This court cannot legislate. Who then shall remedy the evil or supply the new rule?

It would seem, from the opinion in *Kansas* v. *Colorado,* 206 U. S. 46, that any doctrine of equitable apportionment of the waters of rivers between States must be founded upon a broad basis of equitable consideration of all the facts of each case as they appear, with full regard to the equal rights of States of equal dignity, powers and jurisdiction, and not upon the narrower basis of local laws governing mere usufructuary rights of private citizens. But even though we here construe that decision within the narrower limits and assume an equal apportionment of the waters of the stream, we here find that the Laramie River rises not in one but in both States. The waters of

the Wyoming part of the stream, as well as those of the Colorado branch, are available to Wyoming and her citizens. On the other hand, natural conditions are such that Colorado is limited to use of but a part (91/250) of the waters of that branch which rises and flows within her borders. Whatever the injury might be to Wyoming (though none has been proved), this would not appear to be an inequitable use of her own resources by Colorado.

A greater degree of caution is manifest in such controversies as this, than would obtain in suits between citizens within the same or different jurisdictions. The complaining State should be required to establish the injury and its right to relief upon the clearest and most indisputable testimony, before this court would be warranted in preventing the other State from exercising its sovereign control over its natural resources. *Missouri* v. *Illinois,* 180 U. S. 208, 248.

Wyoming has wholly failed to prove the allegations of her bill, and even more, has by her own conduct denied her charges against Colorado by permitting appropriations for and authorizing construction of many new and enormous enterprises in Wyoming, long junior to the Colorado enterprise of which she complains and drawing water from the same stream; and, irrespective of other conclusive proof, has thereby admitted that there was and is ample water in the stream to supply all appropriations junior, as well as senior, to the Colorado enterprise, and that no injury could result to senior appropriations in Wyoming by reason of the Colorado diversion; and that by her official acts, she has contributed to the very depletion whereof she complains. Further, the proof shows that, not only is there ample water in the stream for use of all Wyoming enterprises, but, as well, that Wyoming needlessly wastes more water than will be withdrawn from the stream by Colorado. And, furthermore, the proof reveals, without contradiction, that Wyoming is not only

diverting from the drainage of the Cache la Poudre over into that of the Laramie, but generally recognizes and permits such diversions, by official sanction and decrees of her courts, within her own territory, and by means thereof she has been able to effect her most valuable reclamation and development. No proof was offered in support of her claims as a riparian owner and, on the other hand, by her constitution, laws and decisions of her courts, she has abolished and denied any such; and, lastly, she has offered no sufficient proof whereby this court could adjudicate and determine the relative rights of appropriation within either Wyoming or Colorado, if such a rule as she alleges were here applied.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. John F. Truesdell,* Special Assistant to the Attorney General, were on the brief, for the United States.[1]

The attitude of the executive branch of the Government is, briefly, that the United States has not surrendered to the States or parted in any way with its original right to use the surplus waters (those not appropriated by others under its own laws) of innavigable streams in the Western States; that the United States is, and always has been, since the cession of the territories now comprised in those States, the owner of all the unappropriated and surplus waters; that the appropriated waters there have been granted by the United States under its own laws, using local customs and state laws as subordinate instrumentalities only; that the rights of the States, both as the actual owners of lands granted to them and as the ultimate owners of the property of their citizens, so far as

[1] *Mr. Solicitor General Davis* argued the case on behalf of the United States, at the hearing in 1918. *Mr. Assistant Attorney General Kearful, Mr. Truesdell,* and *Mr. Ethelbert Ward,* Special Assistant to the Attorney General, were with him on the brief.

they may be said to be such owners, are confined to such water rights as have been granted by the United States to them or their citizens under the laws of Congress; and that controversies such as this should be decided upon the basis of such federal grants, and without regard to state boundaries.

As for the effect of these questions upon the public interests and governmental policies of the United States, we think it sufficient here to call attention to the vast areas of land still belonging to the United States; to the fact that much of it is in the arid region where land without water to irrigate it, is of little value; to the federal reclamation policy, which depends upon federal use of both land and water and often upon federal use of interstate streams; to the federal Indian policy, where the Government's ability to protect its Indian wards depends largely upon its ownership and control of the waters on reservations and other Indian lands; and, finally, to the fact that, if the water on these public lands be held to belong to the States, the Federal Government will be at the mercy of the States and be helpless as to these policies in a very real sense, because, while under our system the States are represented in and have a powerful influence upon the Federal Government, the United States is not in any way represented in the States, and, both theoretically and as a practical matter can not control or even influence their action.

The United States retains its original plenary ownership of the right of use of innavigable waters in the Western States, except in so far as it has parted with it through acts of Congress; and this property, like the property in the public lands generally, is wholly immune from state interference or control. The state power affects only those rights which have been granted by Congress.

We respectfully suggest the necessity of keeping separately in mind the two questions of, first, whether the

United States or the States own the right of use of the innavigable waters in the Western States, and, second, the effect of a decision of that question upon the rights of these two opposing States in the waters of an interstate stream. It is our contention that federal ownership controls, and offers a logical and workable solution of this question of rights between the States; but, even if we should be wrong in this, we deem it clear that the United States owns the right of use of the waters in and on its public lands within the States, just as it owns the lands themselves, and that such ownership should not be thrown in doubt by any decision as to the broader question of the rights between States.

Upon the acquisition of the territory now comprised within the Western States, the United States became vested with all property rights in that territory except vested private rights and such Indian rights as the United States might choose to recognize. Therefore, whatever property rights exist in water in that territory, whether the water be navigable or innavigable, belonged to the United States until the creation of the States; and, furthermore, such rights are still federal property, notwithstanding the creation of the States unless, first, they are of such a character as to go to the States upon their mere creation as such and because of the character of state sovereignty, or unless, second, they have been granted to the States or to private persons under acts of Congress.

Property rights in navigable waters and their shores and beds become vested in the States on their creation, as a part of their sovereignty, but the rule is different as to nonnavigable waters and their places of occurrence. The States take no property rights in them. Such waters are not *publici juris,* and title to their use is the same as title to land.

Because of its fugitive nature, the only property rights which exist in water in its natural state are rights of use,

the corpus being only susceptible of ownership while in possession. This corpus while in possession is personal property, but the right of use of the water in its natural state is a real property right of the highest dignity and value. *Tyler* v. *Wilkinson,* 4 Mason, 397; *Embrey* v. *Owen,* 6 Ex. 352; 20 L. J. Ex. 212; *Hargrave* v. *Cook,* 108 Cal. 72; *Smith* v. *Rochester,* 92 N. Y. 463, 480; *Gardner* v. *Newburgh,* 2 Johns. Ch. 162, 166; *Insurance Co.* v. *Childs,* 25 Colo. 360, 363; *Davis* v. *Randall,* 44 Colo. 488, 492. 3 Kent. Com. p. 439; Wiel, Water Rights, 3d ed., p. 755; § 711, p. 777 *et seq.,* and numerous cases cited; § 283, p. 298; § 285, p. 301; Long, Irrigation, 2d ed., § 34, p. 70; 2 Kinney, Irrigation, 2d ed., § 769, p. 1328; Washburn, Easements, 4th ed., pp. 316, 317; 2 Washburn, Real Property, 6th ed., § 1284.

Because of the necessity of protecting the public interests therein (mainly navigation and fishery), property rights in navigable waters in England belonged *prima facie* to the Crown; and in this country they belong *prima facie* to the municipal sovereignties, the States. The Federal Government, though having full control (under the commerce clause) for purposes of foreign and interstate navigation, has no right of property in such waters, or their shores or beds, except as it derives it from the States, either by grant or under operation of state law. *Shively* v. *Bowlby,* 152 U. S. 1, 15, 46, 48; *Hardin* v. *Jordan,* 140 U. S. 371, 381; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 63; *United States* v. *Rio Grande Co.,* 174 U. S. 690.

The crux of the question we are examining is whether innavigable waters are *publici juris,* like navigable waters. Ownership by the States depends upon showing that they are. Such waters are not *publici juris* and ownership of usufructuary rights therein rests upon the same basis and is of the same character as ownership of land. In the first place, it is to be noted that it is now decided beyond any

further possibility of question that the beds and shores of innavigable streams and lakes, even though they are meandered, are owned as ordinary upland is owned, and are not owned by the States. Title to such lands in the public land States comes from the United States and not from the States. *Hardin* v. *Shedd,* 190 U. S. 508. The fact that this court holds that the grantee of the upland from the United States takes to the thread of the stream or not in accordance with the state law, using such law as a rule of convenience merely, in no way weakens this statement. The title comes from the United States, and it is perfectly competent for Congress to change this rule of convenience applied to the grants of the United States if it sees fit. [Cf. *Oklahoma* v. *Texas,* 258 U. S. 574; *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77. Reporter.]

As to the property rights in these innavigable waters themselves, it is to be observed, first, that diffused surface waters and all underground waters were originally looked upon by the law as part and parcel of the soil, and as belonging to its owner. The tendency now is to recognize these waters as distinct from the soil, and as being susceptible of ownership, when out of possession, only as to usufructuary rights therein. Furthermore, the tendency is to treat such rights, not only as interlocking with the rights in the streams and lakes which the underground waters support, but also (even, we think, in the pure appropriation States) as belonging to the several owners of the lands which have access to them. Wiel, Water Rights, §§ 1090, 1124.

Turning to the innavigable surface streams and lakes, it will be found that, in England, it was recognized, at least as early as Lord Hale's time, that the proprietary right in the use and flow of such waters was not in the Crown. Unlike navigable waters, they did not at common law belong *prima facie,* or of common right, to the

sovereign, but did so belong to private persons just as land did. The rule was, and is, the same in our original States; and so, following the same principle upon which this court decided that navigable waters and their shores and beds go to the new States, as well as to the original ones, since it is the States which under our system are the possessors of municipal sovereignty (*Pollard* v. *Hagan,* 3 How. 212, 229, and *Shively* v. *Bowlby,* 152 U. S. 1), we see that neither the new States, nor the original thirteen, have any property rights in innavigable waters by virtue of their sovereignty, or have any different kind of power whatever over them than they have over land. *Smith* v. *Rochester,* 92 N. Y. 463, 473; *Gardner* v. *Newburgh,* 2 Johns Ch. 162, 166; Lord Hale's de Jure Maris, with Judge Cowan's note to *Ex parte Jennings,* 6 Cow. 536, 539–546; *Watuppa Reservoir Co.* v. *Fall River,* 147 Mass. 548, 554, 555, 558, 561; *Home of Aged Women* v. *Commonwealth,* 202 Mass. 422, 433–434; *Opinions of Justices,* 118 Me. 503, 506, 507; *Wadsworth* v. *Smith,* 11 Me. 278, 280, 281; *Chapman* v. *Kimball,* 9 Conn. 38, 40, 41; *Barclay R. R. Co.* v. *Ingham,* 36 Pa. St. 194, 200, *et seq;* Angell, Water Courses, 6th ed., pars. 2, 535; Gould, Waters, 3d ed., par. 46; *Cobb* v. *Davenport,* 32 N. J. L. 369; *Simmons* v. *Paterson,* 60 N. J. Eq. 385, 389; *Attorney General* v. *Delaware &c. R. R. Co.,* 27 N. J. Eq. 631, 638; *Doremus* v. *Paterson,* 65 N. J. Eq. 711, 712. Contra, in part: *McCarter* v. *Hudson Water Co.,* 70 N. J. Eq. 695, affirmed by this court on other and broader grounds. 209 U. S. 349.

General expressions by some of the early writers, and also the existence of prescriptive rights, for a time left some doubt as to whether water, as such, was not *publici juris,* and also as to whether the riparian owner's right to divert the waters on which his land bordered was not dependent in some way upon actual appropriation. Whatever doubt existed in that respect was put at rest in England by a series of cases of which *Mason* v. *Hill,* 5

Barn. & Adol. 1, 23, 24, decided by Lord Denman in 1833, was perhaps the most important. In this country the question had already been disposed of by Mr. Justice Story in *Tyler* v. *Wilkinson,* 4 Mason, 397. Since those cases, it has been settled that, under the common law, both in England and in the United States, the usufructuary rights to innavigable waters belong to the owners of the land bordering on them; that the rights of such owners in the water are in no way dependent upon its use; that such waters are in no proper sense *publici juris,* as, for instance, navigable waters are; that the water right is part and parcel of the title to land itself; and that title to such usufructuary right has the same origin as the title to the land. *Embrey* v. *Owen,* 6 Ex. 352, 368; 20 L. J. Ex. 212; *Ferguson* v. *Shirreff,* 6 Dunlop, 1355, 1374 (Scot's Rev. Reps.)

Undoubtedly the States have the power to control individuals in their use of water. Whatever the power is, it is limited by the provisions of the Fourteenth Amendment protecting vested rights. The power is the same as that which the State has over vested rights in lands. Water rights, under both the appropriation and the riparian doctrines, are vested rights in real property, which can be lost only by grant, condemnation, prescription, or abandonment. The ways in which this power of the State is exercised, of course, will differ in accordance with the kind of property the use of which is to be affected or controlled. Thus, we have regulations limiting the use of land for the public good that would not be at all applicable to water, and, vice versa, we have regulations concerning water that could not apply to land. Wiel, Water Rights, pp. 196, 197; *Robertson* v. *People,* 40 Colo. 119, 124; *Broad Run Co.* v. *Duel Co.,* 47 Colo. 573, 579; *Combs* v. *Farmers Co.,* 38 Colo. 420, 428.

The argument based on the necessities of the arid region wrongly assumes that the riparian system is not suited to

western conditions and that, therefore, the States can dispose of the federal property in water. We think it sufficient here to point out that the main principle of the riparian system is equality of right between the riparian owners; that they among them own the entire right of use of the stream; that any proper use under the circumstances, including, of course, irrigation, is permitted; that rights exactly like appropriation rights can be and frequently are created by grant or condemnation of rights of the riparian owners; that the appropriation system, so called, is not so much a system of owning and using rights as it is a means of acquiring them; that it is an open question whether the correlative rights of the riparian system are not better suited to an irrigation community than the sometimes more definite and less related appropriation rights; and finally, that both classes of rights are now being created out of, and logically rest, under our theory, upon the original federal ownership of riparian rights, and that the argument for state ownership is merely one that it would be better to allow the States to dispose of this class of federal property, and is as applicable to lands as to water.

The fundamental principle of water law, that the corpus of water can only be the subject of ownership while in possession, and that, therefore, water itself in its natural state is owned by no one, has no effect upon the question of whether the title to the usufructuary right therein belongs to the State as a part of its sovereignty.

Water rights now vested in others derive their existence, like titles to land, from the acts of Congress. All interest in water not so granted necessarily remains in the United States. The acts grant nothing to the States, and ratification of state constitutions asserting state ownership of water does not divest the United States of its property rights therein. The earliest acts of Congress affecting innavigable waters show full consciousness of power to deal with

such waters on the public lands. Rev. Stats. § 2476. Acts of May 18, 1796, 1 Stat. 468; March 3, 1803, § 17, 2 Stat. 235; February 20, 1811, § 3, 2 Stat. 642; and March 3, 1811, § 12, 2 Stat. 666; *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 289; *Scott* v. *Lattig,* 227 U. S. 229, 242; *Hardin* v. *Shedd,* 190 U. S. 508, 519. Since the passage of the Act of July 26, 1866, 14 Stat. 251, the disposition of such waters on the public lands has been controlled by that act and by the local laws and customs used as its subordinate instrumentalities. The occasion of this legislation was the extensive occupation and exploitation of the public lands in the West following the discovery of gold in California. The need was to legalize appropriations of mineral land, rights of way, and water rights already made under local customs and laws, and to provide for the future acquisition of rights of the same character in the same manner. *Jennison* v. *Kirk,* 98 U. S. 453; *Atchison* v. *Peterson,* 20 Wall. 507; *Basey* v. *Gallagher,* 20 Wall. 670; *Broder* v. *Water Co.,* 101 U. S. 274; Wiel, Water Rights, § 66, *et seq.;* § 92, *et seq.;* 1 Kinney, Irrigation, §§ 596, 611, 636, *et seq.* To meet this situation the Act of 1866 and the supplementary Act of 1870, 16 Stat. 217, were passed. Congress had already provided adequate means for the acquisition of the government title to agricultural lands by passing the Homestead Act in 1862.

The relation of the Acts of 1866 and 1870 to water rights and waterways was precisely the same as their relation to the mineral lands. Their mining features were crude and were superseded by the more detailed Act of May 10, 1872, 17 Stat. 91, in which, however, the policy of favoring local laws and granting mining rights in accordance therewith is adhered to. The water features of the original acts are still in force. That the Act of 1866 provides a means for the future acquisition of rights, water as well as mining, is the settled holding of the

courts, and made perfectly clear by the Act of 1870. *Jacob* v. *Lorenz*, 98 Cal. 332, 335; *Beaver Brook* v. *St. Vrain*, 6 Colo. App. 130, 138; Wiel, Water Rights, § 99, p. 116; Long, Irrigation, § 74, p. 134.

This legislation is the foundation of all water rights in the Western States today and provides a solution and, we think, the only solution, of the problem of interstate streams. Mineral lands are held open to "exploration and occupation", and he who occupies is given the right to take the other steps which lead to a grant. Water rights are protected and preserved to whoever has possessed them. Local laws, rules, and customs are used in both cases to define the right and provide the course that must be followed to acquire it. The mineralized vein is recognized, as it was before by the customs of the miners, as being the thing appropriated, and so the right is given to follow it regardless of the surface limits of the claim extending vertically downward, which ordinarily define the extent of land holdings. In the field of water rights, again in accordance with local customs, the one who first "appropriates," even for use on nonriparian lands, is given the better right. Both as to mining and water, however, the rights granted are only such as any proprietor of the whole property involved could grant, and the rule of priority is only that which necessarily follows from successive conveyances of defined parts of a whole.

Further, it should be observed that, under this act, the proprietor, the United States, in a way holds its landed estate for conveyance in three classes—mineral rights, water rights, and what may be called, for convenience, ordinary land rights. It holds all of these rights for conveyance separately or together, as the case may be. Consequently, and generally speaking, riparian rights pass or not, under a patent of riparian land, according to whether or not the riparian doctrine or the appropriation doctrine is the rule in the locality where the land is situ-

ated. Congress has provided that it shall be otherwise in the Black Hills Forest Reserve in South Dakota (34 Stat. 233, 234).

It is well understood that the local rules, whether found in miners' customs, court decisions, or legislative acts, were adopted merely to supplement the particular provisions and fundamental conditions of the act, in order to fit it to local conditions, including local preferences, and avoid unnecessary complexity and volume in the act itself. This plan of adopting local laws or rules as the laws and rules of Congress is familiar enough. It is seen in the legislation defining crimes on reservations under exclusive jurisdiction of the General Government; in the conformity provisions governing the federal courts in common-law cases; in various laws for the taking of affidavits, etc. Illustrations might be greatly multiplied. Lindley on Mines, 2d ed., § 249; *Butte City Water Co.* v. *Baker,* 196 U. S. 125; *Clason* v. *Matko,* 223 U. S. 646, 654.

It is somewhat astonishing to find *Broder* v. *Water Co.,* 101 U. S. 274, and *Jennison* v. *Kirk,* 98 U. S. 453, 456, cited in Colorado's brief as authority for the idea that the Act of 1866 recognized an independent title or power in the States. They hold exactly the reverse. See *Union Co.* v. *Ferris,* 2 Sawy. 176, 184; 1 Wiel, Water Rights, § 97, p. 113; § 155, p. 177 *et seq.;* Long, Irrigation, § 74, p. 134. The grant is made directly to the individual appropriator. It takes effect upon his bringing himself within its terms by complying with the local laws. No patent follows as in the case of mining claims, but the title passes by virtue of the statute itself and compliance with it, as is the case with grants of rights of way. Yale, Mining and Water Rights, p. 380.

The law of water rights in California and the numerous States which have followed her lead is based squarely upon the federal title. 1 Wiel, Water Rights, p. 226; *Lux* v. *Haggin,* 69 Cal. 255, 338; *Benton* v. *Johncox,* 17

Wash. 277, 289; *Morgan* v. *Shaw,* 47 Ore. 333, 337; *Smith* v. *Denniff,* 24 Mont. 20, 21; *Barkley* v. *Tieleke,* 2 Mont. 59, 64; *Cruse* v. *McCauley,* 96 Fed. 369, 373–374; *Howell* v. *Johnson,* 89 Fed. 556, 558. Colorado and the other pure appropriation States (1 Wiel, Water Rights, p. 226), endeavor to find some basis for water rights other than the federal title. In those States water rights are identical with appropriation rights in California and the other dual system States, and, of course, are derived, as they are there, from the United States by grants under this act. Subsequent acts of Congress contradict the theory that federal ownership has been abdicated. Kinney, Irrigation, § 637, and pp. 1091, 1095; *Hough* v. *Porter,* 51 Ore. 318; *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545, 552–554; Acts of March 3, 1877, 19 Stat. 377; August 18, 1894, 28 Stat. 422; June 4, 1897, 30 Stat. 11, 36; February 26, 1897, 29 Stat. 599; March 2, 1897, 29 Stat. 603; June 17, 1902, 32 Stat. 388.

The legislation of Congress, with regard to water rights, all centers upon, and is intended to preserve, the policy adopted in the Act of 1866. It is the long continuance of subordinate state control, under a system that involves no recourse to the source of power, that has caused the fact that such control is subordinate sometimes to be lost sight of.

Ratification of state constitutions asserting state ownership of waters does not divest the United States of its property rights therein. Colo. Const., Art. XVI, § 6; *Coyle* v. *Oklahoma,* 221 U. S. 559, 568; *Ex parte Webb,* 225 U. S. 663, 690; *Wilcox* v. *McConnell,* 13 Pet. 498, 516; Kinney, Irrigation, § 388, p. 660.

The question whether the United States or the States own the water of innavigable streams in the West has never been directly passed upon by this court. The cases support federal ownership. Wiel, Water Rights, pp. 183, 194, 223; Kinney, Irrigation, § 640; Long, Irrigation, § 74,

p. 134; *Atchison* v. *Peterson,* 20 Wall. 507; *Basey* v. *Gallagher,* 20 Wall. 670; *Sturr* v. *Beck,* 133 U. S. 541; *United States* v. *Rio Grande Co.,* 174 U. S. 690, 704; *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545; *Kansas* v. *Colorado,* 206 U. S. 46; *Winters* v. *United States,* 207 U. S. 564; *Boquillas Land Co.* v. *Curtis,* 213 U. S. 339.

Upholding of state ownership would disintegrate the law and destroy federal interests without working any practical good to the States.

This controversy, as one involving an interstate stream, should be decided upon the basis of the federal ownership of lands and waters, thereby confining the ownership of the States, as ultimate proprietors, to such water rights as have been or may be granted to the respective States for themselves or for use in connection with the lands within their borders. In practice the Federal Government disregards state lines in the use and control of waters for its own purposes; and state lines have been equally disregarded in the grant, and acquisition, and use, of private water rights in the Western States; so a division of water between the States, making state lines controlling, would interfere with the federal use of water and seriously modify, or destroy, existing vested rights. These rights, being grants from the paramount sovereignty, should be upheld as against the claim that the States, which enjoy a quasi sovereignty only, should be treated in this respect as independent Nations.

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

This is an original suit in this court by the State of Wyoming against the State of Colorado and two Colorado corporations to prevent a proposed diversion in Colorado of part of the waters of the Laramie River, an interstate stream. The bill was brought in 1911, the evidence was

taken in 1913 and 1914, and the parties put it in condensed and narrative form in 1916 preparatory to the usual printing. The case has been argued at the bar three times. The court directed one reargument because of the novelty and importance of some of the questions involved, and the other because of an intervening succession in the office of Chief Justice. As the United States appeared to have a possible interest in some of the questions, the court also directed that the suit be called to the attention of the Attorney General; and, by the court's leave, a representative of the United States participated in the subsequent hearings.

The Laramie is an innavigable river which has its source in the mountains of northern Colorado, flows northerly 27 miles in that State, crosses into Wyoming, and there flows northerly and northeasterly 150 miles to the North Platte River, of which it is a tributary. Both Colorado and Wyoming are in the arid region where flowing waters are, and long have been, commonly diverted from their natural channels and used in irrigating the soil and making it productive. For many years some of the waters of the Laramie River have been subjected to such diversion and use, part in Colorado and part in Wyoming.

When this suit was brought the two corporate defendants, acting under the authority and permission of Colorado, were proceeding to divert in that State a considerable portion of the waters of the river and to conduct the same into another watershed, lying wholly in Colorado, for use in irrigating lands more than fifty miles distant from the point of diversion. The topography and natural drainage are such that none of the water can return to the stream or ever reach Wyoming.

By the bill Wyoming seeks to prevent this diversion on two grounds: One that, without her sanction, the waters of this interstate stream cannot rightfully be taken from

its watershed and carried into another where she never can receive any benefit from them; and the other that through many appropriations made at great cost, which are prior in time and superior in right to the proposed Colorado diversion, Wyoming and her citizens have become and are entitled to use a large portion of the waters of the river in the irrigation of lands in that State and that the proposed Colorado diversion will not leave in the stream sufficient water to satisfy these prior and superior appropriations, and so will work irreparable prejudice to Wyoming and her citizens.

By the answers Colorado and her co-defendants seek to justify and sustain the proposed diversion on three distinct grounds: First, that it is the right of Colorado as a State to dispose, as she may choose, of any part or all of the waters flowing in the portion of the river within her borders, "regardless of the prejudice that it may work" to Wyoming and her citizens; secondly, that Colorado is entitled to an equitable division of the waters of the river and that the proposed diversion, together with all subsisting appropriations in Colorado, does not exceed her share; and, thirdly, that after the proposed diversion there will be left in the river and its tributaries in Wyoming sufficient water to satisfy all appropriations in that State whose origin was prior in time to the effective inception of the right under which the proposed Colorado diversion is about to be made.

Before taking up the opposing contentions a survey of several matters in the light of which they should be approached and considered is in order.

Both Colorado and Wyoming are along the apex of the Continental Divide and include high mountain ranges where heavy snows fall in winter and melt in late spring and early summer,—this being the chief source of water supply. Small streams in the mountains gather the water from the melting snow and conduct it to larger streams

below which ultimately pass into surrounding States. The flow in all streams varies greatly in the course of the year, being highest in May, June and July and relatively very low in other months. There is also a pronounced variation from year to year. To illustrate, the gaging of the Cache la Poudre, a typical stream, for 1912 shows that the total flow for May, June and July was more than three times that for the nine other months, and the gaging for a period of 30 years shows that the yearly flow varied from 151,636 to 666,466 acre-feet [1] and was in excess of 400,000 acre-feet in each of four years and less than 175,000 acre-feet in each of five years. Both States have vast plains and many valleys of varying elevation where there is not sufficient natural precipitation to moisten the soil and make it productive, but where, when additional water is applied artificially, the soil becomes fruitful,—the reward being generous in some areas and moderate in others, just as husbandry is variously rewarded in States where there is greater humidity, such as Massachusetts, Virginia, Ohio and Tennessee. Both States were Territories long before they were admitted into the Union as States and while the territorial condition continued were under the full dominion of the United States. At first the United States owned all the lands in both and it still owns and is offering for disposal millions of acres in each.

Turning to the decisions of the courts of last resort in the two States, we learn that the same doctrine respecting the diversion and use of the waters of natural streams has prevailed in both from the beginning and that each State attributes much of her development and prosperity to the practical operation of this doctrine. The relevant views of the origin and nature of the doctrine, as shown in these decisions, may be summarized as follows: The

[1] An acre-foot is the quantity of water required to cover an acre to a depth of one foot—43,560 cubic feet.

common-law rule respecting riparian rights in flowing water never obtained in either State. It always was deemed inapplicable to their situation and climatic conditions. The earliest settlers gave effect to a different rule whereby the waters of the streams were regarded as open to appropriation for irrigation, mining and other beneficial purposes. The diversion from the stream and the application of the water to a beneficial purpose constituted an appropriation, and the appropriator was treated as acquiring a continuing right to divert and use the water to the extent of his appropriation, but not beyond what was reasonably required and actually used. This was deemed a property right and dealt with and respected accordingly. As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence. This doctrine of appropriation, prompted by necessity and formulated by custom, received early legislative recognition in both Territories and was enforced in their courts. When the States were admitted into the Union it received further sanction in their constitutions and statutes and their courts have been uniformly enforcing it. *Yunker* v. *Nichols,* 1 Colo. 551; *Schilling* v. *Rominger,* 4 Colo. 100; *Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443; *Thomas* v. *Guiraud,* 6 Colo. 530; *Strickler* v. *Colorado Springs,* 16 Colo. 61; *Oppenlander* v. *Left Hand Ditch Co.,* 18 Colo. 142; *Wyatt* v. *Larimer, & Weld Irrigation Co.,* 18 Colo. 298; *Crippen* v. *White,* 28 Colo. 298; *Moyer* v. *Preston,* 6 Wyo. 308; *Farm Investment Co.* v. *Carpenter,* 9 Wyo. 110; *Willey* v. *Decker,* 11 Wyo. 496; *Johnston* v. *Little Horse Creek Irrigating Co.,* 13 Wyo. 208.

As the United States possessed plenary authority over Colorado and Wyoming while they were Territories and

has at all times owned the public lands therein, we turn next to its action.

The Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, contained a section providing: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The occasion for this provision and its purpose and effect were extensively considered by this court in the cases of *Atchison* v. *Peterson,* 20 Wall. 507, and *Basey* v. *Gallagher,* 20 Wall. 670, the conclusions in both being shown in the following excerpt from the latter, pp. 681–682:

"In the late case of *Atchison* v. *Peterson,* we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated

and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

And on the same subject it was further said, in *Broder* v. *Water Co.*, 101 U. S. 274, 276:

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one."

The Act of July 9, 1870, c. 235, § 17, 16 Stat. 217, provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights" acquired under or recognized by the provision of 1866. These provisions are now §§ 2339 and 2340 of the Revised Statutes.

The Act of March 3, 1877, c. 107, § 1, 19 Stat. 377, providing for the sale of desert lands in tracts of one section each to persons undertaking and effecting their reclamation, contained a proviso declaring that "the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Colorado was not at first included in this act, but was brought in by an amendatory act. Next came the Act of March 3, 1891, c. 561, § 18, 26 Stat. 1095, granting rights of way through the public lands and reservations for canals and ditches to be used for irrigation purposes, and containing a proviso saying, "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Of the legislation thus far recited it was said, in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 706: "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow"; and again, "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries."

June 17, 1902, c. 1093, 32 Stat. 388, the National Reclamation Act was passed, under which the United States entered upon the construction of extensive irrigation works to be used in the reclamation of large bodies of arid public lands in the western States. Its eighth section declared: "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, *and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." The words which we have italicized constitute the only instance, so far as we are advised, in which the legislation of Congress relating to the appropriation of water in the arid land region has contained any distinct mention of interstate streams. The explanation of this exceptional mention is to be found in the pendency in this court at that time of the case of *Kansas* v. *Colorado,* wherein the relative rights of the two States, the United States, certain Kansas riparians and certain Colorado appropriators and users in and to the waters of the Arkansas River, an interstate stream, were thought to be involved. Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act,—in other words, that the matter be left just as it was before. The words aptly reflect that purpose.

The decision in *Kansas* v. *Colorado,* 206 U. S. 46, was a pioneer in its field. On some of the questions presented it was intended to be and is comprehensive, and on others it was intended to be within narrower limits, the court saying, " the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed." On full consideration it was broadly determined that a controversy between two States over the diversion and use of waters of a stream passing from one to the other " makes a matter for investigation and determination by this court " in the exercise of its original jurisdiction, and also that the upper State on such a stream does not have such ownership or control of the waters flowing therein as entitles her to divert and use them regardless of any injury or prejudice to the rights of the lower State in the stream. And, on consideration of the particular facts disclosed and the local law of the two States, it was determined that Colorado was not taking more than what under the circumstances would be her share under an equitable apportionment.

As respects the scope and interpretation of the ultimate conclusion in that case it should be observed, first, that the court was there concerned, as it said, with a controversy between two States, " one recognizing generally the common-law rule of riparian rights " and the other the doctrine of appropriation; secondly, that the diversion complained of was not to a watershed from which none of the water could find its way into the complaining State, but quite to the contrary; and, thirdly, that what the complaining State was seeking was not to prevent a proposed diversion for the benefit of lands as yet unreclaimed, but to interfere with a diversion which had been practiced for years and under which many thousands of acres of unoccupied and barren lands had been reclaimed and made productive. In these circumstances, and after observing that the diminution in the flow of

the river had resulted in " perceptible injury " to portions of the valley in Kansas, but in " little, if any, detriment " to the great body of the valley, the court said, " it would seem equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation; " and that, if the depletion of the waters by Colorado should be increased, the time would come when Kansas might " rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes." What was there said about " equality of right " refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the States stand, in point of power and right, under our constitutional system.

Like that case the one now before us presents a controversy over the waters of an interstate stream. But here the controversy is between States in both of which the doctrine of appropriation has prevailed from the time of the first settlements, always has been applied in the same way, and has been recognized and sanctioned by the United States, the owner of the public lands. Here the complaining State is not seeking to impose a policy of her choosing on the other State, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream. Nor is the United States seeking to impose a policy of its choosing on either State. All that it has done has been to recognize and give its sanction to the policy which each has adopted. Whether its public land holdings would enable it to go further we need not consider. And here the complaining State is not seeking to interfere with a diversion which has long been practiced and under which much reclamation has been effected, but to prevent a proposed diversion for the benefit of lands as yet unreclaimed.

With this understanding of the case in hand and of some of the matters in the light of which it should be con-

sidered, we take up the several contentions, before noticed, which are pressed on our attention.

The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas* v. *Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258; *Bean* v. *Morris,* 221 U. S. 485; *Missouri* v. *Illinois,* 180 U. S. 208, and 200 U. S. 496, and *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, are examples.

The objection of Wyoming to the proposed diversion on the ground that it is to another watershed, from which she can receive no benefit, is also untenable. The fact that the diversion is to such a watershed has a bearing in another connection, but does not in itself constitute a ground for condemning it. In neither State does the right of appropriation depend on the place of use being within the same watershed. Diversions from one watershed to another are commonly made in both States and the practice is recognized by the decisions of their courts. *Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443, 449; *Thomas* v. *Guiraud,* 6 Colo. 530; *Hammond* v. *Rose,* 11 Colo. 524; *Oppenlander* v. *Left Hand Ditch Co.,* 18 Colo. 142, 144; *Moyer* v. *Preston,* 6 Wyo. 308, 321; *Willey* v. *Decker,* 11 Wyo. 496, 529–531. And the evidence shows that diversions are made and recognized in both States which in principle are not distinguishable from this, that is, where water is taken in one State from a watershed leading into

the other State and conducted into a different watershed leading away from that State, and from which she never can receive any benefit. The principle of such diversions being recognized in both States, its application to this interstate stream does not in itself afford a ground for complaint, unless the practice in both be rejected in determining what, as between them, is reasonable and admissible as to this stream, which we think should not be done.

We are thus brought to the question of the basis on which the relative rights of these States in the waters of this interstate stream should be determined. Should the doctrine of appropriation, which each recognizes and enforces within her borders, be applied? Or is there another basis which is more consonant with right and equity?

The lands in both States are naturally arid and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act which made reclamation by irrigation a condition to the acquisition. The first settlers located along the streams where water could be diverted and applied at small cost. Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both

States. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught and values mounting into large figures would be lost.

In neither State was the right to appropriate water from this interstate stream denied. On the contrary, it was permitted and recognized in both. The rule was the same on both sides of the line. Some of the appropriations were made as much as fifty years ago and many as much as twenty-five. In the circumstances we have stated, why should not appropriations from this stream be respected, as between the two States, according to their several priorities, as would be done if the stream lay wholly within either State? By what principle of right or equity may either State proceed in disregard of prior appropriations in the other?

Colorado answers that this is not a suit between private appropriators. This is true, but it does not follow that their situation and what has been accomplished by them for their respective States can be ignored. As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the State are indissolubly linked with the rights of the appropriators. To the extent of the appropriation and use of the water in Colorado a like situation exists there.

Colorado further answers that she can accomplish more with the water than Wyoming does or can; that she proposes to use it on lands in the Cache la Poudre valley, and

that they with less water will produce more than the lands in the portion of the Laramie valley known as the Laramie Plains. It is true that irrigation in the Poudre valley has been carried to a higher state of development than elsewhere in the Rocky Mountain region and that the lands of that valley lie at a lower altitude than do those in the Laramie Plains and generally are better adapted to agriculture. In some parts they also require less water. It may be assumed that the lands intended to be reclaimed and irrigated in the Poudre valley conform to the general standard, although this is left uncertain. But for combined farming and stockraising those of the Laramie Plains offer opportunities and advantages which are well recognized. It is to this use that they chiefly are devoted. It is a recognized and profitable industry, has been carried on there for many years and is of general economic value. Many of the original ranchmen still are engaged in it,—some on the tracts where they first settled. With the aid of irrigation, native hay of a high quality, alfalfa, oats and other forage are grown for winter feeding, the live stock being grazed most of the year on unirrigated areas and in the neighboring hills and mountains. In this way not only are the irrigated tracts made productive, but the utility and value of the grazing areas are greatly enhanced. The same industry is carried on in the same way in sections of Colorado. In both States this is a purpose for which the right to appropriate water may be exercised, and no discrimination is made between it and other farming. Even in this suit Colorado is asserting appropriations of this class for 4,250 acres in the portion of the Laramie valley in that State, and is claiming under them an amount of water in excess of what she asserts will irrigate a like acreage in the Poudre valley.

Some of the appropriations from the stream in Wyoming are used for agriculture alone. One of the large projects, dating from territorial days, and constructed at

great cost, carries water from the river through a tunnel one-half mile long and canals several miles in length to the Wheatland District where it is used in irrigating 30,000 acres, all of which are very successfully and profitably farmed in small tracts. This project uses one very large and one comparatively small reservoir for storing water and equalizing the natural flow.

We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned.

In suits between appropriators from the same stream, but in different States recognizing the doctrine of appropriation, the question whether rights under such appropriations should be judged by the rule of priority has been considered by several courts, state and federal, and has been uniformly answered in the affirmative. *Conant* v. *Deep Creek Irrigation Co.*, 23 Utah, 627, 631; *Willey* v.

Decker, 11 Wyo. 496, 534–535; *Taylor* v. *Hulett,* 15 Idaho, 265, 271; *Howell* v. *Johnson,* 89 Fed. 556; *Hoge* v. *Eaton,* 135 Fed. 411; *Morris* v. *Bean,* 146 Fed. 423; *Bean* v. *Morris,* 159 Fed. 651. One of the cases came to this court and the judgment below was affirmed. *Bean* v. *Morris,* 221 U. S. 485. These decisions, although given in suits between individuals, tend strongly to support our conclusion, for they show that by common usage, as also by judicial pronouncement, the rule of priority is regarded in such States as having the same application to a stream flowing from one of them to another that it has to streams wholly within one of them.

The remaining questions are largely matters of fact. The evidence is voluminous, some of it highly technical and some quite conflicting. It has all been considered. The reasonable limits of an opinion do not admit of its extended discussion. We must be content to give our conclusions on the main questions and make such references to and comment on what is evidential as will point to the grounds on which the conclusions on those questions rest. As to minor questions we can only state the ultimate facts as we find them from the evidence.

The question first in order, and the one most difficult of solution, relates to the flow of the Laramie River, the common source of supply. The difficulty arises chiefly out of the fact that the flow varies greatly in the course of the year and also from year to year.

Colorado's evidence, which for convenience we take up first, is directed to showing the average yearly flow of all years in a considerable period, as if that constituted a proper measure of the available supply. We think it is not a proper measure,—and this because of the great variation in the flow. To be available in a practical sense the supply must be fairly continuous and dependable. No doubt the natural flow can be materially conserved and equalized by means of storage reservoirs, but this has

its limitations, both financial and physical. The construction of reservoirs of real capacity is attended with great expense, and unless an adequate return reasonably can be foreseen the expenditure is not justified and will not be made. The years of high water and those of low do not alternate. Often several of the same kind follow in succession. The evaporation of stored water in Colorado and Wyoming is from five to six feet per year. So, while it generally is practicable to store water in one part of the year for use in another, or in one year for use in the next, it often, if not generally, is impracticable to store it for longer periods. All this is recognized elsewhere in Colorado's evidence. One of her principal witnesses said:

"With regard to financial practicability of construction of reservoirs on Poudre River capable of conserving extraordinary floods, will state that they call for an expenditure that could be utilized only occasionally. It would be similar to financial proposition of people in Florida preparing to heat their houses in the same manner as those in the northern part of the United States. For years of unusually high flow in the Poudre River, conservation works, to utilize the excess waters in that stream, would have to count on carrying water over more than one year. The utilization of this water means the presence of population on the land; that population must have a living from year to year and they are not justified in going out on the land and settling to raise a crop only once in three or four years. They must have sufficient to make a living from one year to another, and consequently the investment must be such that there can be sufficient water every year to keep these people on the land, and when water can only be conserved once in every three to five years, there must be provision for carrying over water or the people cannot live. It is a question of population as well as investment. The population has to exist and stay on the ground. From standpoint of investment, con-

servation of flow such as extreme flow of 1884 would be impractical to the extent that it exceeded the ordinary high year. Of such character would be [also] the floods of 1885, 1900 and 1909, three [four] years in thirty." The same witness further said: "Aside from reasons which I have given why reservoirs designed to catch only these rare high water flows of Poudre River are not feasible, it is a fact that no farmer would be able to anticipate the high flow and therefore could not depend at all upon water for irrigation until it reached him. If he undertook to so divert water it would become a gamble rather than a safe guide for living."

Another of her witnesses said:

" The present storage capacity in the Poudre Valley is such that in some years the reservoirs are not all filled, while in some years they are filled and water runs to waste. . . . It would not be possible to inaugurate a scheme in the Poudre Valley to construct reservoirs to store water from one year of high flow to another where such water is the only source of supply, for the reservoirs would have to be constructed to hold the maximum amount, and if the water has to be carried over for three years the average diversion from the reservoir would be only one-third of its capacity, making the cost per acre prohibitive."

And still another of her witnesses, referring to the unused waters of the Poudre in years of high flow and also to what is contemplated by the defendants in respect of the Laramie, said:

" The really dependable water supply of the District [1] will come from the Laramie River, the amount secured from the Poudre River fluctuating greatly and being used to augument the supply from the Laramie. There will

[1] The reference is to the Greeley-Poudre Irrigation District, one of the defendants.

be years when the supply from the Poudre River and its tributaries will be practically nothing. Our plans contemplate taking all the water that it is possible for us to take from the Laramie River each year. It is possible to get only a certain amount from that river, and I do not believe that we can absolutely depend on more than half the required amount from the Laramie River. The very great floods on that watershed we cannot consider because we cannot construct works to take care of them."

In accord with these statements, bearing on what is susceptible of use in actual practice, is further evidence coming from Colorado's witnesses and exhibits to the effect that, notwithstanding the great need for water in the Poudre valley and the returns obtained from its use, large amounts of water pass down the stream without use or impounding in the years when the flow exceeds what is termed the average. With the high state of irrigation development in that valley the full capacity of the reservoir system there provided when the proof was taken was 146,655 acre-feet,—an evidence of the limitation inhering in the practical storage of water from such streams.

The Cache la Poudre River heads in the same mountain range as does the Laramie and the conditions which make for a pronounced variation in the natural flow are largely the same with both. The following table compiled from data relating to the Cache la Poudre, furnished by Colorado, will be helpful in illustrating the view of the witnesses, and also ours. We add the third and fourth columns.

VARIATION IN ANNUAL NET DISCHARGE
OF
CACHE LA POUDRE RIVER.
April to October, both inclusive, for 30 years.
Taken from Colorado's Exhibit 124.

Year.	Run-off in acre-feet.	Variance from average of all.	Variance from average of all but four.
1884	666,466	+369,144	+403,883
1885	465,475	+168,153	+202,892
1886	290,392	− 6,930	+ 27,809
1887	286,840	− 10,482	+ 24,257
1888	155,970	−141,352	−106,613
1889	185,060	−112,262	− 77,523
1890	221,023	− 76,299	− 41,560
1891	257,236	− 40,086	− 5,347
1892	193,790	−103,532	− 68,793
1893	216,730	− 80,592	− 45,853
1894	309,444	+ 12,122	+ 46,861
1895	344,500	+ 47,178	+ 81,917
1896	162,340	−134,982	−100,243
1897	332,070	+ 34,748	+ 69,487
1898	172,290	−125,032	− 90,293
1899	388,591	+ 91,269	+126,008
1900	474,573	+177,251	+211,990
1901	339,155	+ 41,833	+ 76,572
1902	151,636	−145,686	−110,947
1903	345,150	+ 47,828	+ 82,567
1904	315,437	+ 18,115	+ 52,854
1905	361,652	+ 64,330	+ 99,069
1906	279,974	− 17,348	+ 17,391
1907	386,224	+ 88,902	+123,641
1908	252,843	− 44,479	− 9,740
1909	486,002	+188,680	+223,419
1910	157,514	−139,808	−105,069
1911	205,611	− 91,711	− 56,972
1912	297,722	+ 400	+ 35,139
1913	217,959	− 79,363	− 44,624

Average 297,322, including all years.
Average 262,583, omitting 1884, 1885, 1900, and 1909.

This table shows that during thirty years—1884 to 1913—the yearly flow of the Cache la Poudre ranged from 151,636 to 666,466 acre-feet, that in sixteen of the thirty it fell below the average, and that eight of the sixteen

were in immediate succession. Obviously it is not financially practicable, even by means of reservoirs, to equalize the flow of a stream subject to such variation so that it will have a fairly constant and dependable flow at the average of all years. For further illustration we have taken the average of the twenty-six years remaining after excluding the four described by the witness as extraordinary (these being left to take the average of the others) and on that basis have made a computation of the excess and deficiency, which is shown in the fourth column of the table. Even on this basis there were thirteen years in which the flow was below the average and, of these, six came in immediate succession. In four the deficiency exceeded 100,000 acre-feet and of the four only one followed a year in which there was an excess sufficient, if carried over in storage, to cover the deficiency. This suffices to show that the average of all years is far from being a proper or safe measure of the available supply. An intending irrigator acquiring a water right based on such a measure would be almost certainly confronted with drought when his need for water was greatest. Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond.

We have dealt with the matter of the average flow at this length because throughout Colorado's evidence and in her briefs it is treated as if it were a proper measure of the supply available for practical use. It is there applied to the Laramie not only directly, but indirectly by increasing the gaged flow for a particular year or period by percentages derived by comparing the flow of the Poudre for that year or period with the average for the thirty years, including those in which the flow was so extraordinary that concededly much of it neither was nor could be used. Thus water which is not part of the available supply is counted in measuring that supply.

When the evidence was taken, in 1913 and 1914, the Laramie had not been gaged so thoroughly nor for so long a period as had the Cache la Poudre. Such gaging as had occurred had been done at different places in different periods, partly by the United States Geological Survey, partly by Colorado and partly by Wyoming. Some of the gaging stations were in Colorado, but most were in Wyoming. The latter included Woods, nine miles north of the state boundary, and the Pioneer Dam, four miles north of Woods. The evidence centered largely around the flow and gaging at these places. Colorado's chief witness prepared and presented a table based on data, drawn from various sources, and bearing on the flow at Woods from April to October, both inclusive, for several years and made this table the principal basis of his testimony concerning the flow of the stream in that vicinity. We here reproduce the material part of the table, the third and fourth columns being ours.

DISCHARGE OF LARAMIE RIVER, WOODS, WYO.

April to October, both inclusive, for 9 years.

Taken from Colorado's Exhibit 127.

Year.	Acre-feet.	Variance from average.	Variance from average of all but 1899.
1895	220, 239	+ 21, 694	+ 45, 730
1896	108, 022	− 90, 523	− 66, 487
1897	251, 074	+ 52, 529	+ 76, 565
1898	117, 765	− 80, 780	− 56, 744
1899	390, 730	+192, 185	+216, 221
1900	248, 105	+ 49, 560	+ 73, 596
1911	138, 240	− 60, 305	− 36, 269
1912	213, 407	+ 14, 862	+ 38, 898
1913	99, 221	− 99, 324	− 75, 288

Average, 198,533, including all years.
Average, 174,509, excluding 1899.

The data covered two widely separated periods, one of six years and the other of three. The witness took the average of the nine years, which he gave as 198,545 acre-feet, and made this the basis of further calculations. He estimated that the usual flow for the other months was one-tenth of that for the full year, or, putting it in another way, one-ninth of that from April to October, both inclusive; and on this basis he added to his average 21,945 acre-feet, making 220,490. Consulting the Cache la Poudre table, set forth above, he concluded that the nine years, in combination, fell below the full average for the thirty years covered by that table, and to bring the nine years up to a thirty-year average he added 9,510 acre-feet, making 230,000. Some water from Wyoming enters the river between the state boundary and Woods, and for this he deducted 13,000 acre-feet, leaving 217,000. Then, making a reservation as to Sand Creek, to be considered presently, he concluded that 217,000 acre-feet was the average yearly flow in that section of the river. He called it the " normal " flow, an evident misnomer. This did not include water diverted in Colorado, under recognized Colorado appropriations, which does not reach Wyoming.

Even if the computation was to be made along the lines of something approaching a general average, we think the witness's computation and conclusion are subject to objection in particulars which we proceed to state.

The table shows that the flow for 1899 was extraordinary, so much so that it should have been excluded in computing the average and left to take the general level of the others. Its flow was 216,221 acre-feet in excess of their average. The excess added nothing to the available supply,—that which in practice could be used. The flow for the next year was such that it required no augmentation from 1899. So, the inclusion of 1899 in the computation was, in effect, taking what was not available as a

measure of what was. The error raised the average of the other years 24,036 acre-feet, and was carried into the ultimate conclusion.

We do not doubt that it was admissible to compare the data relating to the Laramie with that relating to the Cache la Poudre and to give effect to such conclusions as reasonably were to be drawn from the comparison; but we think there was no justification for the addition which was made to bring the nine years up to the standard of an average year among the thirty covered by the Cache la Poudre table. The addition tended to distort rather than to reflect the available supply. Looking at the Cache la Poudre table, it is evident that the nine years, in combination, would not have appeared short in flow had the four extraordinary years in the thirty been excluded, as they should have been. Besides, a comparison of the two tables shows that the variation in yearly flow in the two streams is not the same and that the difference is such as to preclude a nice calculation such as was here made on the basis of an assumed uniformity. To illustrate: According to one table the flow of the Poudre from April to October, both inclusive, in 1900 was 85,982 acre-feet in excess of that for the same months in 1899, while according to the other the flow of the Laramie for those months in 1899 was 142,625 acre-feet in excess of that for the corresponding period in 1900; and according to one table the flow of the Poudre for those months in 1913 was 73.2 per cent. of that for the same part of 1912, while according to the other the flow of the Laramie for those months in 1913 was 46.5 per cent. of that for the same part of 1912.

Assuming that 13,000 acre-feet enter the river from Wyoming between the state boundary and Woods, and are part of the river at the latter point, we think this water should not have been deducted. It is part of the supply available to satisfy appropriations from the stream in Wyoming.

The witness treated the flow from April to October, both inclusive, in 1912 as being 213,407 acre-feet, and the flow in the same months in 1913 as being 99,221 acre-feet. In this we think he erred. The evidence establishes that the flow in the first period was not more than 191,820 acre-feet and in the second was not more than 94,369. Even with the year 1899 excluded, this error increased the average 3,305 acre-feet.

If we exclude the extraordinary flow of 1899, make the needed correction in the flow of 1912 and 1913, and assume the accuracy of the other data, the average becomes 171,204 acre-feet, instead of 198,545, as given by the witness. This requires that the 21,945 acre-feet which were added to cover the flow for the five other months be reduced to 19,023.

When these corrections are made in the witness's data and computation, the result is changed from 217,000 acre-feet to 190,227.

But we are of opinion that the computation and conclusion of the witness, even when revised in the way we have indicated, are based too much on the average flow and not enough on the unalterable need for a supply which is fairly constant and dependable, or is susceptible of being made so by storage and conservation within practicable limits. By this it is not meant that known conditions must be such as give assurance that there will be no deficiency even during long periods, but rather that a supply which is likely to be intermittent, or to be materially deficient at relatively short intervals, does not meet the test of practical availability. As we understand it, substantial stability in the supply is essential to successful reclamation and irrigation. The evidence shows that this is so, and it is fully recognized in the literature on the subject.

The same witness prepared and submitted another table embodying all the data he was able to secure from records

of past gaging and measurements at Woods. This included three years not shown in the nine-year table. They and their recorded flow from April to October, both inclusive, were: 1889, 132,349 acre-feet; 1890, 168,406 acre-feet, and 1891, 207,146 acre-feet. The witness pronounced the data for these years less accurate than that for the others, and, while his reason for doing so does not clearly appear, we shall assume he was right. Had the three years been included in the nine-year table that would have reduced the average from 198,545 to 189,371 acre-feet, counting all years, and from 174,509 to 171,066 acre-feet, counting all but 1899. It, however, would not have shown another year with a flow as low as that of 1913, nor as low as that of 1896.

Colorado presented other evidence in the way of general estimates, results of very fragmentary gaging, and opinions based on rough measurements of snow-drifts in the mountainous area about the head of the stream; but we put all of this aside as being of doubtful probative value at best and far less persuasive than the evidence we have been discussing.

Wyoming's evidence was based on the same recorded data that were used by Colorado, and also on actual gaging and measurements by an experienced hydrographer covering the period beginning April 1, 1912, and ending April 30, 1914. Shortly stated, her evidence was to the effect that the actual measured flow at the Pioneer Dam, four miles below Woods, was 198,867 acre-feet from April to December, both inclusive, in 1912, was 109,593 acre-feet for all of 1913 and was 19,181 acre-feet for the first four months of 1914; that the flow for 1912 was somewhat above the average, counting all years; that the flow for 1913 was somewhat more than fifty per cent. of the average, and that the average at Woods and in that vicinity, counting all years, was approximately 200,000 acre-feet. Wyoming's chief witness, the hydrographer, submitted

the following table giving the results of his gaging and measurements at the Pioneer Dam.

DISCHARGE OF LARAMIE RIVER AT PIONEER DAM, NEAR WOODS, WYO., (Including diversion just above dam by Pioneer Canal)

IN ACRE-FEET.

	1912	1913	1914
January	.....	2,650	3,283
February	.....	2,355	3,088
March	.....	3,296	4,003
April	5,534	12,674	8,807
May	40,643	38,307	.....
June	91,874	26,598	.....
July	34,863	6,825	.....
August	7,809	3,130	.....
September	4,641	3,023	.....
October	6,456	3,812	.....
November	4,403	3,677	.....
December	2,644	3,246	.....
Total	198,867	109,593	19,181

The evidence does not permit us to doubt the accuracy of these data. They were obtained by work which is shown to have been painstakingly and conscientiously done by one fully competent to do it. The place at which it was done was well adapted to obtaining accurate results and the observations were continuous, not merely occasional or intermittent.

As the gaging did not cover the first three months of 1912, it is necessary to arrive at the flow for those months. The proof shows that the flow for the same months in 1914 fairly may be taken for the purpose. That was 10,374 acre-feet, the addition making 209,241 acre-feet for 1912. The flow for 1913 was 109,593 acre-feet. Both should be increased 4,000 acre-feet to cover water diverted between Woods and the Pioneer Dam and not returning

to the stream above the gaging station. This gives a total of 213,241 acre-feet for 1912 and 113,593 acre-feet for 1913. Tested by the flow of these years, the available supply would be 163,417 acre-feet; that is to say, on that basis the excess in 1912 would match the deficiency in 1913. But a survey of more than two years is essential in arriving at a fair conclusion respecting the available supply. A year of low flow is not always preceded by one of high or moderate flow as was the case with 1912 and 1913.

In diverting and applying water in irrigation there is a material loss through evaporation, seepage and otherwise which is unavoidable. The amount varies according to the conditions,—chiefly according to the distance the water is carried through canals and ditches and the length of time it is held in storage. Where the places of use are in the same watershed and relatively near the stream, as is true of the lands on the Laramie Plains served by the greater part of the Wyoming appropriations, a substantial amount of water percolates back into the stream from irrigated areas and becomes available for further use lower down the stream. This is called return water. The amount varies considerably and there are no definite data on the subject. As respects irrigation on the Laramie Plains above the Wheatland diversion, the evidence satisfies us that the return water will certainly more than counter-balance the loss through evaporation and otherwise when the period of storage is not more than from one year to the next.

What has now been said covers the substance of the evidence, as we regard it, bearing on the available supply at Woods and in that vicinity, that is to say, the supply remaining after the recognized Colorado appropriations are satisfied.

We already have indicated that, as to such a stream as this, the average flow of all years, high and low, cannot

be taken as a proper or reasonable measure of what is available for practical use. What then is the amount which is available here? According to the general consensus of opinion among practical irrigators and experienced irrigation engineers, the lowest natural flow of the years is not the test. In practice they proceed on the view that within limits, financially and physically feasible, a fairly constant and dependable flow materially in excess of the lowest may generally be obtained by means of reservoirs adapted to conserving and equalizing the natural flow; and we regard this view as reasonable.

But Wyoming takes the position that she should not be required to provide storage facilities in order that Colorado may obtain a larger amount of water from the common supply than otherwise would be possible. In a sense this is true; but not to the extent of requiring that the lowest natural flow be taken as the test of the available supply. The question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. Both are interested in the stream and both have great need for the water. Both subscribe to the doctrine of appropriation, and by that doctrine rights to water are measured by what is reasonably required and applied. Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. This comports with the all-pervading spirit of the doctrine of appropriation and takes appropriate heed of the natural necessities out of which it arose. We think that doctrine lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply. Notwithstanding her present contention, Wyoming has in fact proceeded on this line, for, as the proof shows, her appropriators, with her sanction, have provided and have in service reservoir facilities which are adapted for the

purpose and reasonably sufficient to meet its requirements.

There is one respect, requiring mention, in which Colorado's situation differs materially from that of Wyoming. The water to satisfy the Colorado appropriations is, and in the nature of things must be, diverted in Colorado at the head of the stream; and because of this those appropriations will not be affected by any variation in the yearly flow, but will receive their full measure of water in all years. On the other hand, the Wyoming appropriations will receive the water only after it passes down into that State and must bear whatever of risk is incident to the variation in the natural flow. Of course, this affords no reason for underestimating the available supply, but it does show that to overestimate it will work particular injury to Wyoming.

The lowest established flow was that of 1913. There is no claim or proof that in any other year the flow fell so low. Had there been others some proof of it doubtless would have been presented. This is also true of the very low flow of 1896. Therefore we think it reasonably may be assumed that the flow of those years was so exceptional that it is not likely to recur save at long intervals.

We conclude in view of all the evidence, and of the several considerations we have stated, that the natural and varying flow of this stream at Woods, which is after the recognized Colorado appropriations are satisfied, is susceptible by means of practicable storage and conservation of being converted into a fairly constant and dependable flow of 170,000 acre-feet per year, but not more. This we hold to be the available supply at that point after the recognized Colorado diversions are made. The amount may seem large, but, considering what may be accomplished with practicable storage facilities, such as are already provided, and the use which may be made of

the return water, we are persuaded that the amount, while closely pressing the outside limit, is not too large.

The problem to be worked out in obtaining a fairly dependable supply in that amount is measurably illustrated by the following table covering all the years for which the evidence supplies the requisite data, the flow during the missing months being fairly estimated.

Year.	Acre-feet.	Variance from average of all.	Variance from average of all but 1899.	Variance from 170,000.
1889	151,349	−56,893	−38,576	−18,651
1890	187,406	−20,836	−2,519	+17,406
1891	226,146	+17,904	+36,221	+56,146
1895	239,239	+30,997	+49,314	+69,239
1896	127,022	−81,220	−62,903	−42,978
1897	270,074	+61,831	+80,149	+100,074
1898	136,765	−71,477	−53,160	−33,235
1899	409,730	+201,488	+219,805	+239,730
1900	267,105	+58,863	+77,180	+97,105
1911	157,240	−51,002	−32,685	−12,760
1912	213,241	+4,999	+23,316	+43,241
1913	113,593	−94,649	−76,332	−56,047

Average 208,242, including all years.
Average 189,925, including all years but 1899.

It of course is true that the variation in the flow will not always be just what it was in the years covered by the table, and yet the data obtained by the gaging and measurements in those years show better than anything else what reasonably may be expected in the future. We recognize that the problem which the table is intended to illustrate is not a simple one and that to work it out will involve the exercise of both skill and care. But in this it is not unlike other problems of similar moment. Our belief gathered from all the evidence is that, with the attention which rightly should be bestowed on a problem of such moment, it can be successfully solved within the limits of what is financially and physically practicable.

As to Sand Creek, Colorado's witness regarded it as a tributary of the river and estimated its yearly flow at 17,000 acre-feet. The creek rises in Colorado, extends into the Laramie Plains in Wyoming and discharges into Hutton Lake, a few miles from the river. In exceptional years—about one in five—the waters of the creek overflow the lake for a short period and find their way over the prairie into the river. Otherwise the river receives no water from the creek. The proof of this is direct and undisputed. The creek is nominally a tributary of the river, but only that. Besides, its flow does not appear to have been measured. The witness merely estimated it at what he thought would be the natural run-off of the adjacent territory. Other evidence suggests that the estimate is too high, but this we need not consider. A substantial part of the flow is diverted, through what is known as the Divide Ditch, for use in irrigating lands in Colorado, and the evidence suggests, if it does not establish, that existing appropriations in the two States take the entire flow. For these reasons the waters of this creek cannot be regarded as a factor in this controversy.

After passing Woods, and while traversing the territory wherein are the Wyoming appropriations with which we are concerned, the Laramie receives one large and some very small additions to its waters.

The large addition comes from the Little Laramie, a stream whose source and entire length are in Wyoming. Its natural flow is a little more than one-half of that of the main stream at Woods and is subject to much the same variations. Part of its flow is used under appropriations along its course and the remainder passes into the main stream. Including what is appropriated along its course, and excluding minor contributions by small creeks after it gets well away from its headwaters, we think the amount available for practical use is 93,000 acre-feet per year.

None of the small tributaries, whether of the Laramie or the Little Laramie, adds much to the available supply.

Their natural flow is small. As to some it is all used under old appropriations; as to some it is partly used under such appropriations; and as to some it is only seasonal, the channels being dry much of the year. Some creeks spoken of in Colorado's evidence as tributaries are otherwise shown not to be such, but to deliver their waters into lakes or ponds not connected with either of the principal streams. Colorado's evidence also takes into account some tributaries which discharge into the Laramie below the points of diversion of all the Wyoming appropriations with which we are concerned. One, of which much is said in the evidence, is the Sybille. It reaches the Laramie below the diversion for the Wheatland District (the lowest diversion we are to consider), but in its course passes through that district. A small part of its flow is used in that district and it is not practicable to use more. What is used should, for present purposes, be treated as if it reached the Laramie above the Wheatland diversion. Wyoming contends that none of these small tributaries, other than the Sybille, contributes any dependable amount to the available supply. We think there is in the aggregate a fairly dependable contribution of 25,000 acre-feet, but not more.

It results that, in our opinion, the entire supply available for the proposed Colorado appropriation and the Wyoming appropriations down to and including the diversion for the Wheatland District is 288,000 acre-feet.

In contending for a larger finding, Colorado points to the issue by Wyoming's State Engineer of permits, so-called, for appropriations in excess of that amount and insists that these permits constitute solemn adjudications by that officer that the supply is adequate to cover them. But in this the nature of the permits is misapprehended. In fact and in law they are not adjudications, but mere licenses to appropriate, if the requisite amount of water be there. As to many nothing ever is done under them by

the intending appropriators. In such cases there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permit. In late years the permits relating to these streams have contained a provision, saying: "The records of the State Engineer's office show the waters of [the particular stream] to be largely appropriated. The appropriator under the permit is hereby notified of this fact, and the issuance of this permit grants only the right to divert and use the surplus or waste water of the stream and confers no rights which will interfere with or impair the use of water by prior appropriators." It therefore is plain that these permits have no such probative force as Colorado seeks to have attributed to them.

Colorado also comments on the amount of water stored in Wyoming reservoirs in 1912 and seeks to draw from this an inference that the available supply was greater than we have indicated. But the inference is not justified, and for these reasons: First, a part of what was stored was dead water, that is, was below the level from which water could be drawn off and conducted to the places of use. This is a matter commonly experienced in the selection and use of reservoir sites. Secondly, the flow of 1912 was above what could be depended on and prudence required that a substantial part be carried over to meet a possible shortage in the succeeding year. And, thirdly, the evidence shows that in 1912 the storing process was improvidently carried to a point which infringed the rights of small appropriators who were without storage facilities.

The available supply—the 288,000 acre-feet—is not sufficient to satisfy the Wyoming appropriations dependent thereon and also the proposed Colorado appropriation, so it becomes necessary to consider their relative priorities.

There are some existing Colorado appropriations having priorities entitling them to precedence over many of the

Wyoming appropriations. These recognized Colorado appropriations are, 18,000 acre-feet for what is known as the Skyline Ditch and 4,250 acre-feet for the irrigation of that number of acres of native-hay meadows in the Laramie valley in Colorado, the 4,250 acre-feet being what Colorado's chief witness testifies is reasonably required for the purpose, although a larger amount is claimed in the State's answer. These recognized Colorado appropriations, aggregating 22,250 acre-feet, are not to be deducted from the 288,000 acre-feet, that being the available supply after they are satisfied. Nor is Colorado's appropriation from Sand Creek to be deducted, that creek, as we have shown, not being a tributary of the Laramie.

The proposed Colorado appropriation which is in controversy here is spoken of in the evidence as the Laramie-Poudre tunnel diversion and is part of an irrigation project known as the Laramie-Poudre project. Colorado insists that this proposed appropriation takes priority, by relation, as of August 25, 1902, and Wyoming that the priority can relate only to the latter part of 1909. The true date is a matter of importance, because some large irrigation works were started in Wyoming between the dates mentioned, were diligently carried to completion, and are entitled to priorities as of the dates when they were started.

The Laramie-Poudre project is composed of several units, originally distinct, which underwent many changes before they were brought together in a single project. In its final form the project is intended to divert water by means of a tunnel from the Laramie River into the Poudre watershed, there to unite that water with water taken from the Cache la Poudre River and then to convey the water many miles to the lower part of the Poudre valley, where it is to be used in reclaiming and irrigating a body of land containing 125,000 acres. It is a large and ambitious project whose several parts, as finally brought

together, are adjusted to the attainment of that purpose. The parts were separately conceived, each having a purpose of its own. The project now is intended to draw on two independent sources of supply, each in a separate watershed.[1] The appropriations are necessarily distinct. Neither adds anything to, nor substracts anything from, the status of the other. We are concerned with only one of them.

The proposed tunnel diversion from the Laramie was conceived as a possibility by Wallace A. Link in 1897 and was explained by him to Abraham I. Akin in the spring of 1902. Later in the year they visited the headwaters of the two streams, looked over the ground, and agreed that Link's idea was a good one, that the undertaking was large and that they were without the means to carry it through. They concluded to promote the project together; and, thinking their chances of success would be improved by it, they also concluded to construct a ditch, known as the Upper Rawah, from the Laramie valley to a connection with an existing ditch, called the Skyline, and to take water through these ditches into the Cache la Poudre valley and there sell it. By this they hoped to demonstrate that water was obtainable from that source and to obtain money to be used in promoting their project. The Skyline was a fair-sized ditch leading over a low part of the divide to a branch of the Poudre, and they

[1] An engineer who had been connected with the work, and was a witness for the defendants, said: "This system has two distinct and independent sources of supply; that from the Laramie River and that from the Poudre River basin and the tributaries of the South Platte, and it was so designed that the Poudre Valley Canal could divert water from the Poudre River and also from the northern tributaries of the Poudre intercepted by the canal and from the tributaries of the South Platte as far east as Crow Creek and intercepted by the canal wherever there was surplus water. We estimated that the amount of water available outside of the Laramie River source would be between 80,000 and 100,000 acre-feet per annum as an average."

arranged with its owner for the carriage, on a percentage basis, of water from their ditch when constructed. They also conceived that the ditch could be used advantageously in collecting and carrying water to be sent through the tunnel, if and when the tunnel diversion was effected. In 1902, beginning August 25, they surveyed the line of the Rawah and in October of that year filed a statement of claim under it in the State Engineer's office. In the statement they said nothing about a tunnel diversion and made claim only to the amount of water expected to be carried through the Rawah and to the use of certain lakes or natural reservoirs for storage purposes. No work was done on the ditch that year. In 1903 they cleared some of the land over which it was to run, but did no excavating. In 1904 they constructed 6,000 feet of the ditch and did more clearing. No work was done on it in 1905 or 1906. Further work was done in 1907 and some washouts were repaired in 1908. That was the last work on the Rawah. Much more than one-half of the ditch was left unconstructed. No water was delivered through it to the Skyline, nor was any sold or used. Nothing appears to have been done with the lakes or natural reservoirs.

In 1903 Link and Akin gave to each of three others a one-fifth share in their project, in return for which the new partners were to carry on solicitations to get capitalists interested and to raise money. The results of the solicitations were disappointing, but some investors were brought in and became concerned about the preliminary plans. Differences of opinion arose and had to be dealt with. The plans were examined and reëxamined, alternative modes and places of diversion were considered and investigated, particular features were eliminated and others added, and in 1909, but not before, the project was definitely brought into its present form. A short reference to some of the details will serve to make this plain.

In the Upper Rawah filing of October, 1902, nothing was said about the proposed tunnel diversion, but a claim was made to the use of certain lakes or natural reservoirs described as having an aggregate capacity of 325,000,000 cubic feet. The tunnel diversion was merely a mental conception until 1904. In March of that year a survey was made of a tunnel site, a ditch from the west fork of the Laramie to the east fork, and a channel reservoir on the east fork above the tunnel site; and in May following a statement of claim under them was filed, in which the estimated cost of the tunnel and ditch was given as $189,200 and that of the reservoir as $20,000. Later in 1904 a survey was made of a tunnel site, three collecting ditches and two pipe lines, and in October of that year a statement of claim under them was filed, in which the estimated cost of the tunnel, ditches and pipe lines was given as $375,000. The location and dimensions of the tunnel in the second survey differed from those in the first. The difference was not pronounced, and yet was a real change. In September, 1906, another statement of claim was filed covering the Upper Rawah Ditch, the lakes connected therewith and the tunnel. This statement declared that the lakes were to be so enlarged that they would have an aggregate capacity of 1,250,000,000 cubic feet, instead of 325,000,000 as stated in the filing of 1902; and it again changed the location and dimensions of the tunnel,—this time more than before.

In 1905 and 1906 surveys were made to find a route for an open canal from the Laramie around the mountains, through a portion of Wyoming and back to Colorado, which would avoid the construction of a tunnel and the maintenance of ditches in the higher mountain levels; and in 1908 a statement of claim covering such a canal was filed, as was also a claim covering a large channel reservoir nine miles down the stream from the tunnel site. The estimated cost of the canal was given as $1,000,000

and that of the reservoir as $200,000. The plan evidenced by these filings was that of impounding the water in the reservoir and liberating it in an equalized flow into the canal, which was to carry it into the Poudre watershed without the aid of a tunnel. Late in 1908 and in the fore part of 1909 another survey along the same general line and with the same purpose was made at a cost of $15,000. Early in 1909 a statement of claim was filed covering a proposed reservoir near the tunnel site, the cost being estimated at $200,000.

In 1907 the Laramie-Poudre Reservoirs and Irrigation Company succeeded to whatever rights the promoters had acquired up to that time, and all subsequent surveys, investigations and filings were made by it. In April, 1909, the Greeley-Poudre Irrigation District, within which the water is intended to be used, was organized. At that time sufficient capital had not been obtained to carry the project through in any form. In September following the irrigation company and the irrigation district entered into a tentative contract, under which the company was to consummate the project in its present form, and, after doing the construction work, was to transfer the property to the district. Payment therefor was to be made in interest-bearing bonds of the district. By a vote taken the next month, the district ratified the contract and authorized the issue of the bonds. About the last of that month the work of boring the tunnel and making the diversion was begun.

It is manifest from this historical outline that the question of whether, and also how, this proposed appropriation should be made remained an open one until the contract with the irrigation district was made and ratified in 1909. Up to that time the whole subject was at large. There was no fixed or definite plan. It was all in an inceptive and formative stage,—investigations being almost constantly in progress to determine its feasibility and

whether changes and alternatives should be adopted rather than the primary conception. It had not reached a point where there was a fixed and definite purpose to take it up and carry it through. An appropriation does not take priority by relation as of a time anterior to the existence of such a purpose.

It no doubt is true that the original promoters intended all along to make a large appropriation from the Laramie by some means, provided the requisite capital could be obtained, but this is an altogether inadequate basis for applying the doctrine of relation.

No separate appropriation was effected by what was done on the Upper Rawah Ditch. The purpose to use it in connection with the Skyline was not carried out, but abandoned. This, as Link testified, was its "principal" purpose. The purpose to make it an accessory of the large project was secondary and contingent. Therefore the work on it cannot be taken as affecting or tolling back the priority of that project.

Actual work in making the tunnel diversion was begun as before shown, about the last of October, 1909. Thereafter it was prosecuted with much diligence and in 1911, when this suit was brought, it had been carried so nearly to a state of completion that the assumption reasonably may be indulged that, but for the suit, the appropriation soon would have been perfected. We conclude that the appropriation should be accorded a priority by relation as of the latter part of October, 1909, when the work was begun.

Applying a like rule to the Wyoming appropriations, several of them must be treated as relating to later dates, and therefore as being junior to that appropriation. Some of the projects in that State are founded on a plurality of appropriations, a part of which are senior and a part junior to that one.

The evidence shows that the Wyoming appropriations having priorities senior to the one in Colorado, and which

are dependent on the available supply before named, cover 181,500 acres of land and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre-feet. A much larger amount is claimed, but our finding restricts the amount to what the evidence shows is reasonably required, which is one acre-foot per acre for the larger part of the lands, two acre-feet per acre for a part and two and one-half acre-feet per acre for the remainder.

As the available supply is 288,000 acre-feet and the amount covered by senior appropriations in Wyoming is 272,500 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado. The amount sought to be diverted and taken under it is much larger.

A decree will accordingly be entered enjoining the defendants from diverting or taking more than 15,500 acre-feet per year from the Laramie River by means of or through the so-called Laramie-Poudre project.

It is so ordered.

STATE OF WYOMING *v.* STATE OF COLORADO ET AL.

IN EQUITY.

No. 3, Original. Final decree entered June 5, 1922.

This cause having been heretofore submitted on the pleadings and the evidence taken before and reported by the commissioners appointed for the purpose, and the court being now fully advised in the premises:

It is considered, ordered and decreed that the defendants, their officers, agents and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie River and its tributaries in the State of Colo-

rado more than fifteen thousand five hundred (15,500) acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that State,

Provided, that this decree shall not prejudice the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State eighteen thousand (18,000) acre-feet of water per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that State; nor prejudice the right of that State, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State four thousand two hundred and fifty (4,250) acre-feet of water per annum in virtue of and through the meadow-land appropriations in that State which are named in the pleadings and evidence; nor prejudice or affect the right of the State of Colorado or the State of Wyoming, or of any one recognized by either State as duly entitled thereto, to continue to exercise the right to divert and use water from Sand Creek, sometimes spoken of as a tributary of the Laramie River, in virtue of any existing and lawful appropriation of the waters of such creek;

And it is also considered, ordered and decreed that the State of Wyoming do have and recover from the defendants her lawful costs herein.

And it is further considered, ordered and decreed that the clerk of this court do transmit to the chief magistrates of the States of Colorado and Wyoming copies of this decree duly authenticated under the seal of this court.[1]

[1]A modified decree was entered October 9, 1922. It will be printed in Vol. 260 U. S., p. 1.

WEILAND, STATE ENGINEER OF THE STATE OF COLORADO, ET AL. *v.* PIONEER IRRIGATION COMPANY.

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

No. 3. Argued January 17, 1919; restored to docket for reargument June 6, 1921; reargued January 10, 11, 1922.—Decided June 5, 1922.

1. Where a substantial claim of federal, constitutional right is set up in the bill, in addition to diverse citizenship, and is made the basis of decision in the District Court and the Circuit Court of Appeals, the decree of the latter court is appealable here under Jud. Code, § 128. P. 501.
2. Water of a stream flowing from Colorado into Nebraska was diverted in Colorado by a Nebraska corporation and transported through its canal to Nebraska where it was sold and used on Nebraska lands. *Held*, that the appropriation was superior in right to later appropriations from the stream made in Colorado for use on Colorado lands, and that state officials of Colorado were properly enjoined from interfering with it and from treating the appropriator, in the distribution of water, otherwise than if the canal and lands irrigated therefrom were wholly within that State, notwithstanding their objection that the waters of natural streams in Colorado are, by her constitution and laws, the property of the public dedicated to the use of her people and cannot be taken for use elsewhere as against persons desiring to use them in Colorado. P. 502. *Wyoming* v. *Colorado, ante,* 419.

238 Fed. 519, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court enjoining the appellants, officials of the State of Colorado, from interfering with the appellee's right to take water, in Colorado, from a stream flowing thence into Nebraska, for use on lands in Nebraska, and requiring them to recognize the appropriation, in the distribution of water, according to its priority.

Mr. Victor E. Keyes, Attorney General of the State of Colorado, and *Mr. Delph E. Carpenter,* with whom *Mr. Leslie E. Hubbard, Mr. Fred Farrar* and *Mr. Charles Roach* were on the briefs, for appellants.[1]

Mr. Edwin H. Park for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellants, defendants below, are citizens and officers of the State of Colorado, charged with official duties with respect to the distribution of water from streams of that State for irrigating purposes, and other citizens of Colorado, who need not be further noticed.

The appellee, plaintiff below, a corporation organized under Nebraska laws, is the owner of an irrigating canal by which it has diverted water from the North Fork of the Republican River, an interstate stream, at a point about six miles west of the east line of Colorado. Since 1890 one-third of the water thus obtained has been sold and used on lands in Colorado and the remaining two-thirds carried by the canal into Nebraska has been used on lands in that State.

This suit was commenced in 1913, in the District Court of the United States for the District of Colorado. The bill of complaint is not printed in full in the record, but the epitome of it shows that, in addition to diversity of citizenship as a basis of jurisdiction, it was averred that the right of appellee, under the Constitution of the United States, to engage in commerce between the States of Colorado and Nebraska by transporting water from the former into the latter and there selling it for agricultural and domestic purposes was being seriously impaired by the unconstitutional conduct of the state officials of Colorado

[1]At the former hearing the case was argued by *Mr. Carpenter* on behalf of the appellants.

in permitting, under color of the laws of that State, the wasteful use of the water by appropriators prior in right, and the use by others subsequent in right, to a valid appropriation by the appellee. There was also a general allegation that rights of appellee secured to it by the Constitution and laws of the United States had been invaded by the action of the appellant officials. A decree permanently enjoining this alleged unconstitutional action by the state officers was prayed for.

In its decree the District Court found that there existed the requisite diversity of citizenship to give the court jurisdiction and also that the "suit was brought to obtain redress for the deprivation by defendants [appellants] of rights and privileges secured to the complainant [appellee] by the Constitution and laws of the United States" and that therefore it was a suit arising under the laws of the United States. The court found that the carrying capacity of appellee's ditch at the Nebraska state line was 29 cubic feet of water per second, that since the date of the construction of the ditch in 1890 that amount of water had been put to beneficial use in the irrigation of lands within the State of Nebraska, and that by reason of such continued beneficial use there had become vested in the appellee a property right to the continued use thereof. The Colorado officials, and their successors in office were enjoined, "from interfering with the right of complainant [appellee] to said water as herein adjudged, and . . . from treating the complainant in the distribution of water . . . otherwise than it would be treated if said canal were wholly within the State of Colorado, and all lands irrigated therefrom were in said last named State."

The court declined to consider the question of the wasteful or other use of the water by other appropriators in Colorado and confining its decree to the one point dealt with in the injunction, expressly left open for considera-

tion and determination in another proceeding all other issues joined under the pleadings.

The Circuit Court of Appeals affirmed the decree of the District Court and on the contention that a constitutional question is involved the case is brought here for review.

The appellee filed a motion in this court to dismiss or affirm, which was passed to hearing on the merits.

In support of the motion to dismiss it is argued that although jurisdiction was invoked in the bill on sufficiently alleged federal grounds, in addition to diversity of citizenship, nevertheless both the District Court and the Circuit Court of Appeals sustained appellee's use and disposition of the water in Nebraska as one merely of prescriptive right, derived from twenty years of undisputed use and not upon any federal constitutional ground, and that therefore the jurisdiction exercised rested wholly upon diversity of citizenship and an appeal does not lie from the decision of the Circuit Court of Appeals under § 128 of the Judicial Code.

The ground of federal jurisdiction, other than diversity of citizenship, being sufficiently set up in the bill, such a motion to dismiss can prevail only if the claim is so unsubstantial as to be frivolous. *Shulthis* v. *McDougal,* 225 U. S. 561; *Lovell* v. *Newman & Son,* 227 U. S. 412, 420. But such clearly was not the fact in this case.

It is entirely clear that the essential and substantial issue in the case arose from the assertion by the appellee of the federal constitutional right to transport water, derived from an interstate stream, from Colorado into Nebraska under its priority of appropriation as of 1890, and the denial of this claim by the appellant state officers, based upon the contention that water in natural interstate streams in Colorado, having been declared by the constitution and laws of that State to be the property of the public, dedicated to the use of the people of Colorado, the right could not be obtained by appropriation and beneficial

use, to carry such water into an adjoining State for like use, as against persons desiring to use it in Colorado, even though junior in point of date of appropriation. Both lower courts denied this contention of the state officials, appellants, and enjoined them from treating the appellee in the distribution of water otherwise than as if the state line had not existed, and the land irrigated had been wholly within the State of Colorado. It is thus plain that the decree appealed from necessarily rested, not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska, nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee by the Constitution of the United States. This substantial and very fundamental question being in the case, and essential to the disposition which was made of it, the motion to dismiss must be overruled.

As to the merits of the case. In the discussion of the jurisdictional question it has been sufficiently developed that the essential controversy here involved is whether priority of appropriation of water, from the part of an interstate stream in Colorado, for beneficial use on lands in Nebraska, into which State the stream in a state of nature flows, gives superiority of right over later appropriation also made in Colorado from the same stream, but for use in that State.

Both of the lower courts held that the presence of the state line did not affect the superiority of right and enjoined the Colorado state officials from treating the appellee in the distribution of water otherwise than it would be treated if the canal were wholly within the State of Colorado and all the lands irrigated therefrom were in that State.

The question thus presented is so fully disposed of on principle and authority in the opinion of the court this day announced in No. 3 Original, *Wyoming* v. *Colorado*,

ante, 419, that further discussion of it would be superfluous and upon the authority of that decision the decree of the Circuit Court of Appeals is

Affirmed.

WARD & GOW *v.* KRINSKY ET AL.

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

No. 343. Argued December 14, 1921.—Decided June 5, 1922.

1. The rights of employers under the Fourteenth Amendment are not violated by an extension of the New York Compensation Act (see *New York Central R. R. Co.* v. *White,* 243 U. S. 188) to all employments in which four or more workmen or operatives (farm laborers and domestic servants excepted) are regularly employed, construed by the state court as including, also, all other employees of the same employer and employed in the same business with such workmen and operatives, though at places remote from their work. Pp. 510, 513, 516.
2. So *held* of an employer in the business of disposing of advertising space on the cars and station platforms of subway and elevated railway lines in a city, and of selling newspapers, etc., at booths located on the platforms; with numerous employees, including executives, clerks, inspectors, chauffeurs and porters; and many salesmen working in the booths separately and apart from other employees; and where the injury in question was inflicted upon such a salesman by a subway train while he was engaged in emptying from the platform upon the tracks a pail of water, used in connection with his work in his booth. P. 507.

193 App. Div. 557; 231 N. Y. 525, affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, entered upon remittitur from the Court of Appeals, and affirming an award of compensation made by the New York Compensation Commission in favor of the defendant in error Krinsky.

Mr. Herman S. Hertwig for plaintiff in error.

A classification of occupations as hazardous must bear reasonable relation to the facts.

Down to the present time, it has been expressly recognized, by both courts and legislatures, that hazard must in fact exist in an occupation to afford a basis for the exercise of the police power through compensation legislation. By hazard is meant inherent dangers, greater than those existing in the innumerable occupations commonly regarded as non-hazardous. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Arizona Employers' Liability Cases,* 250 U. S. 400.

The compensation plan was put into operation in New York first over certain conspicuously hazardous occupations like mining, railway operations, etc., described in forty-two groups. After the validity of the law was upheld in *New York Central R. R. Co.* v. *White,* 243 U. S. 188, in regard to such obviously hazardous employments, it was next extended by Laws 1916, c. 622, to embrace every employee whose employer was prosecuting one of the hazardous operations as his principal business, whether the occupation of the employee himself was hazardous or non-hazardous. This extension was founded apparently on the theory that where the principal business is hazardous, the legislature may reasonably assume that all employees are in some manner affected by the hazard of the principal operation. The validity of it under the Constitution, so far as we can discover, has not been considered, either in the state courts or in this court. It may well be seriously questioned.

The New York Legislature took as a point of departure in its next enlargement of the scope of the law a provision of the Ohio Workmen's Compensation Law characterizing as inherently hazardous the work of manual laborers in groups of five or more. Gen. Code Ohio, §§ 1465–60, upheld in *State* v. *Creamer,* 85 Oh. St. 349; and again in *Jeffrey* v. *Blagg,* 90 Oh. St. 376, affirmed, 235 U. S. 571. The basis for the holding seems to have been that the mere association of manual workers in group labor neces-

sarily renders their work hazardous by reason of the concurrence in such group labor of so many imperfect human factors. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 159.

With such coöperative labor groups thus established as reasonable objects of imputed hazard, the New York Legislature proceeded to use such groups—not, like the Ohio Legislature, simply as objects themselves of compensation, but as the nucleus for a comprehensive group, drawing into the compulsory compensation plan all employees of an employer who happens to employ four or more workmen or operatives. The result was second Group 45.

This extension of the law is revolutionary. If valid, it subjects to the compulsory compensation law practically every employer of any consequence in the State, because there are few employers with a dozen or more employees in their service who do not have at least four among them engaged in some manual labor. They must either maintain compensation insurance for all, at heavy annual premiums, or else make deposits of securities with the State to guarantee payment of compensation benefits.

In twenty years of operation by the plaintiff in error, there have been but four accidents among employees, and all these have been among the manual laborers who are covered by insurance. In these twenty years, there has never before been an accident among the other employees constituting the vast majority of the plaintiff in error's force.

The occupation of the claimant himself and of the vast majority of his co-employees was conspicuously free from hazard. His injury was the consequence, not of any hazard inherent in his employment, but of gross personal negligence and incredible folly that would have brought injury to any person in any occupation whatever.

In private employments, made subject to compulsory compensation laws, the quality that has been declared by

legislatures and courts alike to clothe such employments with public interest, and thus to justify intervention by the legislature, has been that of inherent hazards of the employments, exposing employees, without regard to fault on either side, to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. *Arizona Employers' Liability Cases,* 250 U. S. 400, 428. Without the presence of such hazard in an employment, these features of public concern are lacking, and this means, as was demonstrated in *Munn* v. *Illinois,* 94 U. S. 113, that the necessary foundation for police regulation is lacking.

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

Mr. Justice Pitney delivered the opinion of the court.

The New York Workmen's Compensation Law of 1913–1914 [Laws 1913, c. 816; Laws 1914, cc. 41 and 316] sustained as constitutional against attacks based on the due process and equal protection clauses of the Fourteenth Amendment in *New York Central R. R. Co.* v. *White,* 243 U. S. 188, after several amendments was further amended by c. 634 of the Laws of 1918, which added to the list of hazardous employments in § 2 a new sub-division or group, as group 45—the second to be so designated—reading as follows: " Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire,

express or implied, oral or written, except farm laborers and domestic servants."

The present writ of error raises the question whether the Compensation Law, as thus extended, if construed and applied so as to impose upon plaintiff in error a liability for compensation in the case of defendant in error Himan Krinsky, is in contravention of either of the cited constitutional provisions.

The singularity of the facts makes a somewhat particular statement necessary to a clear understanding of the argument. Plaintiff in error, Artemas Ward, under the name of Ward & Gow, leases from the Interborough Rapid Transit Company advertising and vending privileges upon various subway and elevated railway lines in the City of New York, and carries on the business of disposing of advertising space in the cars and on station platforms, and selling periodicals and various articles of merchandise in booths located upon the platforms. In the latter department, which alone requires mention, there are 307 employees, including executives, office workers, news stand inspectors who travel singly over the different elevated and subway lines to inspect displays and see that the sales booths are properly kept, chauffeurs who drive trucks transporting merchandise from headquarters downtown in Manhattan to the different subway and elevated stations, 18 porters for loading and unloading the trucks at headquarters, and various others, among them 125 news stand salesmen, each of whom is stationed at a booth in a subway or elevated railway station, and whose work is separate from that of other employees. Each of them goes directly to his stand in the morning and thence to his home in the evening, and his duties consist of keeping a display of papers, magazines, candies, and other small articles in proper order, selling them across the counter, keeping an account of sales and turning in the collections. The only other employees with whom a salesman comes in contact

are the inspector, and the chauffeur who brings supplies from the truck, either down to the subway or up to the elevated platform, and passes them across the counter to the salesman.

Krinsky was one of these salesmen, stationed in a booth at a subway station in the Bronx. The booth was a steel structure 12 feet long, 8 feet wide or high, 2½ feet deep, located against a wall 10 feet from the edge of the platform. In order to keep the booth and its contents free from dust, and his hands in a proper condition of cleanliness, water was kept for convenience in the booth, in a pail furnished by the employer, to be emptied by Krinsky when necessary, and replenished with water obtained from a washroom two flights of stairs above the train level. He was in the habit of emptying the water in the morning upon the tracks of the subway and replenishing the supply before starting business. One morning in February, 1919, while thus emptying the water as usual, Krinsky was struck upon the side of the head by an approaching train, his skull was fractured and he sustained disabling personal injuries which the Industrial Commission found were accidental and arose out of and in the course of the employment.

An award of compensation made by the commission was affirmed by the Appellate Division of the Supreme Court (193 App. Div. 557), and its judgment was affirmed without opinion by the Court of Appeals. The record was remitted to the Appellate Division, which made the order and judgment of the Court of Appeals its own, and to it as custodian of the record the present writ of error was directed.

It was not disputed in the state courts, nor is it questioned here, that in the merchandising department of plaintiff in error there were more than four " workmen or operatives " within the meaning of second group 45 of § 2 of the Compensation Law. Evidently the porters were

such, and clearly were " engaged in the same business " with the salesmen, for they loaded the trucks which carried the merchandise from the central depot to the booths. The Appellate Division held that the salesmen, although not " workmen or operatives ", nevertheless were within the protection of the statute. Reference was made to the definition of " employee " in subdivision 4 of § 3, amended by Laws 1916, c. 622, and Laws 1917, c. 705, so as to include anyone in the service of an employer whose principal business is that of conducting a hazardous employment, construed in previous decisions as bringing within the protection of the statute all employees accidentally injured in the performance of duties incidental to the prosecution of a business defined as hazardous, even though such duties were not a part of the characteristic process or operation forming the basis of the group (*Matter of Dose* v. *Moehle Lithographic Co.*, 221 N. Y. 401, 405; *Spang* v. *Broadway Brewing & Malting Co.*, 182 App. Div. 443; *Joyce* v. *Eastman Kodak Co., id.*, 354); and it was held that since this rule applied to all the other groups defined in § 2, it must be applied in respect to second group 45. That the view of the Court of Appeals was substantially the same, appears not only from its affirming the judgment of the Appellate Division without questioning its reasoning, but from the opinion delivered by the Court of Appeals itself in a case decided at the same time with this, *Europe* v. *Addison Amusements, Inc.*, 231 N. Y. 105. Europe was conductor of a famous band of musicians who, after a military service with the American Forces in France, went upon a concert tour throughout the United States, under employment by Addison Amusements, Inc. With the band of sixty-five pieces there were four or more workmen or operatives employed to accompany it, arrange platforms, chairs and scenery, handle baggage, etc. Europe himself, although an employee was not among those described as " work-

men or operatives," nor engaged in hazardous work, ordinarily so-called. During an intermission in the program of a concert he was stabbed and killed by a drummer of the band. The Court of Appeals, sustaining the Industrial Commission and the Appellate Division, held that he was within the protection of second group 45.

In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action.

Under the due process of law clause, plaintiff in error contends that the validity of compulsory workmen's compensation acts depends upon the inherently hazardous character of the occupations covered; that a legislative declaration that a certain employment is hazardous is not conclusive; and that to impose upon the employer, as is said to be done in this instance, a liability to make compensation to any employee out of hundreds whose occupations are non-hazardous, because four or more workmen or operatives may happen to be regularly employed in the same business, or in or about the same establishment, although not brought into contact with the injured employee, and where, to use the words of counsel, " his injury was the consequence not of any hazard inherent in his employment, but of gross personal negligence, or incredible folly that would have brought injury to any person in any occupation whatever," is so altogether unreasonable as to be wanting in due process. The argument rests upon the curious misconception that the legislature

regarded the workmen or operatives as the sole source of danger to those engaged in the same business with them; and upon the assumption, equally untenable, that the occupation of a salesman at a subway station, protected ordinarily by the comparative security of a steel booth but called upon at times, in the line of duty, to go into the moving throngs of passengers and into close proximity to the rails upon which locomotives and trains are moving, is free from inherent hazard to the salesman.

That Krinsky's injuries arose out of and in the course of his employment was found by the commission, whose findings and decision were affirmed by both courts, and must be conclusive upon us unless ascertained to be without support in the evidence, including any reasonable inference that may be drawn from it.

As has been seen, he was charged with the sale of a stock of merchandise belonging to the employer, and for this purpose was stationed in a booth placed upon the platform of a subway station, about ten feet from the tracks. There was evidence showing that he had sole responsibility for the care and display of this merchandise, which, of course, he was to sell to the passing throngs of train passengers, and was required to keep the booth, the stock, and his own person in a cleanly condition. The employer supplied a container for water to be used for the latter purpose, and naturally this was kept in the booth, emptied and replenished by Krinsky as occasion required. He was not instructed how this should be done, and the state commission and courts reasonably might infer that he was at liberty to do it in the most convenient and expeditious mode. To say, as is suggested, that he was constrained to close and lock the booth, leave it and go up two flights, either by elevator or staircase, in order to empty the water, with consequent interruption of business in the meantime (thirty minutes, according to the evidence), when the same object could be accomplished

in a few moments and without closing the booth by stepping ten feet across the platform to the edge of the track and there emptying the water, relying upon a volunteer assistant to bring a fresh supply, would be to place a strained and unreasonable construction upon the scope of implied duties. True, he might have avoided the particular hazard that overtook him, had he chosen the tedious journey two flights up and down again, instead of the half-dozen steps across the platform to the edge of the track. Whether, in the hurry and bustle of a subway crowd, the nature of Krinsky's duties required or permitted him to follow the slower course, or even that it involved less probability of personal injury than the one habitually adopted, are questions upon which the commission and the state courts are peculiarly fitted to draw correct inferences. Certainly, we are not warranted in holding that the findings are without support in the evidence.

A sufficient vindication of compulsory Workmen's Compensation and Employers' Liability Acts, as it has seemed to this court, is found in the public interest of the State in the lives and personal security of those who are under the protection of its laws; from which it follows that, when men are employed in hazardous occupations for gain, it is within the power of the State to charge the pecuniary losses arising from disabling or fatal personal injury, to some extent at least, against the industry after the manner of casualty insurance, instead of allowing them to rest where they may happen to fall—upon the particular injured employees or their dependents; and to this end to require that the employer—he who organizes and directs the enterprise, hires the workmen, fixes the wages, sets a price upon the product, receives the gross proceeds, pays the costs and the losses and takes for his reward the net profits, if any—shall make or secure to be made such compensation as reasonably may be prescribed, to be paid in

the event of the injury or death of one of those employed, instead of permitting the entire risk to be assumed by the individuals immediately affected. In general, as in the New York law, provisions for compulsory compensation are made to apply only to those employed in hazardous occupations, where it may be contemplated by both parties in advance that sooner or later some of those employed probably will sustain accidental injury in the course of the employment, but where nobody can know in advance which particular employees or how many will be the victims, or how serious will be the injuries. *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 202, *et seq.; Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 239, 243–244; *Arizona Employers' Liability Cases,* 250 U. S 400, 420, 422–426.

That there was inherent hazard in Krinsky's occupation is conclusively shown by the fact that in the course of it he received a serious and disabling personal injury arising out of it. That the event might have been foreseen is demonstrated by the way in which it occurred, not to speak of the fact that the legislature actually foresaw it and made provision for it, long before it occurred. Hence there was no undue deprivation of the liberty or property of plaintiff in error, or his right to acquire property in lawful business, in the act of the legislature which required him to take warning and make provision against the event which afterwards in fact occurred.

It will be seen that while, by the terms of the statute, the employment of " four or more workmen or operatives regularly, in the same business or in or about the same establishment," etc., apparently is indicated as the basis of the new group—one rather frequently adopted in laws of this character, *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 574, etc.; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159;—in effect, by the construction adopted by the state court and binding upon us, the em-

ployees brought within the compensation features of the act include not only the "four or more workmen or operatives", or others injured through contact with them, but any and all other employees in the same business who may suffer accidental and disabling injury arising out of and in the course of their employment, although due to incidental hazards not typical of the group.

The contention that by this construction second group 45 has been extended beyond the limit allowable consistently with due process of law and "has been applied in this case to an employment with no inherent hazard whatever," rests upon an assumption of fact disproved by Krinsky's experience. Were it not so, the argument is self-destructive. The statute requires the employer to make or secure compensation for the disability or death of an employee only where it results from accidental personal injury arising out of and in the course of the employment. Where the employment is entirely free from inherent hazard to the employee, the statute imposes no responsibility upon the employer, hence cannot substantially interfere with his liberty or property, with or without "due process of law." *Arizona Employers' Liability Cases,* 250 U. S. 400, 429.

Reducing the argument by omitting the extravagant statement that so plainly leads to absurdity, it may be outlined thus: that Krinsky's occupation was no more hazardous than that of millions of residents of the metropolitan district who daily make use of the subways and elevated railways in going to and from their work; that there had been no such accident among plaintiff in error's employees in 20 years of operation; and that it is unreasonably and unnecessarily burdensome to require the employer to either maintain compensation insurance at heavy annual premiums, or deposit securities with the State to guarantee payment of compensation benefits, where the probability of injury is so slight. The answer is

easy: To the self-insurer no liability accrues except as disabling injuries actually occur; the giving of security, a reasonable regulation in aid of the general scheme (*New York Central R. R. Co.* v. *White,* 243 U. S. 188, 208–209), does not increase the obligation. To the employer who insures, presumably the premiums will not exceed a reasonable estimate of the risk; to him who insures in the state fund, there is an assurance of equivalency in the public administration of the fund under § 90, *et seq.,* of the law, especially the duty imposed upon the state board by § 95 to keep separate accounts as to each group so as to determine equitable rates, to rearrange the groups by withdrawing any employment embraced in one group and transferring it wholly or in part to another, to set up new groups at discretion, to determine the hazards of the different classes composing each group and to fix the premiums therefor, based upon the total pay-roll and number of employees in each class of employment, at the lowest possible rate consistent with the maintenance of a solvent insurance fund and the creation of a reasonable surplus and reserve. A similar system was sustained in *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 241–243.

The fallacy of the argument for holding it arbitrary and unreasonable to impose upon the employer the burden of making compensation in employments where injury is improbable and difficult to be foreseen, should be fairly apparent when it is pointed out that, in the absence of the statute, not a part but the entire loss consequent upon a disabling or fatal injury arising out of and in the course of the employment would have to be assumed and borne by the disabled employee or his dependents, just as under the statute they still must bear all beyond the scheduled compensation. Yet they have no better opportunity to foresee the casualty than the employer, and (in the judgment of the legislature) less opportunity to make pro-

vision against it. The common-law rule, requiring the employee to assume the risk, and to take account of it in advance when fixing the wages, recognized dimly that the cost of industrial accidents ought to be borne by the industry, but failed to effectuate such a purpose, partly for the very reason that the hazard could not be estimated by the individual in advance, nor the loss provided against without coöperation.

The extension of the Compensation Law by addition of second group 45, following the recent modification of the definition of "employee," far from demonstrating in its application to Krinsky's case unreasonable, arbitrary action by the State through its legislative department, shows, rather, intelligent foresight, an anticipation, based upon practical experience in the operation of the law as it stood before, that, however little foreseen by persons immediately concerned, accidental disabling injuries inevitably would occur in occupations not previously classed as hazardous, and a reasonable determination to include them in a scheme already found to be free from constitutional objection in its general application.

We have sufficiently indicated grounds for holding that the statute as thus extended is not repugnant to the guaranty of "due process of law" in the Fourteenth Amendment.

That it does not deny to plaintiff in error "the equal protection of the laws," is equally clear. The argument that it does proceeds upon the untenable theory that if hazard be imputed to the employment of "four or more workmen or operatives regularly, in the same business or in or about the same establishment," its effect in the scheme of compensation must be confined to the hazards attributable to group labor. In *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 575; and *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159, a somewhat similar classification was sustained, but not upon any limited

ground. In the framing of so far-reaching a scheme of legislation, dealing with occupations so diverse, necessarily a wide range must be accorded to legislative discretion about defining the groups to which it shall apply. Lines must be drawn, and it is not to be assumed that they have been drawn without good reason. The difference between the larger and the smaller establishments may be recognized as a basis of classification in legislation affecting the defenses of contributory negligence and assumption of risk, as was held in *Jeffrey Manufacturing Co.* v. *Blagg, supra.* So, the minimum number in a single employ may be regarded, we think, in arranging a system designed to distribute the burden of industrial accident losses with a view to the ability of the industry to bear it. Nor need a law framed on the lines of that under consideration confine the compensation narrowly to typical cases, where it is confined, as here, to cases actually arising in the course of gainful employment, and due to inherent hazards of the occupation. Second group 45 applies impartially to all employers who come within the descriptive terms; the employment of "four or more workmen or operatives regularly" is treated as the nucleus of a business probably involving personal hazard to some of those employed; and the same rule of construction is applied to this as to other groups.

But, it is insisted, neither *stare decisis* nor *ita lex scripta est* furnishes an adequate reply to a constitutional objection. This court sustained the New York Workmen's Compensation Law, and the kindred statutes of Washington and Arizona, fundamentally upon the ground of the hazardous nature of the occupations covered. If that ground is defensible at all—so runs the argument—the system must be confined to occupations actually hazardous in their nature; a legislative definition is not sufficient, nor is the occurrence of a single accident, much less one so singular and so little related to his general duty as that

which befell Krinsky, adequate proof of occupational hazard. It might occur to anybody, any day, on his way downtown to business, were he not especially careful. This is too fantastic a definition of "inherent risk" to form a basis of a law which must conform to standards of reasonableness. And again, how can the classification resorted to in second group 45 be sustained as reasonable, within the requirements either of the "due process of law" or the "equal protection of the laws" provisions of the Fourteenth Amendment? The occupation of a salesman stationed alone far uptown in the Bronx does not become hazardous simply because four or more porters are regularly employed at headquarters downtown in Manhattan. How can we accept the reason suggested by the Court of Appeals in the *Europe Case, supra,* (somewhat at random, it should be said, and when the court, by its own confession, was not required to test its adequacy), "that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose"? This would be an assumption contrary to common experience—especially as applied to manual work downtown in Manhattan and the occupation of a single salesman—it might as well have been 500 clerks—uptown in the Bronx. What reason is there for imposing compulsory liability upon the employer of salesmen or clerks in the Bronx simply because he finds it convenient to employ at the same time, but in separate duties, four workmen or operatives in Manhattan? He might dismiss the workmen—his neighbor and business competitor might dispense with such workmen—and thus gain immunity from the statute. Classification is permissible in legislation only when based on reasonable grounds. This peculiar grouping is classification gone wild. It cannot be sustained by the simple and obvious tests applied in *Jeffrey Manufacturing Co.* v. *Blagg, supra,* and kindred cases.

This, we believe, is a fair summary of the reasoning expressed or suggested in the brief and in the oral argument of plaintiff in error. We have not minimized its force, and concede that, if it is to be taken seriously, it seems to subject second group 45, and the Compensation Law as extended by this and other recent amendments, to a test that ought to be responded to satisfactorily if the validity of the statute is to be made clear.

Many of the propositions may be admitted—for the purpose of the argument only—as correct according to *a priori* standards, and unanswerable without resort to the tests of experience. We shall endeavor, with some care, to answer from the latter standpoint, not contenting ourselves with some rather too obvious replies already suggested.

The New York Workmen's Compensation Law by its terms is based upon the existence of actual, not hypothetical, inherent hazards confronting employees in gainful occupations; was sustained as valid by this court upon that ground in *New York Central R. R. Co.* v. *White, supra;* has been administered by the State constantly on that basis; and second group 45 shows no clear evidence of a purpose to depart from it. We leave wholly aside, as not here involved, the question whether the new group could be sustained on any other basis. Any question about the validity of an act purporting to impose compulsory liability upon employers for losses due to occupational hazards where there really are no occupational hazards, may safely be left until such a case is presented.

Next, we agree that, in a test of constitutionality under the Fourteenth Amendment, the question whether there is inherent hazard in an occupation or a group of occupations is not to be settled conclusively by a legislative declaration or by an empty form of words. We add, it is not to be settled, hardly is affected, by an arbitrary *a priori* statement, unaided by the light of experience in

which the legislature acted, that there is *absolutely no* inherent hazard in an occupation, especially where it appears that even one employee has been seriously injured while acting in the line of his duties in a manner that easily might have been anticipated by the employer, or the inspector who supervised his work, to say nothing of the employee himself, had either of these exercised the ordinary care of the reasonably prudent man to whom the common law so frequently resorts for a standard. The legislature, in the New York system, is justified in extending the benefits of the Compensation Law as far as it reasonably may determine occupational hazard to extend —to the "vanishing point" as it were—and any lines of group definition it may adopt, if easily understood and applied, cannot reasonably be called "an empty form of words" merely because they do not carry on their face the reasons for adopting them.

Again, we agree that (if it were necessary, as we hold it is not, that group lines should explain themselves), the suggestion quoted from the opinion of the Court of Appeals in the *Europe Case* hardly offers a satisfactory explanation of the new group, reasonably definite and substantial in its basis, within the tests of the Fourteenth Amendment. But this court, while bound by the *construction* of the statute adopted by the state court of last resort—that being a question of state law—is not concluded by its *reasoning* but must exercise an independent judgment, when called upon to determine the federal question whether the act as construed and applied, is repugnant to the restrictions of the Amendment. Any suggestion from the state court *in aid of* the act fairly may be accepted; but a suggestion having an adverse effect, while entitled to respectful consideration, is not to be taken as weakening the action taken by the State through its legislative branch, or as furnishing an *exclusive* statement of the grounds upon which the legislature acted. It

is proper to say that in the *Europe Case* no question of the constitutionality of the new group 45 appears to have been presented, and the court alluded to the phraseology merely to dispose of the question of construction.

In examining the Compensation Law and its many amendments, including the one in question, and the workings of the law as indicated by the decisions cited and others, we have been impressed again and again, to the point of complete conviction, that this act or any of its amendments is not the work of novices or bunglers. *A priori* reasoning has not been resorted to; there is no reliance upon generalizations or "common knowledge"; no "simply because"; nothing taken for granted. No case that we recall illustrates more aptly or forcibly the wisdom of the familiar rule, expressed by this court in a recent case in these terms: "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 157. The law was passed in 1913 and reënacted in 1914 after the taking effect of a constitutional amendment adopted under circumstances mentioned in the *White Case,* 243 U. S. 188, 195; the decision of this court was announced in March, 1917; meanwhile, administration commenced July 1, 1914, and was continued for four years prior to the enactment of second group 45; a multitude of compensation rulings, opinions of the Attorney General, and court decisions, sufficiently reported to the public, together with the administration of the state insurance fund, and a study and adoption of the plan of classifications used by private casualty insurance companies for underwriting business, may give but an inadequate impression of the informed, expert opinion upon which the legislature might, and we fairly may presume did, draw for aid in framing the new group.

What was it they were aiming at, and how did they seek to accomplish it? We need not be sure of hitting upon a correct, much less a complete, explanation. Upon the general presumption referred to the questioned group must stand, unless it were demonstrated to a moral certainty, beyond a reasonable doubt, that the grouping could not possibly be explained on reasonable grounds.

Let us assume that after four years' practical experience in the operation of the Compensation Law, aided by the intensive studies of the Commission, the legislature was satisfied with the law as well suited to the needs of the people, except that it did not go far enough and left uncovered much unclassified ground where undefined and virtually undefinable industrial hazards remained. It was desired to leave out, as before, farm laborers and domestic servants; a classification sustained upon simple grounds, doubtless far from expressing in full the reasons that had actuated the legislature, in *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 208.

Aside from this, let us suppose it was desired to extend the benefits of the law as far as practicable from the administrative standpoint; abandon the attempt to go further in grouping occupations as hazardous because of the names by which they are described, include all remaining businesses, above a fixed minimum, in a single group, treat them all as more or less hazardous, and leave questions as to the particular degree of hazard, and the proper grouping of businesses as between themselves, to be worked out by the Commission in the light of experience, according to the methods of private casualty insurance companies, as already was done with the existing groups.

Was actual inherent hazard ignored? Not at all; rather it was treated as virtually universal, but incapable of being precisely defined or classified by fixed statutory rules in advance, and more easily treated in the light of experience; the new group was to be a part of a law which oper-

ates, as nearly as experience may guide, not *in vacuo,* but only where there is actual inherent hazard and to the extent that it extends.

But why begin with "four workmen or operatives regularly employed?" Possible answer: It was necessary to begin somewhere; the legislature must decide where; it is reasonable to believe there is some actual inherent hazard, where even as few as four workmen or operatives are employed steadily, though it be no more than may arise from the danger of their injuring each other; besides, an employer who has as many as four workmen or operatives regularly employed, reasonably may be counted on to have a payroll account that may be made the basis upon which to compute the premiums for state insurance; below four, the business perhaps hardly would pay the cost of administration, hardly give opportunity to distribute the loss, according to the general principle of insurance which runs throughout the Compensation Law.

But why extend the responsibility of the employer to others in the same employ whose occupations are separate and non-hazardous? Possible answer: It is the employer himself who commingles in a single business or establishment those doing the more hazardous with those doing the less hazardous work, if it is done. If it be practicable to carry them on separate payrolls, presumably the Commission has the discretion to adjust it in fixing the amount of securities to be deposited under § 50, or the premium rate under § 95. Further possible answer: The difficulty is inherent in the subject; in years of practical experience, it had been found that in the extremely varied and complex organization of industry, disabling or fatal injuries occur when least expected, and in ways not characteristic of any particular industry described. The legislature hardly could be called upon to predict, any more than the employer, who was to be injured; and to confine the cost of casualty insurance strictly to those who were

sure to be "casualties", might baffle the efforts even of the experienced legislators who framed second group 45. Accidents cannot be relied upon to follow the symmetrical lines of group description; this is a difficulty that showed itself under the groups as they stood before, and led to the 1916 amendment of the definition of "employee". Even clerks and salesmen cannot, in this busy day, be confidently treated as immune from industrial hazards; if a general rule must be declared, it would be safer to say, on the basis of experience, that no occupation is free from industrial hazard, than to say that any specified occupation is free. Even the probable oversights or want of vision of the employer are an appreciable source of danger to clerks, as witness *Joyce* v. *Eastman Kodak Co.*, 182 App. Div. 354, where a clerk employed by a maker of photographic cameras and supplies (classed as hazardous in group 23) but engaged in clerical duties having no direct connection with the manufacture, was injured because of a defect of the chair in which she was sitting at work. A like suggestion arises in the case before us, where the employer insured the chauffeurs who drove the trucks with merchandise to the various stations, but failed to insure the salesmen, overlooking the fact that they also occasionally were subjected to peril in the line of duty. It may be objected that these cases are not typical; but the legislature may have realized, as an element of the problem with which they were dealing, what indeed is proverbial, that accidents do not conform to types; that they are one thing that happen "simply because"—they *are* accidents. The particular cases are not imaginary; they actually occurred, and were brought to the test of the Compensation Law. The legislature may have had the best of reasons for believing that others as strange were happening rather frequently in the great, busy, bustling population of the Empire State; that while an individual clerk's or salesman's life and limb perhaps were less in danger than an indi-

vidual machinist's, yet they were in appreciable danger; there were more clerks and salesmen than machinists; many times, naturally, they would be employed in the same business with machinists, or other "workmen or operatives"; any seeming incongruity or unfairness in grouping them together under the Compensation Law may be taken care of through the operation of the law itself, according to the tests of experience; second group 45 will cost nothing, in the large sense, beyond expenses of administration, if it should happen to reach where industrial hazard is non-existent; it will not be more burdensome than the industrial losses prove to be, where such hazards do exist.

And so we venture to suggest again, what has been hinted before, that *the common employer* may have been the mysterious link between the workmen in downtown Manhattan and the 125 scattered salesmen so far removed from the dangers of group labor. The legislature *may have* found it impracticable to charge industrial losses against the industry without seeking out him to whom it falls to pay other expenses; hence took the industries as they found them actually organized, holding each employer responsible as to all in his employ "in the same business or in or about the same establishment", etc., leaving the Industrial Commission to determine in particular cases whether the hazards are great or small, whether the employer should be required to deposit securities in advance, in what amount, what the premium rate ought to be, and all doubtful matters, according to experience; confident that an employer competent to conduct a business requiring "four or more workmen or operatives regularly" may be relied upon to make a profit above his payroll, insurance premiums, and other like expenses.

The State of New York, by constitutional amendment, has made this system due process of law for that State.

We are unable to say that in extending it by the addition of second group 45 the State has in the least degree exceeded the limitations imposed by the Fourteenth Amendment.

Judgment affirmed.

Mr. Justice McReynolds, with whom concurred Mr. Justice McKenna, dissenting.

The New York Workmen's Compensation Law provides:

" § 2. Application. Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: . . .

" Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

By subdivision 4, § 3, " employee " is defined as—

"A person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

In *Europe* v. *Addison Amusements, Inc.*, 231 N. Y. 105, the Court of Appeals construed these provisions and some quotations from the opinion will show their far-reaching effect.

503. McREYNOLDS and McKENNA, JJ., dissenting.

"The legislature, in § 2, has classified certain employments as hazardous, and has given the right of compensation to employees engaged in such hazardous employments.

"By the amendment of subdivision 4, § 3 (Laws of 1916, c. 622, § 2), an employee, to be entitled to compensation, is no longer required to be himself engaged at the time of accident in hazardous work. It is sufficient that he is an employee in such hazardous business. *Matter of Dose* v. *Moehle Lithographic Co.*, 221 N. Y. 401.

"Group 45 as above quoted, was added by the Laws of 1918, c. 634, § 2. The legislature classified as hazardous employments all those occupations in which there were regularly engaged four or more workmen or operatives. It covered employments not specified in the other subdivisions. No doubt it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged. It is not necessary for us finally to define or limit the words 'workmen' or 'operatives' as used in this subdivision. Generally speaking, a workman is a man employed in manual labor, whether skilled or unskilled, an artificer, mechanic or artisan, and an operative is a factory hand, one who operates machinery. Webster's New International Dictionary. There is a marked distinction between a workman and an employee. Although in a general sense all workmen and operatives are employees, yet all employees are not workmen or operatives, within the meaning of this law. The words 'workmen' and 'operatives' are used in their narrower meaning. *Bowne* v. *S. W. Bowne Co.*, 221 N. Y. 28.

"Europe, however, was an employee within the meaning of § 3, subd. 4, employed in a business or enterprise classified as hazardous, because it employed regularly four workmen or operatives. The evidence permitted the finding that the four men above named did manual work, consisting of moving scenery, arranging the stage, handling baggage, and cleaning and pressing clothes.

"Why the legislature should have extended by the second group of subdivision 45 the hazardous employments to any employment having four workmen or operatives is not for us to say. The courts, in construing statutes, are not concerned with the wisdom of the legislation. *Wilson* v. *C. Dorflinger & Sons,* 218 N. Y. 84, 86.

"We do not think, however, that the legislature has exceeded its powers of classification by this extension of hazardous employments. It may be, as above intimated, that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose.

"Whether or not the legislature can extend the benefits of compensation to all employments irrespective of workmen's hazards we are not called upon, at this time, to decide."

Apparently former opinions of this court have upheld workmen's compensation acts against the claim that they destroy the right freely to contract and thereby deprive of property without due process of law upon the theory that the State may charge pecuniary losses arising from personal injuries against the industry, when men are employed in hazardous occupations for gain. If "hazardous occupations" is not a mere empty phrase, there must be real hazard—legislative declaration is not enough. And hazard is something more than the mere possibility of injury which is always present.

Opinions of the court below have so construed the challenged provisions that if a merchant while employing five hundred clerks in New York City, no one of them within the Workmen's Compensation Act, should employ four workmen to paint signs or nail up boxes at Buffalo, all his clerks would immediately come under the act. The occupation of a clerk stationed in New York City cannot be rendered hazardous simply because four workmen are employed at Buffalo. To argue that an occupation is

hazardous because some one engaged therein has received personal injuries is not helpful. Many have suffered fatal accidents while eating, but eating could hardly be called hazardous. If, as suggested by the court below, " it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged" irrespective of anything else, then the assumption is contrary to common experience.

If the State has power to declare an employer liable whenever his employee is injured, irrespective of hazard, the discussions heretofore indulged which treated hazard as important were unfortunate and misleading. But if that element can be wholly disregarded, then consideration must be given to the classification adopted by the New York statute in its relation to the equal protection clause. As often declared, classification is permissible when rational. But what possible reason is there for imposing liability in favor of a hundred employees otherwise outside of the compensation statute simply because their employer has found it desirable to hire four men to do manual work in a shop or dig trenches miles away from the only place where the hundred serve?

Such cases as *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, and *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, are not pertinent. The classifications there approved rested upon the obvious truth " that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones," or upon some other distinction declared to be " sufficiently patent, simple and familiar."

In the present case it is said that the plaintiff in error may be put into a peculiar group and required to compensate Krinsky solely because he employed mechanics to hammer at a bench miles away from the station where

Krinsky sold papers, magazines, candy and chewing gum, and sometimes applied a little soap and water to his hands. I think both the due process and equal protection clauses of the Amendment forbid.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* CHEEK.

ERROR TO THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

No. 149. Argued March 6, 1922.—Decided June 5, 1922.

1. The Service Letter Law of Missouri, requiring every corporation doing business in the State to furnish, upon request, to any employee, when discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving, is not an arbitrary interference with freedom of contract amounting to a deprivation of liberty or property without due process of law. P. 534.
2. This requirement is within the regulatory power of the State over foreign and domestic corporations. Pp. 536, 544.
3. The requirement does not deny the equal protection of the laws in being made of corporations and not of individuals. P. 546.
4. The Federal Constitution imposes no restriction on the States protective of freedom of speech, or liberty of silence, or the privacy of individuals or corporations. P. 543.
5. A decision of a state court holding that an agreement of several insurance companies having a monopoly of a line of insurance business in a city, that neither would employ within two years any man who had been discharged from or left the service of either of the others, was unlawful, and sustaining an action against one of the companies by its former employee for damages resulting from the agreement, does not deprive the defendant of property without due process of law in violation of the Fourteenth Amendment. P. 547.
6. Under Jud. Code § 237, as amended 1916, when a case is properly here on writ of error because involving the constitutionality of a statute, other federal questions which in themselves warrant review only by certiorari, will be determined also. P. 547.

223 S. W. 754, affirmed.

ERROR to a judgment affirming a judgment on verdict for the plaintiff, Cheek, in his action for damages against the Insurance Company.

Mr. John H. Holliday, with whom *Mr. S. W. Fordyce, Mr. T. W. White, Mr. W. H. Woodward, Mr. W. R. Mayne, Mr. Alfred Hurrell* and *Mr. James Guest* were on the briefs, for plaintiff in error.

Mr. Frederick H. Bacon, for defendant in error, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

Robert T. Cheek sued the Prudential Insurance Company of America in the Circuit Court of St. Louis to recover damages upon a cause of action set forth in two counts: First, that the company being a New Jersey corporation conducting a life insurance business in Missouri under license of the insurance department of that State, and plaintiff having been for more than ten years continuously employed in its service, and having resigned said employment and left the company's service, plaintiff demanded of defendant's superintendent a letter setting forth the nature and character of the services rendered by him to said corporation and the duration thereof, and truly stating for what cause plaintiff had quit said service; that defendant, acting through its superintendent, without just cause refused to give to plaintiff such a letter, as provided by statute, and because of this plaintiff had been unable to secure employment and had suffered substantial damages. The second count was based upon an alleged unlawful agreement between defendant and two other companies, the Metropolitan Life Insurance Company and the John Hancock Mutual Life Insurance Company, said companies having a monopoly of the industrial life insurance business in St. Louis, to the effect that

neither would for a period of two years after his leaving the employ of either company employ any man who for any reason had left the service of or had been discharged by either of the other companies, by which means plaintiff had been rendered unable to secure employment and had sustained substantial damages.

The first count was based upon § 3020, Missouri Revised Statutes, 1909, which reads as follows: "Whenever any employe of any corporation doing business in this State shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employe (if such employe shall have been in the service of said corporation for a period of at least ninety days), to issue to such employe a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employe when so requested by such employe, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

A general demurrer interposed to each count was sustained by the trial court, and, plaintiff declining to plead further, judgment was rendered for defendant, from which plaintiff appealed to the Supreme Court of the State. That court, construing § 3020, held that it imposed a duty not upon the superintendent or manager personally but upon the corporation acting through its superintendent or other proper officer, to issue the letter; that the statute having imposed this duty for the public benefit

and also for the benefit of the employees of corporations, the public remedy by fine or other penalty was not exclusive and the plaintiff as a party injured was entitled to recover his damages; overruled various constitutional objections raised by defendant to the validity of § 3020, among others that it deprived the corporation of liberty of contract without due process of law and denied it the equal protection of the laws, in violation of the Fourteenth Amendment; held that the agreement or combination alleged in the second count gave the corporations a monopoly in their business, contrary to the law and public policy of the State, and if it prevented plaintiff from obtaining employment entitled him to recover his damages caused thereby; sustained both counts on all points, reversed the judgment, and remanded the cause for trial. 192 S. W. 387.

Defendant thereupon answered the petition, reiterating in its plea to the first count the constitutional objections to § 3020, and in its plea to the second count averring that to permit a recovery against it by reason of the alleged agreement between the companies would deprive defendant of its property and its right to contract without due process of law in violation of the Fourteenth Amendment.

On the issues so made up, the case went to trial and resulted in a verdict in favor of plaintiff upon both counts. Defendant having reserved its constitutional points, appealed from the resulting judgment to the Supreme Court, which, however, refused to take jurisdiction on the ground that all constitutional questions had been decided on the former appeal and that the verdict, being for only $1500, was less than the jurisdictional amount required by statute; and hence transferred the cause to the St. Louis Court of Appeals for final disposition. 209 S. W. 928. Defendant, treating this decision of the Supreme Court as a final judgment reviewable by writ of error from this court, sued out such a writ, and upon the ground that the judgment

was not final under the state law the cause was dismissed March 8, 1920. 252 U. S. 567. Thereafter it was submitted to the St. Louis Court of Appeals, which in conformity to the former opinion of the Supreme Court affirmed the judgment (223 S. W. 754), overruled a motion for rehearing and refused an application for certification of the case to the Supreme Court. A writ of error from this court to the St. Louis Court of Appeals followed, under § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

A motion to dismiss the latter writ, based upon the ground that the judgment of the Court of Appeals is not that of the highest court of the State in which a decision in the suit could be had, because the first decision of the Supreme Court rendered the constitutional questions *res judicata,* and that under the state constitution the Court of Appeals has no jurisdiction to pass upon questions of that character, manifestly must be denied, and the case considered on its merits.

The argument in support of the contention that the Service Letter Act is repugnant to the due process of law clause of the Fourteenth Amendment in brief is that at common law an employer is under no obligation to give a testimonial of character or clearance card to his employee; that no man is compelled to enter into business relations with another unless he desires to do so, and upon the dissolution of such relations no man can be compelled to divulge to the public his reasons for such dissolution; that it is a part of every man's civil rights that he be at liberty to refuse business relations with any other person, whether the refusal rests upon reason or is the result of whim, caprice or malice, and with his reasons neither the public nor third persons have any legal concern; and that in the absence of a contract either employer or employee may sever the relation existing between them for any reason or without reason and may not be compelled to divulge

the reason without material interference with his fundamental rights. Assuming the rules of the common law to be as stated, it is obvious that to say they have an unqualified and universal application unalterable by statute, begs the question at the outset.

Section 3020 of the Revised Statutes of Missouri, now a part of the general corporation laws of the State, was derived from an Act of April 14, 1905 (Mo. Laws 1905, p. 178), entitled "An Act for the protection of laboring men by requiring employing corporations to give letter showing service of employe quitting service of such corporation, and providing penalty for violation of this act." In giving its genesis the Supreme Court declared (192 S. W. 389): "Prior to the enactment of this statute a custom had grown up in this state, among railroad and other corporations, not to employ any applicant for a position until he gave the name of his last employer, and upon receiving the name, it would write to said former employer, making inquiry as to the cause of the applicant's discharge, if discharged, or his cause for leaving the service of such former company. If the information furnished was not satisfactory, the applicant was refused employment. This custom became so widespread and affected such vast numbers of laboring people it became a public evil, and worked great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces. The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the state to ascertain the degree of the intelligence as well as the honesty, capacity, and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom." And again, (p. 392): "The statute under consideration imposes no unjust burden or expense upon the respondent or other

corporations doing business in this state. It was designed to protect the public interests as well as the wage-earner, against an injurious custom given birth to and fostered by said corporations. That a foreign corporation has no inherent right to exist or to do business in this state is no longer an open question. It derives those rights from the state, impressed with such conditions and burdens as the state may deem proper to impose, and when such a corporation comes into this state to do business, it must conform to the laws of this state, and will not be heard to complain of the unconstitutionality of our police regulations."

That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair* v. *United States,* 208 U. S. 161, 174; *Coppage* v. *Kansas,* 236 U. S. 1, 14.

But the right to conduct business in the form of a corporation, and as such to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law; and a State in authorizing its own corporations or those of other States to carry on business and employ men within its borders may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.

The statute in question is of this character; in it the legislature has recognized that, by reason of the systematic methods of engaging and dismissing employees that

employing corporations themselves established, "letters of dismissal," or something of the kind, are not only customary but a matter of necessity to those seeking employment, as well as to the corporations themselves, perhaps more necessary to those seeking employment, because of their want of organization, than to the corporations.

Can it be called an unreasonable or arbitrary regulation that requires an employing corporation to furnish to an employee, who after having served it for a time is discharged or voluntarily quits the service, a letter signed by the superintendent or manager setting forth the nature, character and duration of the service rendered and for what cause, if any, he left the service? It does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon. So far as construed and applied in this case it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even indirectly, with the liberty of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a "reference" or "character," a brief statement of his service with the company according to the truth, a word of introduction to be his credentials where otherwise the opportunity of future employment easily might be barred or impeded.

That statutes having the same general purpose, though sometimes less moderate provisions, have been adopted in other States attests a widespread belief in the necessity for such legislation. Indiana Rev. Stat. 1901 (Horner), § 5206r; Acts 1911, c. 178; Acts 1915, c. 51; Montana Rev. Codes 1907, §§ 1755–1757; Nebraska Rev. Stat. 1913, §§ 3572–3574; Oklahoma Rev. Laws 1910, § 3769; Texas

Rev. Civil Stat. 1911, Art. 594. Fifty years ago, in an act for the protection of seamen, Congress established and still maintains a provision that upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of discharge, in a prescribed form which calls for numerous identifying particulars and permits a statement of the seaman's character and capacity. Act June 7, 1872 c. 322, § 24, 17 Stat. 262, 267, 280; Rev. Stats. § 4551; Table B, p. 896.

Plaintiff in error places much reliance upon expressions of opinion contained in a number of cases in the state courts, chiefly the following:

Wallace v. *Georgia, C. & N. Ry. Co.*, 94 Ga. 732. Here the Supreme Court of Georgia held that "An Act to require certain corporations to give to their discharged employees or agents the causes of their removal or discharge, when discharged or removed," was contrary to the fundamental law of the State, on the ground that the public, whether as a multitude or a sovereignty, had no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public, but for private information as to the reasons for discharges; and that the statute was violative of the general private right of silence enjoyed in that State by all persons, natural or artificial, from time immemorial; liberty of speech and of writing being secured by the state constitution, "and incident thereto is the correlative liberty of silence, not less important." The case obviously is not in point, since the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.

Atchison, Topeka & Santa Fe Ry. Co. v. *Brown*, 80 Kans. 312, held that a service letter statute of that State (Laws 1897, c. 144; Gen. Stat. 1901, § 2422) was repug-

nant to § 11 of the bill of rights of the State and "an interference with the personal liberty guaranteed to every citizen by the state and federal constitutions." The section of the bill of rights relied on was "All persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right." This of course has no present significance. The reference to the Federal Constitution was to § 1 of the Fourteenth Amendment, but the opinion does not indicate what bearing, if any, the due process of law clause was deemed to have. It appears rather that the right to discharge a servant for any reason or for no reason was thought to be one of the "privileges or immunities of citizens of the United States." But, as this court more than once has pointed out, the privileges or immunities of citizens protected by the Fourteenth Amendment against abridgment by state laws are not those fundamental privileges and immunities inherent in *state* citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution, or its laws. *Slaughter-House Cases,* 16 Wall. 36, 72–74, 77–80; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Maxwell* v. *Bugbee,* 250 U. S. 525, 538. The reasoning of the Supreme Court of Kansas in this case is not convincing. The case was cited in *Coppage* v. *Kansas,* 236 U. S. 1, 24; not however in approval of its views upon the question now presented, but in order to show that the court had recognized that under the law of the State an employer might discharge his employee for any reason or without reason, and could not be compelled to give a reason where one did not exist; a view inconsistent as we thought with the same court's decision in the *Coppage Case,* then under review.

The legislature of Texas placed upon the statute book an act aimed at "Blacklisting" (Rev. Civil Stat. 1911, Art. 594), which required that any corporation or receiver of the same, doing business in the State, having discharged

an employee should furnish him with a true statement of the cause of discharge, or a statement in writing that he had left the service voluntarily; besides other provisions much more onerous and which were especially criticised by the Supreme Court of the State when it came to pass upon the constitutionality of the act.

This statute, having twice been sustained as constitutional by the Court of Civil Appeals (*St. Louis Southwestern Ry. Co. of Texas* v. *Hixon* [1910], 126 S. W. 338; reversed by the Supreme Court, without passing upon the constitutional question, 104 Tex. 267, 270; *St. Louis Southwestern Ry. Co. of Texas* v. *Griffin* [1913], 154 S. W. 583), was passed upon by the Supreme Court in the latter case, and the act declared invalid, 106 Tex. 477 (1914). That court declared that the liberty of contract was a natural right of the citizen beyond the power of the Government to take from him; in effect that the same liberty pertained to a corporation employer as to an individual employee; by implication that the statutory provision requiring such an employer to furnish its discharged employee with a statement of the cause of his discharge amounted to a destruction of the corporation's right to discharge the employee without cause and "a violation of the constitutional right of equal protection of the law as secured by the Fourteenth Amendment"; that to confer upon an employee the right to recover damages if the corporation upon his dismissal should fail to give him a statement of the true cause of his discharge was "a violation of the natural right to speak or be silent, or the liberty of contract secured by the constitution of this State and of the United States"; besides much in criticism of certain so-called inquisitorial provisions not found or paralleled in the Missouri statute that we are considering.

Opinion of the Justices, 220 Mass. 627, is an advisory opinion to the senate of the Commonwealth upon a pro-

posed measure of legislation, to the effect, " that no employee of a railroad corporation shall be disciplined or discharged in consequence of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information "; and that the corporation be prohibited from discharging an employee without compliance with the proposed provisions, under a heavy penalty. The opinion appears to have been based upon the ground, among others, that the proposed bill would require the corporation to produce at a hearing the person from whom it had derived its information even though such person might be a stranger to the railroad and declined for any reason or was unable to confront the employee. After quoting views expressed by this court in *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Lochner* v. *New York,* 198 U. S. 45, 53; *Adair* v. *United States,* 208 U. S. 161, 174–175; *Coppage* v. *Kansas,* 236 U. S. 1, 14, the opinion proceeded: " It seems to us impossible to say that the right of an employer to discharge an employee because of information affecting his conduct in respect of efficiency, honesty, capacity, or in any other particular touching his general usefulness, without first providing a hearing, stands on a different footing or is less under the shield of the constitution than the right held to be secured in the *Adair* and *Coppage Cases.* . . . In the absence of a contract, conspiracy or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also as a prerequisite to the exercise of his right, to enable the employee to make

a statement in the presence of some one else,—a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute. . . ."

For reasons thus outlined five of the seven justices expressed the view that the proposed bill would be invalid as an unreasonable interference with the liberty of contract; and for other reasons not necessary to be mentioned. It will be noted that the proposed bill had a direct effect upon the relations between employer and employee, pending the employment, which the Missouri statute has not.

We have examined the opinions referred to with the care called for by the importance of the case before us; and are bound to say that, beyond occasional manifestations of a disinclination to concede validity to acts of legislation having the general character of Service Letter Laws, we have found nothing of material weight; no well-considered judgment, much less a formidable body of opinion, worthy to be regarded as supporting the view that a statute which, like the Missouri statute, merely requires employing corporations to furnish a dismissed employee with a certificate setting forth the nature and character of the service rendered, its duration, and for what cause, if any, the employee has left such service, amounts to an interference with freedom of contract so serious and arbitrary as properly to be regarded a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment.

The cases cited from Georgia, from Kansas, and from Texas place material dependence upon provisions of the several state constitutions guaranteeing freedom of speech, from which is deduced as by contrast a right of privacy called the "liberty of silence"; and it seems to be thought that the relations between a corporation and its employees and former employees are a matter of wholly private con-

cern. But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence"; nor, we may add, does it confer any right of privacy upon either persons or corporations.

Previous decisions of this court are far from furnishing support for the contentions of plaintiff in error. *Allgeyer* v. *Louisiana,* 165 U. S. 578, related to legislation of a wholly different character and contains nothing that bears upon this. *Lochner* v. *New York,* 198 U. S. 45, dealt with a statute concededly valid if enacted in the interest of the public health, and held it void on the ground that in truth it was not, within the fair meaning of the term, a health law but was an illegal interference with the right of individuals to make contracts upon such terms as they might deem best. *Adair* v. *United States,* 208 U. S. 161, 174–175; *Coppage* v. *Kansas,* 236 U. S. 1, 17, dealt with statutes—the former with an act of Congress making it criminal for a common carrier in interstate commerce to discharge an employee because of his membership in a labor organization; the latter with a state law making it criminal to prescribe as a condition upon which one might secure or retain employment that the employee should agree not to become or remain a member of any labor organization while so employed; and this in the absence of contract between the parties, coercion on the part of the employer, or incapacity or disability on the part of the employee. In accord with an almost unbroken current of authority in the state courts holding statutes of that character to be invalid, this court came to a like conclusion. In the latter case there was a direct interference with freedom in the making of contracts of employment not asserted to have relation to the public health, safety, morals or general welfare beyond a purpose to favor the employee at the expense of the employer, and

to build up the labor organizations, which we held was not properly an exercise of the police power. This statute, in making it criminal, as it did upon the construction adopted and applied, for an employer to prescribe as a condition of employing or retaining a man competent and willing to assent to the condition, that he should agree not to become or remain a member of a labor organization while so employed, the employee being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice, in effect made it a compulsory and unwelcome term of the employment that the employee *must* be left free to join a labor union; membership in which reasonably might be expected to interfere materially with the member's fidelity to his employer.

As has been shown, the Missouri statute interposes no obstacle or interference as to either the making or the termination of contracts of employment, and prescribes neither terms nor conditions. The Supreme Court of the State, having ample knowledge of the conditions which gave rise to the particular legislation, declares with an authority not to be denied that it was required in order to protect the laboring man from conditions that had arisen out of customs respecting employment and discharge of employees introduced by the corporations themselves. It sustains the act as an exercise of the police power, but in truth it requires no extraordinary aid, being but a regulation of corporations calling for an application of the familiar precept, *sic utere tuo,* etc., in a matter of general public concern. Except by consent of the State the corporation, foreign or domestic, would have no right to employ laborers within its borders. A foreign corporation does not, as intimated by the court below, waive any constitutional objection by coming in (see *Terral* v. *Burke Construction Co.,* 257 U. S. 529). But it has no valid objection to such reasonable regulations as may be prescribed for domestic corporations similarly

circumstanced. The State with good reason might regulate the terms and conditions of employment, including the methods of accepting and dismissing employees, so as to prevent the corporations from producing undue detriment to the individuals concerned, either while employed or when afterwards they are called upon to seek other employment. In our opinion, no danger of "blacklisting" is necessary to justify legislation requiring that corporations dismissing employees furnish them with a certificate stating the period of the service, its nature and character, and the cause, if any, that led to its termination. It might be recognized that in the highly organized conditions of industry now prevailing—largely developed by the corporations themselves and to which their success is greatly due—it is not to be expected that unemployed men can obtain responsible employment without some credentials proceeding from a former employer. The legislature might believe it to be well understood that a period of employment by a corporation—notably so in the case of insurance companies—is a test of capacity, fidelity and the other qualities that go to make efficiency; that such a corporation may operate as a training school fitting employees not only for its own but for other lines of employment. Such a training may almost inevitably produce effects upon the individuals in forming both character and reputation—effects that cannot be brought to an end at the will of the employee or of the corporation or both of them combined, although the employment may be terminated at the will of either; but may continue while the employee lives; his employment with the corporation remains a part of what is called his "record," by which he must be judged whenever afterwards he may be in search of employment. The reputation of the dismissed employee is an essential part of his personal rights—of his right of personal security (1 Black. Com. 129; 3 *id.* 119). Even the common law regarded

a man's public repute as a fact having a bearing upon his ability to earn a livelihood; looked upon a good reputation in a particular trade or calling as having special pecuniary value; regarded a prospective employer as privileged to make inquiries about what his would-be employee had done in a former place of employment; conferred upon the former employer a privilege to communicate the truth in reply. What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping, and to convert what otherwise might be but a legal privilege, or under prevailing customs a "moral duty", into a legal duty, by requiring, as this statute does, that when an employee has been discharged or has voluntarily left the service it shall give him, on his request, a letter setting forth the nature and character of his service and its duration, and truly stating what cause, if any, led him to quit such service.

It is not for us to point out the grounds upon which the state legislature acted, or to indicate all the grounds that occur to us as being those upon which they may have acted. We have not attempted to do this; but merely to indicate sufficient grounds upon which they reasonably might have acted and possibly did act to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law.

The argument under the "equal protection" clause is unsubstantial. As we are assured by the opinion of the Supreme Court, the mischiefs to which the statute is directed are peculiarly an outgrowth of existing practices of corporations and are susceptible of a corrective in their case not so readily applied in the case of individual employers, presumably less systematic in their methods of

employment and dismissal. There is no difficulty, therefore, in sustaining the legislature in placing corporations in one class and individuals in another. See *Mallinckrodt Chemical Works* v. *St. Louis*, 238 U. S. 41, 55–56. And the act applies to all corporations doing business in the State, whether incorporated under its laws or not.

It is assigned for error, aside from the statute, that the decision of the Missouri court sustaining the cause of action under the second count amounts to depriving plaintiff in error of property without due process of law. This point was set up properly in the state courts as a special claim of immunity under the Fourteenth Amendment; and although under § 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, it could not have been made the basis of a writ of error from this court, but only a writ of certiorari, we think that, by the fair intendment of the act, since the record has been brought here properly under a writ of error because involving the constitutionality of a statute, plaintiff in error is at liberty to assign any other ground of error therein, based upon an adverse decision by the state court of last resort upon any right, title, privilege or immunity especially set up or claimed under the Constitution or laws of the United States.

The pith of the objection to the second count is that to permit a recovery against plaintiff in error on account of the agreement said to have been made between it and two other companies having a monopoly of the industrial life insurance business in the City of St. Louis, to the effect that neither of the three would within two years employ any man who had left the service of or been discharged by either of the others, was equivalent to depriving it of property without "due process of law." The Supreme Court held (192 S. W. 393), that the corporations had no lawful right to enter into a combination or

agreement the effect of which was to take from them the right to employ whomsoever they deemed proper, and at the same time deprive former employees of their constitutional right to seek employment. It seems to us clear that the State might, without conflict with the Fourteenth Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And for the purposes of our jurisdiction it makes no difference, under that Amendment, through what department the State has acted. The decision is as valid as a statute would be. No question of "equal protection" is raised here.

The judgment under review must be and is

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

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

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 19. Argued April 20, 1921; restored to docket for reargument June 6, 1921; reargued October 6, 1921.—Decided June 5, 1922.

1. Where an issue upon the constitutionality of a state statute, though not actively litigated in the trial court, is actually decided by the state court of last resort in favor of the statute, its judgment is reviewable here under Jud. Code, § 237, as amended September 6, 1916. P. 551.
2. The law of Oklahoma requiring public service corporations to issue to employees, when discharged from or voluntarily quitting their service, letters setting forth the nature of service rendered by such employees, and its duration, with a true statement of the cause of discharge or leaving, is consistent with due process and the equal protection of the laws. Pp. 555, 556. *Prudential Insurance Co.* v. *Cheek, ante,* 530.

3. Provisions that such letters shall be on plain paper selected by the employee, signed in ink and sealed by the superintendent or manager, and free from superfluous figures, words, designs, etc., are likewise valid. P. 555.

75 Okla. 25, affirmed.

ERROR to a judgment of the Supreme Court of Oklahoma, affirming a judgment for the plaintiff Perry in his action for damages against the railway company.

Mr. C. O. Blake, Mr. W. R. Bleakmore, Mr. John W. Willmott, Mr. R. J. Roberts, Mr. Thomas P. Littlepage and *Mr. Sidney F. Taliaferro,* for plaintiff in error, submitted. *Mr. Raymond A. Tolbert* and *Mr. Roy S. Lewis* also were on the briefs.[1]

Mr. Phil. D. Brewer, with whom *Mr. Edward S. Vaught* and *Mr. Jean H. Everest* were on the briefs, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error was sued out to test the validity, in view of the due process and equal protection provisions of the Fourteenth Amendment, of the Service Letter Law of Oklahoma (Act of April 24, 1908, Oklahoma Laws 1907–08, p. 516; Revised Laws Oklahoma 1910, § 3769), applicable to public service corporations and the like, in a case that arose under the following circumstances.

Daniel J. Perry, defendant in error, brought suit against Jacob M. Dickinson, then receiver of the Chicago, Rock Island & Pacific Railway Company (the company itself afterwards was substituted in his place while the cause was pending in the Supreme Court of the State). Plaintiff alleged that while in the employ of the company,

[1]At the former hearing the case was argued by *Mr. Blake* on behalf of the plaintiff in error, and submitted by *Messrs. Vaught* and *Everest* for defendant in error.

which operated a railway in Oklahoma and by which he had been employed continuously for a period of years, and while in the performance of his duties as switchman, he received severe personal injuries caused by a defect in a car brake, which either was known or in the exercise of due care by its employees would have become known to the railway company; the latter acknowledged responsibility for his injuries, settled with him through its claim agent on the basis of the company's negligence, furnished him with hospital treatment before and after the settlement; after some months dismissed him from the hospital as able to resume work; then refused to reëmploy him on the ground that he was ineligible by reason of physical incapacity; and after he had unavailingly sought reemployment at intervals during two years, furnished him through its superintendent with a service letter certifying (correctly) that he had been employed upon the company's lines as switchman for a period named, and (contrary to the fact) that he had been dismissed on account of his responsibility in a case of personal injury to himself June 30, 1913, his service being otherwise satisfactory; and he averred that because of this letter he had been unable to secure employment although competent, able and willing.

Defendant, besides a general denial, averred that the statute upon which the action was based was void because it deprived defendant of the due process of law and denied to it the equal protection of the laws guaranteed by the Fourteenth Amendment, and also because it violated a section of the state constitution in denying to defendant freedom of speech, including the right to remain silent. A trial by jury resulted in a verdict and judgment for plaintiff, which on appeal was affirmed by the Supreme Court. *Dickinson* v. *Perry,* 75 Okla. 25.

That court overruled the contention that the proof failed to show that the service letter given to plaintiff

did not truly state the cause of his discharge; then proceeded to discuss the constitutional questions, sustained the act, and affirmed the judgment.

Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the State actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. *Miedreich* v. *Lauenstein,* 232 U. S. 236, 243; *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248, 257.

Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry upon his dismissal a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. But the case cannot properly be dealt with upon this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law but deemed it

necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported. Apparently, under the law of Oklahoma apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived.

The act (Oklahoma Laws 1907–08, p. 516; Revised Laws Oklahoma 1910, § 3769) reads as follows:

"3769. *Corporation to give letter to employee leaving service.* Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this State, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon request of such employee, to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year: Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee.

No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

The Supreme Court (75 Okla. 31), after stating, on familiar grounds, that the legislature itself was the judge of the conditions which warranted legislative enactments, and laws were only to be set aside when they involved such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they might be said to be merely arbitrary and capricious, and hence out of place in a government of laws and not of men, went on to say: "Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employees who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed among employers was sufficient for 'blacklisting' employees, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse, among other things, which caused the legislatures of various States to enact laws declaring blacklisting unlawful, and requiring corporations to give a letter to employees discharged or leaving the service, setting forth the reasons

for the discharge of the employee or of his leaving the service and the nature of the service rendered by the employee. . . . [p. 32] The idea of requiring employers to give employees leaving their service a letter showing the character of work performed while in their service is not a new one. The common law recognized a moral obligation resting upon the employers to give a 'character' to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted. . . . [p. 33] There is nothing in the law contested which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employees when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employees discharged or leaving its service. All that is required is a statement of the employer showing the character of services rendered by the employee and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employee, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled. . . . There is nothing unusual or revolutionary in requiring the employer to give a certificate to the employee leaving his service showing the time he has been employed and the character of service rendered. . . . The employee who perhaps has devoted years of his life to a particular trade, when relinquishing employment, is without evidence to present in another locality or to another employer unless he has some certificate showing the term and character of his previous employment."

The court proceeded to say that the legislation was a warranted and lawful exercise of the police power of the State, that the contention that it involved a private and not a public matter, in that only the individual employee and the individual employer were concerned, was a pure

assumption that failed to recognize existing conditions; that the welfare of employees affected that of entire communities and the whole public. The decision of the Supreme Court of Missouri in *Cheek* v. *Prudential Insurance Co.,* 192 S. W. 387, 392, affirmed this day in our No. 149, *ante,* 530, was cited with approval and the statute attacked held not to deny to defendant due process of law nor to constitute an illegal infringement upon the right of contract.

The contention that the statute was a denial and abridgment of the right of free speech was overruled upon the ground that the right did not exist under the state constitution in the absolute form in which it was asserted. The decisions by the supreme courts of Georgia, Kansas and Texas in *Wallace* v. *Georgia, C. & N. Ry. Co.,* 94 Ga. 732; *Atchison, etc. Ry. Co.* v. *Brown,* 80 Kans. 312; and *St. Louis Southwestern Ry. Co.* v. *Griffin,* 106 Tex. 477, were disapproved.

Except for the particular requirements contained in the proviso, the statute here in question does not differ substantially from the Missouri statute this day sustained in *Prudential Insurance Co.* v. *Cheek, ante,* 530, and may be sustained as against the contention that it is inconsistent with the guaranty of " due process of law " for the reasons set forth in the opinion in that case.

The proviso requires that the service letter shall be written entirely upon a plain sheet of white paper to be selected by the employee, no printed blank to be used and the letter if written upon typewriter to be signed with pen and black ink, and immediately beneath the signature an official stamp or seal to be affixed in an upright position. No figures, words or letters to be used, except such as are plainly essential, either in the date line, the address, the body of the letter, or the signature and seal or stamp; and no picture, imprint, character, design, device, impression or mark to be either in the body or upon the face or back of the letter. Manifestly these

provisions are designed to insure the authenticity of the document, to prevent fabrication and alteration, and to make sure that it shall not only be fair and plain upon its face but shall exclude any cryptic meaning. They are contrived to prevent the purpose of the act from being set at naught by the giving of fraudulent service letters, which while bearing one meaning to the employee might bear another and very different one to the prospective employer to whom they might be presented. The act being valid in its main purpose, these provisions intended to carry it into effect, must be sustained. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, 570; *Second Employers' Liability Cases,* 223 U. S. 1, 52.

The contention that the Service Letter Law denies to plaintiff in error the equal protection of the laws is rested upon the fact that it is made to apply to public service corporations (and contractors working for them), to the exclusion of other corporations, individuals, and partnerships said to employ labor under similar circumstances. This is described as arbitrary classification. We are not advised of the precise reasons why the legislature chose to put the policy of this statute into effect as to public service corporations, without going further; nor is it worth while to inquire. It may have been that the public had a greater interest in the personnel of the public service corporations, or that the legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they "knew what they were about." *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 157–158, and cases cited.

Judgment affirmed.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds dissent.

Counsel for Parties.

LIPKE *v.* LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

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

No. 596. Argued March 21, 22, 1922.—Decided June 5, 1922.

1. In a suit to restrain revenue officers from seizure of property under color of an act of Congress, a substantial claim that the act, as construed and sought to be applied by them, is unconstitutional, will support a direct writ of error from this court to the District Court. P. 560.
2. The so-called taxes retained in force and imposed by § 35 of the National Prohibition Act upon dealing in liquor prohibited and made criminal by the act, are in reality a penalty, and cannot be enforced by distraint of the offender's property without first affording him a due opportunity for a constitutional hearing. P. 561.
3. Revised Statutes, § 3224, forbidding suits to restrain assessment or collection of any tax, and the statutory remedy of payment and action to recover, are inapplicable to such a case; and the person affected is entitled to relief by injunction, for want of an adequate legal remedy. P. 562.

274 Fed. 493, reversed.

APPEAL from a decree of the District Court dismissing a bill to restrain the collection by distress, sale or otherwise, of amounts assessed as taxes and penalties under the National Prohibition Act.

Mr. Lincoln L. Eyre, with whom *Mr. Francis J. Maneely* and *Mr. Otto A. Schlobohm* were on the brief, for appellant.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon *Ketterer* v. *Lederer,* 269 Fed. 153, the court below dismissed the bill, upon motion, for want of equity, 274 Fed. 493, and the cause is here by direct appeal.

The bill alleges:

That complainant Lipke paid all internal revenue taxes required by the laws of the United States for the year ending June 30, 1920; and he holds a retail liquor license issued by the Court of Quarter Sessions, County of Philadelphia, for the year ending May 31, 1921. On December 29, 1920, he was arrested for selling liquor contrary to the National Prohibition Act and gave bail to appear and answer in the United States District Court. This prosecution is still pending.

That on March 18, 1921, complainant received a written communication from the defendant which stated: " Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within 10 days after date of this notice, a penalty of 5 per cent. of the amount of tax due will be added, plus interest at the rate of 1 per cent. per month until paid." The total assessment amounted to $557.29, made up of three items indicated thus—" R. L. D. Sec. 35 D. T. 45.83; 11 Mos. 21 3244 P. 11.46; S. F. P. A. 1–26–21 S. P. 500.00."

That on March 31st he received a second written demand for $557.29 with penalty of 5 per cent. for failure to pay within prescribed time. And he was advised " If payment of tax and penalty is not received within 10 days, collection of the same, with any accrued interests thereon and costs, shall be made by seizure and sale of property."

That " In addition to the notice printed on said so-called tax bills, that the property of your orator will be

seized and sold for non-payment, your orator has been informed by officials of the defendant department that after the expiration of ten days from the rendition of said second notices, his property will be seized and sold by warrant of distress. . . . He is now subject, at any moment to have the defendant, as Collector of Internal Revenue, seize his property, real or personal, for the non-payment of said fines and penalties and that he is wholly without adequate remedy at law to prevent such seizure of his property."

That § 3244 Rev. Stats.,[1] has no application; § 35 of the Prohibition Act confers no such power as the Collector seeks to exercise; and he is undertaking to punish complainant by fine and penalty for an alleged criminal offense without hearing, information, indictment or trial by jury, contrary to the Federal Constitution. If the latter section has the meaning ascribed to it by the defendant, it is unconstitutional.

The prayer is for an injunction restraining the defendant from proceeding to collect the sum demanded by warrant of seizure, distress or sale or otherwise, and requiring a cancellation of the so-called " tax bills."

Appellant maintains that the demand upon him was not for taxes, but for a penalty for an alleged criminal act; that the method adopted for enforcing this penalty is contrary to the Federal Constitution; and that if construed as appellee insists it should be, § 35 is unconstitutional.

Appellee maintains that the cause involves only questions of construction and, therefore, the appeal should be

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[1] Sec. 3244. Special taxes are imposed as follows:

* * * * *

Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.

dismissed; that § 3224, Rev. Stats.,[1] prohibits the relief prayed; that the bill states no ground for equitable relief; and that full, adequate and complete remedy may be had at law.

The cause is properly here by direct appeal from the District Court. Appellant claimed that as construed and sought to be enforced by the Collector, § 35 of the Prohibition Act conflicts with the Federal Constitution. The point is substantial and sufficient to support our jurisdiction. *Towne* v. *Eisner,* 245 U. S. 418, 425; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *South Covington & Cincinnati Street Ry. Co.* v. *Newport ante,* 97.

The National Prohibition Act, c. 85, 41 Stat. 305, is entitled "An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries." "It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes." *United States* v. *Yuginovich,* 256 U. S. 450. "Title II—Prohibition of Intoxicating Beverages"—contains thirty-nine sections.

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

* * * * *

[1] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

"Sec. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

* * * * *

"Sec. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case, ante,* 20. When by its

very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States,* 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function " is to provide for the support of the government " and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324.

The Collector demanded payment of a penalty and § 3224, which prohibits suits to restrain assessment or collection of any tax, is without application. And the same is true as to statutes granting the right to sue for taxes paid under protest. A revenue officer without notice has undertaken to assess a penalty for an alleged criminal act and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind.

Section 35 prescribes no definite mode for enforcing the imposition which it directs, and, if it be interpreted as above stated, we do not understand counsel for the United States claim that relief should be denied to the appellant. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law. *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 136, 138, 142. And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot* v. *Accardo,* 278 Fed. 871. A preliminary injunction should have been granted.

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

Reversed.

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE PITNEY concurs.

The suit is in equity. So far as appears, the plaintiff had a full, adequate and complete remedy at law; and there was no danger of irreparable injury. The relief should, therefore, be denied, whatever the construction of § 35, Title II, of the Volstead Act, and even if it be deemed unconstitutional. Compare *Bailey* v. *George, ante,* 16.

Plaintiff describes himself as a retail liquor dealer in Philadelphia who had paid the federal special tax for the year ending June 30, 1920, and held a license under the Brooks Law which did not expire until May 31, 1921. On December 29, 1920, he was arrested under § 2, Title II, of the Volstead Act for illegally selling liquor; and the prosecution is still pending. On March 18, 1921, he received from the Collector of Internal Revenue a "Notice and Demand for Tax"; and on March 31, 1921, a second notice. By the latter he was informed that, if he did not pay the alleged tax within ten days, collection would be made by seizure and sale of his property. The amount demanded is $557.29, made up of three items: one for $45.83 for double tax under said § 35; another of $11.46 called penalty under § 3244 of the Revised Statutes; and a further amount of $500.00 "special penalty" under said § 35. This suit against the Collector was commenced May 25, 1921. The plaintiff says that there is in law no authority to levy this alleged tax and the penalties; that the claim is in fact not for a tax, but for fines; that the so-called "Notice and Demand for Tax" is in fact an attempt to inflict punishment without a hearing and without judicial trial; "and that he is wholly without adequate remedy at law to prevent such seizure of his property."

The claim is for a small sum. For aught that appears plaintiff might readily pay it under protest and bring an

action against the Collector to recover the amount paid. If he does not wish to pay, he can let the distraint be made and then sue for the trespass incident to wrongful distraint. And if personal property should be seized, he may replevy it. There is in the bill no allegation that the plaintiff is unable to pay the small amount claimed by the Government; nor of fraud or oppression or abuse of process on the part of the Collector; nor that a cloud will be cast upon title to real estate; nor that the property subject to distraint is of such a character that if distrained it will be sacrificed; nor that a proceeding in equity is necessary to prevent multiplicity of suits.

If the sum assessed against the plaintiff is a tax legally due, distraint by the Collector is a permissible and long sanctioned method of collection. Revised Statutes, §§ 3187–3216; *Hartman* v. *Bean,* 99 U. S. 393, 397; *Blacklock* v. *United States,* 208 U. S. 75. Compare *Scottish Union & National Insurance Co.* v. *Bowland,* 196 U. S. 611, 632. If it is in its nature a tax, but is claimed to be an unconstitutional one, still, particularly in view of Rev. Stats. § 3224, suit will not lie to restrain its collection. *Snyder* v. *Marks,* 109 U. S. 189; *Dodge* v. *Osborn,* 240 U. S. 118. And if the contention is that the Government's demand is not for a tax at all, but for a fine, and that, therefore, Congress lacks power to confer upon the Collector authority to collect it by distraint, still equity should not grant relief, because the bill fails to allege any fact showing that the legal remedy would not be adequate or that there is danger of irreparable injury.[1] Whether the Government's demand be deemed one for a fine or for a tax

[1] Compare *Dows* v. *Chicago,* 11 Wall. 108; *Shelton* v. *Platt,* 139 U. S. 591; *Pittsburgh, etc., Ry.* v. *Board of Public Works,* 172 U. S. 32; *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269; *Indiana Manufacturing Co.* v. *Koehne,* 188 U. S. 681; *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481.

which is unconstitutional, legal remedies are available; and there is, therefore, lack of jurisdiction in equity. We have here, at the worst, the case of a threatened distraint which it is contended will be wrongful if made; a case not differing in substance from wrongful distraint by landlords or other wrongful distraint by tax collectors; and not differing in substance from wrongful attachment. In all these cases, as has long been settled, the owner of the property of which seizure is threatened is not entitled to relief in equity, unless it appears that there is no plain, adequate and complete remedy at law.

Whether the action of the Government is lawful depends upon the construction of a statute; and on this question the lower courts have differed. As was said by this court in *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269, 274: "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding." If the Government is proceeding without warrant in law, the plaintiff should, of course, have redress. An early determination of the constitutional question presented would be desirable. But, in my opinion, we cannot properly decide it in this case.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

In Equity.

No. 20, Original. Partial decree entered June 5, 1922.

Red River is not a navigable stream in Oklahoma; the State acquired no title to the part of the river bed within her borders by virtue of her admission into the Union; her right, title and interest in that

part are only such as are incidental to her ownership of lands on the northerly bank.

The federal mining laws have never applied to the parts of the river bed lying within and south of the Indian pasture reserve formerly called the Big Pasture.

Certain petitions of intervention claiming under lease from Oklahoma, or based on locations made under the mining laws, are dismissed.

Decree adjudicating proprietary claims to land in the bed of Red River, in accordance with the opinion reported in 258 U. S. 574.

Certain issues in this cause involving proprietary claims to the bed of Red River having been heretofore submitted on the pleadings, various petitions of intervention and the evidence taken before and reported by a commissioner, and the court having considered those issues and announced its conclusions thereon in an opinion delivered May 1, 1922:

It is considered, ordered and decreed as follows:

1. That Red River is not a navigable stream in any part of its course within the State of Oklahoma.

2. That the State of Oklahoma did not in virtue of her admission into the Union as a State acquire any title to, or become the owner of, the bed of the part of Red River within her borders.

3. That the State of Oklahoma has no title, right or interest in or to the part of the bed of Red River within her borders, save such as is incidental to her ownership of lands on the northerly bank of the river.

4. That the intervener D. D. Brunson, who claims rights in the bed of Red River in virtue of certain oil and gas leases granted by the State of Oklahoma and her officers, did not acquire and does not hold any right whatever in such river bed under those leases or any of them, and that the said leases have been at all times void and of no force or effect.

5. That the portion of the bed of Red River which formerly was within what was known and designated as Kiowa, Comanche and Apache Pasture Reserve Number One (commonly called the Big Pasture), and the portion of the bed of Red River which lies south of what formerly was known and designated as such pasture reserve, has not at any time been subject to location or acquisition under the mining laws of the United States.

6. That the several interveners hereafter named in this paragraph, who are asserting rights in the portions of the bed of Red River named in the last preceding paragraph in virtue of mining locations claimed to have been made under the mining laws of the United States, did not acquire and do not hold any right whatever in such river bed under those mining locations or any of them, and that the said mining locations have been at all times void and of no force or effect. The said interveners are as follows:

Burk Divide Oil Company, No. 2, a corporation: Benjamin H. Goddin, William Dee Hammonds, Robert R. Lavender, Robert H. Woodruff, Claude C. Lear, Ralph L. Winchell, Luther H. Hammonds, Charlie L. Mount.

Burk Divide Oil Company, No. 3, a corporation: Francis M. Crane, Joseph C. Eversole, L. M. Varner, Abner Eversole, Marvin W. Tindle, O. W. Crane, Columbus R. Atchley, Charlie F. Crane.

Burk Divide Oil Company, a corporation, Walter C. Daugherty, James L. Taylor, Evander Kaiser, Floyd N. Thompson, Robert L. Hart, A. C. Goddin, Thomas R. Foster, James B. Crossland, Judsonia Developing Association.

Burk Divide Oil Company (Consolidated), a corporation.

Pacific-Wyoming Oil Co., a corporation: H. L. Roberts, H. R. King, W. F. Long, Albert L. Peters, J. C. Brown, R. E. Litton, H. H. Overton, Jim Hyde.

J. H. Sharrock, Roy Sharrock, Earl Fuller, Robert E. Kent, T. D. Hamill, T. A. Hammill, Charles H. Martin, Charles H. Slack.

Frank Sharrock, Charles H. Murphey, R. O. Hammill, Caleb B. Bledsoe, M. Harve Foshee, Edna Sharrock, Lovie R. Lear, George Bradfield, C. O. Keeley, ———— Ellis, ———— Lambert, Lambert & Ellis (partnership).

Lena H. Slack, Louie L. Varner, Lena Hammill, Sarah E. Davis, Gertrude Hamill, Lena N. Kent, Eva C. Wilson, Jennie Hamill.

Alva A. Varner, Wm. T. Davis, Earl N. Walford, F. C. Hamill, John R. Slack, Ollie M. Sharp, Riley I. Davy, George W. Hamill.

William M. Patterson, William G. Trigg, Melville E. Peters, Interstate-Texas Oil Company (a corporation), Belmont Oil Company (joint-stock association), Melish Consolidated Placer Oil Mining Association, Hazel Burk Oil Company, (a joint-stock association), R. F. Henderson, trustee, Delta Oil Company, J. B. Lawton, Carl C. Staley, Eugene H. Smith, D. V. Burrell, W. L. Boyd, W. M. Egbert, Clarence Brashear, R. L. Brown, James H. Shaw, Alfred A. Brashear, Oscar W. Rhodes, George J. Lackey, W. M. Egbert, Mark Benson.

Ava Willis, A. F. Anderson, Jorgen Jorgensen, George M. Coffman, Tracey L. Coffman, Edwin Sundgren, Mark Denson, Walter V. Burchett, Eugene Smith, H. C. Pollock, J. L. Ellsworth, C. S. Govereau, S. C. George, O. J. Baxter, H. G. Pollock, C. B. Govereau, John Rickert, Flora E. Billingsley, G. N. Coffman, Eugene H. Smith, Snoden T. Brashear, M. C. Coffman, W. L. Brown.

Buckeye Petroleum Company, South West Petroleum Company, Delta Oil Company, H. N. Brennan, H. B. Cobb, W. E. Bishop, W. J. Steward, J. W. Akin, W. I. Brashears, R. O. Kenley, Langford Oil & Development Company, Aldine Oil Corporation.

Agriculture Aid Association: James S. Fulton, Green B. Wolfe, Noble A. Gordon, Isaac D. Settle, Mactie Pool, Hoyt N. Berryman, Charles L. McGuire, John Robert Gillam, W. T. Adams.

Oregon Mining Company: John F. Watson, H. K. Maxwell, George A. Fitzimmons, John B. Blocher, Anna B. Wright, Frances M. Wright, Jake Hamon.

AAA—1 Placer Mining Association: Smith S. Fryar, Thomas H. Gilliland, Rawleigh L. Robertson, David N. Downing, Tilden H. White, George H. Willis, Alvin A. Wells.

AABA Placer Mining Association: Harry A. Markham, Howard V. Hinckley, Wm. F. Schoenhoven, Herbert L. McCracken, Orren Harden Deel, Frank M. English, James A. Collier, Harold Wallace.

Amalgamated Assets Association: Aultman B. Swaim, Tarlton M. Brock, Ira C. Cribbs, Billie Jones, George M. Sharrock, Ralph V. Widman, Gos Owens.

Airplane Arts Association: Joseph F. Hamilton, Thomas R. Carl, John W. Kukuk, Duncan M. Circle, Lewis Butler, Jed P. Owens, Jules S. Cormier.

All American Association: P. S. McGuire, Samuel J. Meals, Alonzo R. Poyer, Melvin S. Poyer, Arthur Heatherly, Charles C. Crump, Alin G. Huffhines.

All Argosies Association: T. H. Ware, R. M. Cowan, Fred De Vinna, Clarence Fink, Myrtle A. McGuire, Roy Evans, N. Douglas, Seymour S. Price.

Aspen Attorney Association: Henry E. Asp, Andrew J. Key, Wm. J. Carter, William Wilson, Christina M. Gordon.

Sons of Thor Mining Association: Lillian Gilstrap, Josie L. Owen, James A. Embry.

All Around Association.

Arkansas Placer Oil Mining Company: Marion N. Addison, Daniel L. Hannifin, James M. Patterson, William M. Addison, Ruth Flanagan, Lucile Heston, Beulah Palk.

Good Luck Oil Mining Company: George W. Potter, Thomas A. Ikerd, Eddie S. Traylor, Jeff D. Trigg, Jess R. Short.

Rain Water Oil Mining Association: Millie A. Trigg, Nettie Harden, Edward Lee Frye, C. B. Gamill, Katie Gamill, B. L. Stephens, Bertha Stephens.

Belmont Placer Oil Mining Company: Stephen P. Hannifin, Zac T. Trigg, Grover Addison, Nelson Emery.

Whale Oil Company: Arthur J. Emery, Benita Moorhead, Rhea Moore, Cloney A. Smith.

Goat Island Association No. 1: John M. Bender, H. Clay Dykes, W. O. Tarr, T. W. McGraw, H. A. Pendleton, Tom Isbell, Tom A. Upshaw, T. F. Ragsdale.

Goat Island Association No. 2: Robert S. Ragsdale, Dave Thorne, Ed. D. Heine, W. Roy Hill, W. D. Utts, C. L. Mayes, A. M. Miller, W. H. Miller.

American Aces Association: Fred Ptak, F. H. Wall, Clarence L. Henley, Robert P. Carpenter, Adolph Honegger, William F. Caldwell.

Double Triangle Petroleum Development Association, Big Chief Petroleum Development Association, Mid River Petroleum Development Association, Submarine Petroleum Development Association, Sand Bar Petroleum Development Association, River Bend Petroleum Development Association, Big Eight Petroleum Development Association, Meander Petroleum Development Association, Half Island Petroleum Development Association, Blue Goose Petroleum Development Association, Albert Bissell, Nathan Ulrich, F. D. Ross, William H. Drybread, Mortie McDaniel, Frank Swartie, Margaret Owen Read, Lulu Truitt, Casper S. Ulrich, Allen Fields, Bruce P. Fields, J. F. Erwin, Mary Patterson, J. A. Diffendaffer, Illie Johns, J. A. Staily, Charles Payne, E. R. Kerby, A. J. Grimes, E. O. Hadley, J. Anthony, George Pugh, H. B. Eller, T. E. Kendrick, E. Ulrich, L. L. Cole, W. E. Pannell, John Vosburg, Nannie Kimberly, John E. Wilson,

H. C. Smith, Harry Williams, Mary Manes, Lou Cunningham, J. L. Pope, H. D. Ashley, John W. Hammond, William Zea, John T. Fields, Hamilton Morgan, Raymond Fields, Mrs. P. Little, J. C. Hagan, Alex Walker, Jerry Sparling, John T. Orin, Sam Madox, Perrie Dennas, Clyde Owen, Rondo Stevens, Lafe Owen, L. W. Hurley, O. D. Day, Lulu Hall, George Frampton, James W. Hues, A. C. Kendrick, J. G. Andrews, John F. Mieling, Etta Scay, C. S. Chumn, G. M. Burkhart, B. Bissell, Ned Shepler, Joe Altman, F. C. McCarthy, M. M. White, George W. Rogers, W. P. Danford, Thomas Green, Albert Mitschrich, Nettie Ulrich, Laura Fields, E. Chester Ecker, Charles Field, Guy Ulrich, J. T. Smith, Maggie Wilson, Oscar Pope, Francis M. John, jr., John M. Shanklin, A. B. March, I. F. Collie, Burkburnett Placer Mining & Oil Company (a corporation).

Melish Consolidated Placer Oil Mining Association: Elsie E. Wright, O. J. Logan, John Stuard, C. H. Hyde, George Brown, B. F. VanDyke, Sam Finley, W. B. Skirvin, L. A. Klinkenbeard, A. S. Thomas, P. F. Slaton, E. H. Howell, Nestor Rummons, A. F. Schwartz, M. L. Whelan, F. R. Quimby, Frank Nevills, A. N. McKinney, Joe Huber, Truitt Johnson, Tom Testerman, Ray Testerman, Joe Clark, W. B. Cuppy, Scotty Vinson, James Byran, A. C. Seives, Marvin Spears, P. W. Reamer, G. M. Brown, W. A. Bennett, Warren K. Snyder, I. B. Levy, F. L. Nevills, Cam Galt, H. C. Enoch, J. B. Doolin, E. A. Haines, Ruby Turner, Ira E. Gaskill, J. B. Lamsden, J. H. Windle, D. H. Pershall, S. H. Harris, O. E. Heatherington, F. P. Duncan, J. H. Cline, J. Garnett Hughes, Lucy Lacy.

7. That the petitions of intervention based on the oil and gas leases named in paragraph four (4) hereof and the petitions of intervention based on the mining locations named in paragraph six (6) hereof are hereby severally dismissed on their merits.

STATE OF GEORGIA *v.* STATE OF SOUTH CAROLINA.

IN EQUITY.

No. 16, Original. Form of decree submitted May 15, 1922.—Decree entered June 5, 1922.

Decree declaring location of interstate boundary.

This cause came on to be heard by this court, and, for the purpose of carrying into effect the conclusions of the court as stated in its opinion herein, [257 U. S. 516],

It is ordered, adjudged, and decreed that the boundary between the States of Georgia and South Carolina is and shall be the rivers Savannah, Tugaloo and Chattooga to the point where the latter river touches the North Carolina line at the thirty-fifth parallel of North latitude; and the location of the boundary line between said States is hereby established and declared to be as set forth in the opinion of the court, as follows:

1st. Where there are no islands in the boundary rivers the location of the line between the two States is on the water midway between the main banks of the river when water is at ordinary stage;

2nd. Where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage;

3rd. That all islands formed by nature in the Chattooga river are reserved to Georgia as completely as are those in the Savannah and Tugaloo rivers.

4th. That the parties to this suit may at any time, by mutual consent, locate and monument the boundary line in any part of the boundary rivers in accordance with the provisions of this decree.

It is further ordered, adjudged, and decreed that the costs of this suit shall be equally divided between the said

two States, and that the Clerk of this court shall forthwith transmit to the Chief Magistrates of the States of Georgia and South Carolina copies of this decree, duly authenticated under the seal of the court.

DECISIONS PER CURIAM, FROM MAY 2, 1922, TO AND INCLUDING JUNE 5, 1922, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 741. ALABAMA POWER COMPANY ET AL. *v.* BANKS S. TALMADGE, AS ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Alabama. Motion to dismiss or affirm submitted April 24, 1922. Decided May 15, 1922. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. William L. Martin* and *Mr. Perry W. Turner* for plaintiffs in error. *Mr. Ogden Persons* and *Mr. E. W. Pettus* for defendant in error.

No. 119. UNITED SHOE MACHINERY CORPORATION ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Eastern District of Missouri. Motion for rehearing and modification of decree submitted May 15, 1922. Order entered May 29, 1922.

The United Shoe Machinery Corporation and others, appellants, having presented their application for rehearing and modification of the decree of affirmance heretofore rendered in this cause [258 U. S. 451], upon consideration thereof the same is overruled. It is ordered that the District Court after the receipt of the mandate of affirmance may hear an application of the appellants for an extension of time in which to readjust the business of the United Shoe Machinery Corporation with its lessees, and, if satisfied that the same is necessary, may grant a time, not exceeding three months from the date of the receipt of the mandate, in which the United Shoe Machinery Corporation may adjust its business with lessees in a manner to comply with the decree of this court affirming

the decree of the District Court. *Mr. Frederick P. Fish, Mr. Charles F. Choate, Jr., Mr. Malcolm Donald* and *Mr. Henry W. Dunn* for appellants. *Mr. Solicitor General Beck, Mr. LaRue Brown* and *Mr. Elias Field* for the United States.

No. 57. JOHN SIMMONS COMPANY *v.* GRIER BROTHERS COMPANY. Certiorari to the Circuit Court of Appeals for the Third Circuit. Submitted May 15, 1922. Motion to modify decree denied May 29, 1922. *Mr. James Q. Rice* for petitioner. *Mr. C. P. Byrnes, Mr. David A. Reed, Mr. Geo. H. Parmelee* and *Mr. Geo. E. Stebbins* for respondent. [See 258 U. S. 82.]

No. 927. SOUTHERN RAILWAY COMPANY *v.* A. D. WATTS ET AL.; and

No. 928. ATLANTIC & YADKIN RAILWAY COMPANY *v.* A. D. WATTS ET AL. Appeals from the District Court of the United States for the Western District of North Carolina;

No. 960. SEABOARD AIR LINE RAILWAY COMPANY *v.* A. D. WATTS ET AL.;

No. 961. ATLANTIC COAST LINE RAILROAD COMPANY *v.* A. D. WATTS ET AL.; and

No. 962. NORFOLK SOUTHERN RAILROAD COMPANY *v.* A. D. WATTS ET AL. Appeals from the District Court of the United States for the Eastern District of North Carolina. Motions for stay and to advance submitted May 15, 1922. Order entered May 29, 1922. *Per Curiam.* In these cases, which were suits brought under § 266, Judicial Code, as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013, for a preliminary and permanent injunction, a preliminary injunction was denied by the District Court and a stay granted until an application could be made to this court. As the District Court is

familiar with the character of the case, and we are not, we deny the motion for a stay, with leave to apply to the District Court for a stay until the matter can be disposed of here, if in its judgment it deem that such a stay should be granted. The motion to advance is granted and the cases set for hearing on the first Monday in November. *Mr. S. R. Prince, Mr. L. E. Jeffries* and *Mr. A. B. Andrews* for appellants in Nos. 927, 928. *Mr. Murray Allen, Mr. Forney Johnston* and *Mr. James F. Wright* for appellant in No. 960. *Mr. Thomas W. Davis* for appellant in No. 961. *Mr. W. B. Rodman* for appellant in No. 962. *Mr. James S. Manning* and *Mr. William P. Bynum* for appellees.

No. 634. DORA E. ROOKER ET AL. *v.* FIDELITY TRUST COMPANY ET AL., ETC.; and

No. 785. DORA E. ROOKER ET AL. *v.* FIDELITY TRUST COMPANY ET AL., ETC. Petition for a writ of certiorari and error to the Supreme Court of the State of Indiana. May 29, 1922. Motion for a rule to show cause; petition for supplemental writ of error; and petition for supplemental writ of certiorari in this case, severally denied. *Mr. William V. Rooker* for petitioners and plaintiffs in error. No brief filed for respondents and defendants in error. See *post*, 580.

No. 887. WILLIAM E. WOODBRIDGE *v.* UNITED STATES. Appeal from the Court of Claims. Motion to reinstate submitted May 29, 1922. Decided June 5, 1922. Motion to rescind order docketing and dismissing this case granted, and leave granted to file and docket the case. *Mr. Rufus S. Day* and *Mr. H. P. Doolittle* for appellant. *Mr. Solicitor General Beck* for the United States. [See 258 U. S. 634.]

No. 401. BUELL V. STEVENS *v.* SOUTHERN PACIFIC LAND COMPANY;

No. 402. RALPH E. STEVENS, ADMINISTRATOR, ETC. *v.* SOUTHERN PACIFIC LAND COMPANY; and

No. 403. MARY V. BEGGS *v.* SOUTHERN PACIFIC LAND COMPANY. Error to the District Court of Appeal, Second Appellate District, Division Two, of the State of California. Motion to dismiss or affirm submitted May 29, 1922. Decided June 5, 1922. *Per Curiam.* Dismissed for the want of jurisdiction. § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Baltimore & Potomac R. R. Co.* v. *Hopkins,* 130 U. S. 210; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 6; *Schaff* v. *Famechon Co.,* 258 U. S. 76. *Mr. Daniel N. Clark* and *Mr. William L. Chitty* for plaintiffs in error. *Mr. Frank Thunen* and *Mr. C. F. R. Ogilby* for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM MAY 2, 1922, TO AND INCLUDING JUNE 5, 1922.

No. 857. WILLIAM R. WARNER & COMPANY *v.* ELI LILLY & COMPANY. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Francis Rawle, Mr. George W. Wickersham* and *Mr. Roger S. Baldwin* for petitioner. *Mr. E. W. Bradford* for respondent.

No. 942. DIRECTOR GENERAL OF RAILROADS *v.* SAMUEL KASTENBAUM. May 15, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Lyman M. Bass* for petitioner. *Mr. Israel G. Hollender* for respondent.

No. 891. TOLEDO SCALE COMPANY *v.* COMPUTING SCALE COMPANY. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. George D. Welles* and *Mr. Horace Kent Tenney* for petitioner. *Mr. John M. Zane, Mr. Charles F. Morse* and *Mr. Drury W. Cooper* for respondent.

No. 973. FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL. *v.* COMPUTING SCALE COMPANY ET AL. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Charles Markell, Mr. Edward Osgood Brown* and *Mr. Edwin J. Marshall* for petitioners. *Mr. John M. Zane, Mr. Charles F. Morse* and *Mr. Drury W. Cooper* for respondents.

No. 968. ST. JOHNS N. F. SHIPPING CORPORATION *v.* S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Clarence Bishop Smith* for petitioner. *Mr. E. Curtis Rouse* for respondent.

No. 972. AUGUST V. ANDERSON, WARDEN, ETC. *v.* ARTHUR CORALL. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Solicitor General Beck, Mr. Blackburn Esterline* and *Mr. W. C. Herron* for petitioner. No appearance for respondent.

No. 994. WALLACE BENEDICT, AS RECEIVER, ETC. *v.* AARON RATNER. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Selden Bacon* for petitioner. *Mr. Louis S. Posner* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED FOR WANT OF PROSECUTION, FROM MAY 2, 1922, TO AND INCLUDING JUNE 5, 1922.

No. 634. DORA E. ROOKER ET AL. *v.* FIDELITY TRUST COMPANY, ET AL., ETC. May 15, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied. *Mr. William V. Rooker* for petitioners. No brief filed for respondents. [See *ante*, 577.]

No. 843. GRISCOM-RUSSELL COMPANY *v.* STANDARD WATER SYSTEMS COMPANY ET AL. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Richard P. Whiteley* for petitioner. *Mr. William M. Stockbridge* for respondents.

No. 866. ABBOTT FACTORY, INC. *v.* EARL BANCROFT, AS TRUSTEE, ETC. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edmund J. Wager* for petitioner. *Mr. Percival De Witt Oviatt* for respondent.

No. 885. JOHN MCGOVERN *v.* UNITED STATES. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Seymour Stedman* and *Mr. Charles H. Soelke* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 888. A. J. KRANK MANUFACTURING COMPANY *v.* CHRIS. H. PABST ET AL., ETC. May 15, 1922. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank B. Kellogg* and *Mr. Frank A. Whiteley* for petitioner. No appearance for respondents.

No. 890. KEYSTONE PUBLISHING COMPANY *v.* JEWELERS' CIRCULAR PUBLISHING COMPANY. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Carlton Comstock* and *Mr. Robert C. Beatty* for petitioner. *Mr. W. Hastings Swenartson* for respondent.

No. 922. THOMAS H. HAYES *v.* JOSEPH CHESTER GIBSON, TRUSTEE, ETC. May 15, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Thomas F. Bayard, Mr. W. Thomas Kemp* and *Mr. Robert Pennington* for petitioner. *Mr. Josiah Marvel* for respondent.

No. 870. VIRGINIA HUEY ET AL. *v.* D. A. BROCK ET AL. Error to the Supreme Court of the State of Alabama. May 29, 1922. Petition for a writ of certiorari herein denied. *Mr. George H. Lamar,* for plaintiffs in error, in support of the petition. No appearance for defendants in error.

No. 873. COCA COLA COMPANY *v.* CITY OF ATLANTA;

No. 882. THOMAS K. GLENN *v.* CITY OF ATLANTA; and

No. 892. EMPIRE COTTON OIL COMPANY *v.* CITY OF ATLANTA. Error to the Supreme Court of the State of Georgia. May 29, 1922. Petitions for writs of certiorari herein denied. *Mr. Clifford L. Anderson, Mr. L. Z. Rosser, Mr. L. C. Hopkins* and *Mr. Harold Hirsch,* for plaintiffs in

error, in support of the petitions. *Mr. George M. Napier,* for defendant in error, in opposition to the petitions.

No. 883. Henry Vogt Machine Company *v.* J. C. Allin. May 29, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Frank L. Lynch* and *Mr. Eugene R. Attkisson* for petitioner. No brief filed for respondent.

No. 896. New York Central Railroad Company *v.* William P. Cooper. May 29, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Robert E. Whalen* for petitioner. *Mr. Alexander G. Bentley* for respondent.

No. 923. Columbia Railway, Gas & Electric Company *v.* State of South Carolina. May 29, 1922. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. Jo-Berry S. Lyles* for petitioner. No appearance for respondent.

No. 938. Charles H. Morris et al., etc., *v.* Ella Foster. May 29, 1922. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lorenzo A. Bailey* for petitioners. *Nina I. Thomas* for respondent.

No. 939. Spring Coal Company et al. *v.* Bethlehem Steel Company. May 29, 1922. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. Charles C. Bucknam* for petitioners. *Mr. John L. Hall* for respondent.

No. 946. MARY E. LAWMAN *v.* PEOPLES SAVINGS & TRUST COMPANY OF PITTSBURGH ET AL. May 29, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mary E. Lawman* pro se. *Mr. Thomas Patterson* for respondents.

No. 947. BALTIMORE & OHIO RAILROAD COMPANY *v.* GORDON A. RAMSAY, ADMINISTRATOR, ETC. May 29, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. James M. Sheean* and *Mr. George E. Hamilton* for petitioner. *Mr. David K. Tone* for respondent.

No. 948. SAMUEL LUMIERE *v.* ROBERTSON-COLE DISTRIBUTING CORPORATION. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernie Adamson* for petitioner. *Mr. Francis G. Caffey* for respondent.

No. 949. THOMAS J. TAYLOR ET AL., PARTNERS, ETC., *v.* LOUISVILLE SOAP COMPANY. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmund F. Trabue, Mr. Thomas K. Helm* and *Mr. John C. Doolan* for petitioners. *Mr. Alex. Pope Humphrey* and *Mr. Edward Porter Humphrey* for respondent.

No. 951. BUNTARO KANEDA *v.* UNITED STATES. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Annette Abbott Adams* for petitioner. No brief filed for the United States.

No. 952. MARU NAVIGATION COMPANY, OWNER, ETC., ET AL. *v.* SOCIETA COMMERCIALE ITALIANA DI NAVIGAZIONE. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Homer L. Loomis* for petitioners. *Mr. John C. Prizer* for respondent.

No. 955. JAMES H. ALDERMAN ET AL. *v.* UNITED STATES. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Bell* for petitioners. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 959. MISSOURI PACIFIC RAILROAD COMPANY *v.* INDUSTRIAL COMMISSION OF THE STATE OF ILLINOIS, ET AL., ETC. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Alexander County, State of Illinois, denied. *Mr. Lindorf O. Whitnel* and *Mr. Edward J. White* for petitioner. No appearance for respondents.

No. 963. DELAWARE STEAMSHIP & COMMERCE CORPORATION *v.* NEW ENGLAND COAL & COKE COMPANY ET AL. May 29, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nelson B. Cramer* and *Mr. T. K. Schmuck* for petitioner. *Mr. Emory R. Buckner* for respondents.

No. 894. ARKANSAS ANTHRACITE COAL & LAND COMPANY *v.* MARY A. STOKES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James B. McDonough* for petitioner. No appearance for respondent.

No. 895. ARKANSAS ANTHRACITE COAL & LAND COMPANY *v.* FREMONT STOKES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James B. McDonough* for petitioner. No appearance for respondent.

No. 897. J. L. LANCASTER ET AL., RECEIVERS, ETC. *v.* MRS. CLARA ALLEN, ADMINISTRATRIX, ETC. June 5, 1922. 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 petitioners. *Mr. S. P. Jones* for respondent.

No. 933. EMMA C. BERGDOLL ET AL. *v.* UNITED STATES;
No. 934. CHARLES A. BRAWN ET AL. *v.* UNITED STATES;
No. 935. CHARLES A. BRAWN ET AL. *v.* UNITED STATES;
No. 936. EMMA C. BERGDOLL ET AL. *v.* UNITED STATES; and
No. 937. JAMES E. ROMIG *v.* UNITED STATES. June 5, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John S. Maxwell* for petitioners. *Mr. Solicitor General Beck* and *Mr. W. C. Herron* for the United States.

No. 940. HENRY W. PERRY ET AL., TRUSTEES, ETC. *v.* PARA RUBBER COMPANY OF PENNSYLVANIA. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for petitioners. *Mr. E. Lowry Humes* and *Mr. Leonard K. Guiler* for respondent.

No. 941. PUBLIC SERVICE RAILWAY COMPANY *v.* HAROLD WURSTHORN, AN INFANT, ETC. June 5, 1922. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank Bergen* for petitioner. *Mr. Edwin F. Smith* for respondent.

No. 950. BARNEY LITTLE *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles M. Hay* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 956. DOUGLAS NEWTON *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maynard F. Stiles* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 958. ROBINS DRYDOCK & REPAIR COMPANY *v.* PAN AMERICAN PETROLEUM & TRANSPORT COMPANY. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Catesby Jones* for petitioner. *Mr. Charles C. Burlingham* and *Mr. Roy Rood Allen* for respondent.

No. 964. DAVID H. RIDDLE *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry E. Davis* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 966. BALTIMORE TALKING BOARD COMPANY *v.* JOSHUA W. MILES, COLLECTOR OF INTERNAL REVENUE, ETC. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander Armstrong* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for respondent.

No. 967. PATTERSON-SARGENT COMPANY, INC. *v.* H. H. RUMBLE ET AL., TRUSTEES, ETC. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John S. Wise, Jr.,* for petitioner. No appearance for respondents.

No. 969. PEOPLE OF PORTO RICO *v.* FORTUNA ESTATES ET AL. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. G. T. Trent* and *Mr. Logan N. Rock* for petitioner. *Mr. Francis E. Neagle* for respondents.

No. 970. HON. HARLAND B. HOWE, DISTRICT JUDGE, ETC., *v.* UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles Hershenstein* for petitioner. No appearance for respondent.

No. 979. GILLETTE SAFETY RAZOR COMPANY *v.* JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Eugene M. Schwarzenberg* for petitioner. *Mr. Austin M. Pinkham* for respondent.

No. 982. AL VESELY *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. L. E. Dadmun* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 983. TOM TIERNEY *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. H. Gaines* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 984. HARVEY LAUNDRY COMPANY & REFINITE COMPANY *v.* PERMUTIT COMPANY. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward F. Colladay, Mr. D. P. Wolhaupter* and *Mr. William J. Hughes* for petitioner. *Mr. James Q. Rice* for respondent.

No. 985. DANISH PRIDE MILK PRODUCTS COMPANY *v.* PAUL STUPPEL, INC. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William G. Wheeler* for petitioner. No appearance for respondent.

No. 986. FORD MOTOR COMPANY *v.* HOTEL WOODWARD COMPANY. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Davis, Mr. Alfred Lucking, Mr. DeLancey Nicoll, Mr. William J. Hughes* and *Mr. H. H. Emmons* for petitioner. *Mr. Stephen C. Baldwin* and *Mr. Charles H. Tuttle* for respondent.

No. 987. PENNSYLVANIA RAILROAD COMPANY *v.* JOHN P. PUGH. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Frederic D. McKenney, Mr. John Spalding Flannery* and *Mr. H. S. Adams* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 989. NEW ORLEANS LAND COMPANY *v.* ROBERT B. BROTT ET AL. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Charles Louque* for petitioner. No appearance for respondents.

No. 990. ROCKY MOUNTAIN FUEL COMPANY *v.* CONSOLIDATED COAL & COKE COMPANY. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Jesse G. Northcutt* and *Mr. Henry E. Lutz* for petitioner. *Mr. Charles W. Waterman* for respondent.

No. 996. CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY *v.* JOHN WILLIAMS. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. Henry E. Davis* and *Mr. F. B. Grier* for petitioner. *Mr. Benjamin B. McCowen* for respondent.

No. 323. MAX POTTASH ET AL., ETC., *v.* HERMAN REACH & COMPANY, INC. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit dismissed for the want of prosecution. *Mr. Ira Jewell Williams* for petitioners. No appearance for respondent.

No. 338. WILLIAM S. LEIB *v.* COMMONWEALTH OF PENNSYLVANIA. June 5, 1922. Petition for a writ of certiorari to the Superior Court of the State of Pennsylvania dismissed for the want of prosecution. *Mr. Wm. A. Carr, Mr. Charles A. Douglas* and *Mr. Hugh H. Obear* for petitioner. *Mr. John H. Maurer* for respondent.

No. 734. GEORGE YAFFEE *v.* UNITED STATES. June 5, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit dismissed for the want of prosecution. *Mr. Harry Hess* for petitioner. *The Attorney General* for the United States.

No. 828. JOHN BARTON PAYNE, FEDERAL AGENT, *v.* MATILDA GARVIN. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania dismissed for the want of prosecution. *Mr. Frederick M. Leonard* for petitioner. No appearance for respondent.

No. 829. JOHN BARTON PAYNE, FEDERAL AGENT, *v.* NISH TORRENCE ET AL. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania dismissed for the want of prosecution. *Mr. Frederick M. Leonard* for petitioner. No appearance for respondents.

No. 837. BESSIE R. INNIS *v.* I. NOBLE HEFT ET AL. June 5, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Michigan dismissed for the want of prosecution. *Mr. Charles W. Nichols* for petitioner. No appearance for respondents.

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No. 346. PUBLIC UTILITIES COMMISSION OF THE STATE OF ILLINOIS, ETC., ET AL. *v.* ILLINOIS CENTRAL RAILROAD COMPANY. Appeal from the District Court of the United States for the Northern District of Illinois. May 15, 1922. Dismissed with costs, on motion of counsel for appellants. *Mr. Edward J. Brundage, Mr. James H. Wilkerson* and *Mr. Garfield Charles* for appellants. No appearance for appellee.

No. 711. STATE OF CONNECTICUT *v.* THOMAS MCAULIFFE. Error to the District Court of the United States for the District of Connecticut. Argued March 15, 1922. June 5, 1922, abated, upon suggestion of death of defendant in error. *Mr. Allan K. Smith* and *Mr. Hugh M. Alcorn* for plaintiff in error. *Mr. Walter J. Walsh* and *Mr. Henry J. Calnen* for defendant in error. *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, by leave of court, filed a brief on behalf of the United States as *amica curiae.*

No. 605. NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* HAM, YEARSLEY & RYRIE. Error to the Supreme Court of the State of Washington. June 5, 1922. Dismissed with costs, pursuant to the tenth rule. *Mr. Ralph B. Williamson* for plaintiffs in error. *Mr. Reese H. Voorhees* for defendant in error.

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5. *Id. Diversion; Law and Custom.* Colorado may not divert waters within her borders, regardless of rights in stream below her boundary; in view of law and practice of both States, objection to diversion on ground that it is to another watershed from which Wyoming can receive no benefit, is not tenable. *Id.*

6. *Id. Priority.* Doctrine of appropriation *held* only equitable basis for decision; private appropriations recognized in order of priority; supply available determined with regard to conservation and avoidance of waste. *Id.*

7. *Id. Evidence; Available Supply; Laramie River.* Conclusions made from evidence and controlling principles stated as to proper measure of available yearly supply and extent of existing Wyoming and Colorado appropriations. *Id.*

8. *Id. Time of Proposed Colorado Appropriation.* Dated from time when project became fixed plan and when work begun; not related back to earlier date when project was in inceptive stage. *Id.*

9. *Id. Permits,* of state engineer, to appropriate water in specified quantity, are mere licenses, and not adjudications that surplus subject to appropriation exists. *Id.*

10. *Id. Decree* enjoining Colorado and its officers from diverting more than specified amount of water for proposed project. *Wyoming* v. *Colorado*..... 496

11. *Id. Interstate Streams; Priority of Appropriation.* Diversion in Colorado for use on Nebraska lands *held* superior to later appropriations made in Colorado for use on Colorado lands. *Weiland* v. *Pioneer Irrig. Co*..... 498

12. *Id. Injunction. State Officials* enjoined from interfering with appropriation and from treating appropriator in distribution of water otherwise than if lands irrigated were wholly within Colorado. *Id.*

13. *Id. State Law.* Objection that waters are by Colorado constitution and laws the property of her people and cannot be taken for use elsewhere as against persons desiring to use them in Colorado, is untenable. *Id.*

WEBB-KENYON ACT. See **Intoxicating Liquors, 4.**

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1. "Capital used in banking." See *Fidelity & Deposit Co.* v. *United States* 296
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2. "Evidence of criminality." See *Collins* v. *Loisel* 309
3. "Foreign country." See *Id.*
4. "Interstate commerce." See **Interstate Commerce.**
5. "Persons employed in Indian affairs." See *Ewert* v. *Bluejacket* 129
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WRIT. See **Habeas Corpus**; **Injunction**; **Jurisdiction**; **Procedure.**

WYOMING. See **Procedure**, I, 1; **Waters**, 3–13.

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